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## Reframing Affirmative Action: From Diversity to Mobility and Full Participation

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**REFRAMING AFFIRMATIVE ACTION:  
FROM DIVERSITY TO MOBILITY AND FULL PARTICIPATION**

*Susan P. Sturm*

At the same time that a national racial reckoning has galvanized students to press higher education institutions (HEIs) to face up to their legacies of racism and commit to antiracism, courts are considering arguments for prohibiting consideration of race in admissions decisions. Advocates for racial equity and antiracism, along with HEIs committed to racial justice, have no choice but to confront these contradictory pressures.

For decades, affirmative-action jurisprudence has framed many HEIs' approaches to pursuing racial equity. This framework for admissions decisions elevates diversity to the position of the only court-approved and safe justification for taking race into account absent a finding of discrimination. It also makes admissions decision-making the focal point for increasing participation of people of color in higher education.

Diversity has become the talisman for constitutional race-consciousness in admissions as well as in other aspects of higher education decision-making. Even critics of the diversity rationale for deemphasizing equity fit their egalitarian rationales for race-consciousness within the diversity framework. Higher education officials and their legal counsel understandably fear branching out beyond the diversity discourse, in part due to the continued instability and uncertainty of the Court's equal-protection jurisprudence. This fear is compounded by transparent efforts of affirmative action's opponents to treat the Supreme Court's affirmative-action jurisprudence as a stepping-stone to banning all forms of race-consciousness in higher education, voting, contracting, employment, and government decision-making.

Defending affirmative action as we know it continues to be important and necessary. Affirmative action is a crucial tool, particularly under current circumstances. No other strategies have worked to increase the admission of people of color to selective HEIs, at least in the short run.<sup>1</sup> Arguments to the contrary, such as those made by Professor

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<sup>1</sup> *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F. Supp. 3d, 126 (D. Mass. 2019) ("Racial categorizations are necessary to achieve those goals. In the absence of such categorizations, racial diversity at Harvard would likely decline so precipitously that Harvard would be unable to offer students the diverse environment that it reasonably finds necessary to its mission.").

Richard Sander and by the plaintiffs in the litigation challenging Harvard's use of affirmative action, have not withstood careful scrutiny. Taking as given the existing policies, priorities, and culture of selective higher education institutions, affirmative action is needed to level the playing field currently stacked in favor of White men. Affirmative action carries expressive significance, signaling continuing commitment to antiracism and full participation. Affirmative action also includes people who are more likely to care about racial justice and hold higher education institutions accountable for building antiracist institutions.

Yet, affirmative action's preoccupation with diversity and admissions has constrained the pursuit of more transformative and potentially less legally vulnerable approaches to advancing racial equality as part of higher education's educational mission. Affirmative action sidesteps the most pressing problems relating to racial and economic inequality and fails to engage with related issues that must be addressed to achieve racial equity. It compensates for tests' limitations and structural biases built into the system but leaves those biases in place. It accepts that the "end states" sought under the current system are "a few of the more readily measurable ones" such as high first-year grade point averages, with questionable predictive value even for those.<sup>2</sup> It produces short-term diversity, but maintains practices contributing to persistent inequality and declining social mobility.

Affirmative action also has skewed the Court's equal-protection jurisprudence through its focus on admissions decision-making by highly selective universities, which has meant that the legal norms have been developed in the area triggering the greatest scrutiny and constitutional concern. Under the current admissions regime in selective higher education institutions, admissions decision-making requires making distinctions among and allocating a limited number of positions to competing individuals, making those decisions high stakes and zero-sum. Thus, the Supreme Court's racial jurisprudence has developed in an area that triggers strict scrutiny because HEIs' use of race in admissions has been found to operate as a classification allocating benefits and opportunities to individuals based on race.

These characteristics of admissions decision-making do not apply to many other efforts that relate to higher education's mission and warrant consideration of race to be effective. Supreme Court jurisprudence does not restrict higher education institutions to the missions preapproved by the Supreme Court. The Court has not in fact

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<sup>2</sup> Howard Gardner, *Vygotsky to the Rescue*, in Lani Guinier & Susan Sturm, eds., Who's Qualified? 50 (Beacon 2001).

ruled out other aspects of educational missions as a basis for considering race in educational decision-making. In the area of elementary and secondary education, other constitutionally viable justifications for taking race into account have been identified, such as addressing racial isolation. Strict scrutiny does not apply without a racial classification, or in situations where no individualized harms or benefits attach to those racial classifications. Yet, these distinctions have become blurred in both the legal and higher education discourse about legal and acceptable bases for taking race into account as part of higher education's efforts to pursue its multiple missions.

Legality and efficacy thus call for reframing the affirmative-action debate within a broader institutional effort to address structural inequality in higher education. Affirmative action's operation often substitutes for a more comprehensive effort to address the fundamental problems in the way we allocate educational opportunity. When affirmative action is the primary strategy for racial justice, it offers a narrow, at-the-margins response to exclusion, which deflects attention from more central problems with the current system and invites zero-sum reactions to racial justice efforts.

It is crucial to identify and address the disconnect between affirmative action and HEIs' decisions that contribute to enduring racial and economic inequality and waning social mobility. There is a persistent and growing gap between higher education's rhetoric of diversity, opportunity, and mobility and the reality of underparticipation, polarization, and stratification. That gap has racial, gender, and socioeconomic dimensions. The path to shoring up the legality of affirmative action actually overlaps with the structural changes required to meet the imperative of educating the next generation of students, a majority of whom will be Black and Brown and educated in nonprivileged, segregated environments.

This Essay first shows that affirmative action holds in place higher education's role in stratifying access to higher education and restricts social mobility by race and class. It then explains practices perpetuating this structural inequality—the reward of past privilege rather than future potential, the hoarding of resources by privileged institutions, and the reliance on admissions decision-making to advance goals that in fact require broader institutional commitment and transformation. The next Part offers strategies and examples that reframe affirmative action by (1) nesting it within an effort to transform institutions to ensure full participation, (2) shifting from rewarding privilege to cultivating potential and increasing mobility, and (3) building partnerships and enabling systemic approaches to increasing educational access and success. The final Part argues that

these structural approaches are less likely to trigger strict scrutiny from the courts, and will foster the inquiry needed to document the need for affirmative action in admissions and expand the justifications for race-conscious approaches.

### **I. Affirmative Action Normalizes Structural Inequality in Higher Education**

Affirmative action normalizes the operation of a system that preserves racial and economic stratification and hierarchy. It deflects attention from decisions maintaining structural barriers to racial equity and normalizes an inequitable, unfair, and dysfunctional status quo.

Selective HEIs claim to be engines of social mobility, but reality casts them as leading actors in the growing stratification of access to higher education by race and class. Intergenerational mobility has sharply declined since 1980 in the United States, leading researchers to conclude that upward mobility is no longer the “dominant feature of American labor markets.” Higher education now contributes to that trend. “Paradoxically, increasing college access is increasing inequality within the higher education universe. High-socioeconomic status (SES) students outnumber low-SES students by fourteen to one in the most competitive four-year institutions, yet low-SES students outnumber high-SES students in community colleges by nearly two to one.” Young adults from the highest income quartile families are seven times more likely (79 percent) to earn a bachelor’s degree by the age of twenty-four than those in the lowest income quartile (11 percent). One study found that “low-income high school students in the top academic quartile attend college only at the same rate as high-income high school graduates in the bottom quartile of achievement.” Education as a channel for intergenerational mobility has been particularly muted for Black and Latinx families.

The research shows that both race and class, independently and in interaction, figure prominently in these differences in access to higher education. White students are increasingly concentrated today, relative to population share, in the nation’s 468 most well-funded, selective four-year colleges and universities while Black and Latinx students are more and more concentrated in the 3,250 least well-funded, open-access, two- and four-year colleges. More than 30 percent of Black and Latinx with a high school grade point average (GPA) higher than 3.5 (on a 4.0 scale) go to community colleges compared with 22 percent of Whites with the same GPA. Among Black and Latinx college students who score more than 1200 out of a possible 1600 points on the SAT/ACT, 57 percent eventually get a certificate, an

associate's degree, or a bachelor's degree or better; for White students the percentage rises to 77 percent.

Recent studies show that metropolitan neighborhoods remain separated by race and income. People of color are more likely to grow up in low-opportunity communities characterized by low levels of economic attainment and high poverty. Thirty-three percent of Black children, compared with only 6 percent of White children, live in high-poverty communities. Residential separation also contributes to racial and economic isolation in schools. More than 60 percent of Black and Latinx students attend high-poverty schools (defined as schools with more than 50 percent of the students below the poverty line). White students, by contrast, are highly concentrated in more affluent suburban districts, and only 28 percent of White students attend high-poverty schools. The median wealth of White families is twenty times that of Black families and eighteen times that of Latinx families. This racialized economic inequality is compounded by structural racism documented in the criminal justice system, education, housing, and employment.

Affirmative action—both class-based and race-based—normalizes and perpetuates selective HEIs' reliance on practices cementing this growing racial and economic divide. These practices include rewarding past privilege rather than future potential and the hoarding of resources by privileged institutions.

#### A. Rewarding Past Privilege Over Future Potential

Selective higher education institutions rely heavily on criteria and practices that unfairly exclude many qualified low-income students and students of color and that correlate with past privilege rather than future potential.

##### *1. Overusing tests and other criteria.*

Many selective HEIs have continued to use standardized tests to sort and rank-order applicants. These tests strongly correlate with income:

Students from families earning over \$200,000 (roughly the top 5 percent) score 388 points higher than students from families earning less than \$20,000 per year (roughly the bottom 20 percent); and students whose parents hold graduate degrees (roughly the top 10 percent) score 395 points higher than students whose parents have not completed high school (roughly the bottom 15 percent). In each case, these gaps in raw scores place the average elite

student in roughly the top quarter of all test takers and the average disadvantaged student in the bottom quarter.<sup>3</sup>

A recent study of UC applicants found that “the correlation between students’ socioeconomic background and SAT scores is about three times greater than the correlation between their socioeconomic background and high-school grade-point averages.”

The overriding problem with tests’ role in selection is how they are used by selective HEIs—to rank-order applicants at the margins, to exclude applicants who could do as well as higher-scoring students, and to stand in for accountability for pursuing public values and institutional goals. Many treat the admissions process as an opportunity to increase their rankings in U.S. News and World Report. Although selective institutions take into account factors other than standardized test scores, that consideration usually helps differentiate among high-scoring test takers, most of whom come from highly privileged backgrounds. This use of tests overvalues differentials in test performance that do not correlate with meaningful performance in the first year, let alone aspects of performance that will matter over the long run. Test scores have been shown to be a weak measure of merit as compared to other available metrics, even where merit is defined only to include success in the first year of college. One study found that “students’ high-school grades and class rank reliably predicted their first- and second-year retention rates, but that the SAT didn’t add any predictive value. Two students with the same GPA and a 100-point difference in scores were just as likely to persist.”

Misplaced reliance on standardized tests also skews definitions of value toward a few measurable “end states,” particularly first-year grade point averages, at the expense of more important values.<sup>4</sup> A study of three classes of Harvard alumni over three decades, for example, “found a high correlation between “success”—defined by income, community involvement, and professional satisfaction—and two low SAT scores and a blue-collar background.” A study of graduates of the University of Michigan Law School found a negative relationship between high LSAT scores and subsequent community leadership or community service. The “After the JD” study—a national cross-section of law graduates over the first decade of their careers—found that Black lawyers were more likely to work in government and

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<sup>3</sup> Daniel Markovits, *The Meritocracy Trap* 132 (Penguin 2020).

<sup>4</sup> Howard Gardner, *Vygotsky to the Rescue*, in Lani Guinier and Susan Sturm, eds, *Who’s Qualified?* 50 (Beacon 2001).

public service positions than any other racial/ethnic group, and people of color generally were well represented in these sectors.

*2. Overselecting from highly privileged, predominantly White feeder schools.*

At both the undergraduate and post-graduate level, selective HEIs recruit and admit a disproportionate percentage of students from feeder institutions that are themselves highly privileged and predominantly White. “The top 20 private schools send 20 percent of their graduates to the Ivy League, Stanford, and MIT alone . . . They claim about a tenth of all of the available places in elite colleges.”<sup>5</sup> The same pattern holds true for selective law schools, which disproportionately admit students from elite colleges.

It is also worth noting that many selective HEIs consider whether students have taken Advanced Placement courses, regardless of whether students had access to those courses. Many students of color attend high schools that do not offer such courses:

According to a 2016 survey of admissions officers, the top four factors used in admissions decisions are grades in college prep courses, grades in all courses, strength of high school curriculum, and admissions test scores. With an over-emphasis on class- and race-biased standardized tests and participation and performance in high school courses that aren’t equally available to low-income students and students of color, colleges and universities are—at best—failing to deconstruct the systemic barriers that impede Black students. At worst, they are adding another systemic barrier that makes it more difficult for Black Americans to climb the socioeconomic ladder.

A report on Latinx student representation reaches similar conclusions.

**B. Hoarding of Resources and Preservation of Privilege**

Selective HEIs also receive and spend a disproportionate share of both public and private resources relative to their less privileged counterparts. Disparities in patterns of support for students precollege by race and class are mirrored in the levels of investment and resources in selective colleges as compared to open-access, four-year institutions educating the vast majority of students of color, first-generation students, and students from low-income families. The number of students attending open-access institutions, most of whom

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<sup>5</sup> Daniel Markovits, *The Meritocracy Trap* 133–34 (Penguin 2020).

are low-income and people of color, has increased at a time when the number of open-access colleges has declined, producing crowding and lower rates of investment per student in those colleges. “The 82 most selective colleges spend almost five times as much on instruction per student as the open-access schools.” This difference in levels of resources available has been linked with the differences in completion rates, which “for the 468 most selective four-year colleges is 82 percent, compared with 49 percent for open-access, two- and four-year colleges.” This dramatic difference in completion rate holds true for students with comparable entry credentials.

Trends in financial aid also play a role. Recently, many public and private institutions have dramatically shifted their financial aid policies in favor of scholarships supporting high-performing students. At the same time, increased tuition costs mean that Pell grants cover a smaller percentage of the total costs students face. Financial aid, particularly in the form of merit scholarships, is increasingly used as a way to improve institutions’ academic standing and prestige. Higher education institutions are increasingly connecting availability of scholarships to SAT scores, which are heavily weighted in the ranking scheme used by U.S. News and World Report and have much greater correlation with income than with performance in college. Much of the financial aid goes to students with the least financial need and those who would likely have attended college anyway.

Selective, predominantly White HEIs also enjoy disproportionately high levels of investment and resources, as compared to less well-endowed and more diverse HEIs. “In 2013, 138 institutions each had over \$500 million in endowment and these institutions—roughly 3.6 percent of all colleges and universities—held 75 percent of all postsecondary endowment wealth.” Federal taxpayers subsidize these endowment funds because they are tax exempt. Yet, most privileged institutions do not make good on the public responsibility represented by this public investment. “Nearly half of the members of the \$500 million club enroll so few Pell Grant recipients that they are in the bottom 5 percent nationally. And nearly 4 in 5 of these wealthy institutions have an annual net price for low-income students that exceeds 60 percent of their annual family income. This effectively prices out many low-income students, funneling them to institutions that are less selective and have far fewer resources.”

Selective higher education institutions encourage this disparity by utilizing criteria in admissions that increase the likelihood of alumni contributions to their institution, including preference in admissions

for children of alumni.<sup>6</sup> Higher education institutions that face the most difficult and pressing challenges, and that educate the largest share of students of color and from low SES, have the fewest material resources and lowest amounts of investment in education.

### C. Admissions Fetishism

Admissions decision-making is too limiting as the driver for efforts to address the structural barriers facing people of color and nonprivileged students. Its focus on the admissions decision point leaves unquestioned the decisions and policies that produce the pool from which admissions decisions are made. It places responsibility for justifying and advancing diversity on a small set of actors who are not involved directly in the interactions and decisions that justify the use of race as a factor to achieve the educational benefits of diversity. The actors with the power and mandate to operationalize these learning and leadership goals, most notably the faculty, remain peripheral. Yet, their involvement is crucial to both the success of the learning goals and the capacity to understand, identify, and demonstrate the relationship of race to achieving the learning and leadership goals justifying its use.

These actors operate within an overall institutional culture that often works at cross-purposes with the mission of diversity, mobility, and reducing inequality. A growing body of research shows that institutional transformation is necessary for higher education institutions to be able to attract and sustain a diverse group of students and faculty and to address the structural barriers to mobility facing these groups. The architecture of the setting—what and who is valued, how decisions are made, which interests matter, who gets to participate, how work is organized, how problems are addressed—cuts across areas of practice that tend to be siloed, and must come together. Higher education institutions seeking to create diverse learning communities, increase mobility, build global competitiveness, revitalize metropolitan areas, redress durable inequality, and cultivate leadership capacity require an architectural or systems approach.

Higher education institutions working alone cannot seriously advance toward many of the goals described above. Admissions decision-making is one step along a pathway starting much earlier and continuing long after admissions decisions have been made. Addressing issues of mobility requires the capacity to collaborate with actors in the P–12 community, as well as with government actors, community members,

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<sup>6</sup> See Daniel Markovits, *The Meritocracy Trap* 111–56 (Penguin 2020) (noting that, under pressure, some selective HEIs have eliminated alumni preferences).

and other sectors. Admissions decision-making plays a significant role, but cannot alone construct the strategies needed to be successful. Piecemeal programs operating at the margins must give way to an institution-wide effort focused on advancing these goals.

Similarly, initiatives focused on faculty, students, and community members often proceed in separate spheres, without sustained attention to their interdependence and potential synergy. Faculty diversity initiatives frequently focus on expanding the pool of faculty and reducing bias in search practices, without connecting with the relationship of faculty diversity to teaching, research, and engagement. Student diversity and inclusion rarely connect to initiatives aimed at increasing faculty diversity or involving students in public scholarship. Yet, research suggests that the engagement of diverse faculty has a significant impact on student diversity and engagement, and that publicly engaged scholarship positively affects the levels of engagement of diverse faculty and students.

Additionally, research indicates that faculty reward systems do not adequately encourage faculty to engage actively in understanding the dynamics affecting thriving and success in the classroom. Institutional policies often create disincentives for faculty to spend the time and energy associated with this undertaking. Yet, faculty participation is essential both to reaping the benefits of racial diversity and to understanding why and how diversity contributes to learning, leadership development, and public problem solving. Shifts in culture and incentives will be crucial in bringing together research findings in an integrated way to better understand the synergies between student and faculty diversity, community engagement, and student success.

A broader focus is needed to take account of the challenges associated with the particular historical moment we are in. Higher education is facing a set of forces that have led many (even those who disagree about the direction of the change) to agree that we are at a moment of shift in the structure and paradigm, “a threshold moment of decline or disorienting adaptation.” The mobilization that has emerged in the wake of the most recent killings of Black people by police demands a systemic response that will produce meaningful systemic change. Issues from technology to the breakdown of the current model for financing education all have implications for the capacity of higher education to fulfill its mission, and for the communities and groups who have yet to participate in any meaningful way in the higher education enterprise.

## II. Reframing Affirmative Action within a Structural Approach Advancing Social Mobility, Full Participation, and Institutional Citizenship

There are three complementary ways in which affirmative action's framework for addressing race needs to be broadened: (1) nesting affirmative action within an overall institutional effort that links admissions with other stakeholders and combines short-term programs with long-term institutional transformation; (2) articulating and pursuing broader educational aims justifying race-consciousness and promoting a shift from rewarding privilege to cultivating potential and mobility; and (3) sharing selective higher education's resources, including by forging robust public and private partnerships with institutions.

### A. Nesting Affirmative Action Within an Institutional Transformation Effort Aimed at Advancing Full Participation

The long-term success of diversity, mobility, and student success initiatives requires that these efforts become more fully integrated into the overall culture and that their larger institutional settings undergo transformation. Some kind of integrating goal or framework is needed that will offer a holistic set of goals that focus attention on (1) the institutional conditions that enable people in different roles to flourish, and (2) the questions designed to mobilize change at the multiple levels and leverage points where change is needed. Full participation is an example of one such framework. Full participation is an affirmative value focused on creating institutions that enable people, whatever their identity, background, or institutional position, to thrive, realize their capabilities, engage meaningfully in institutional life, and contribute to the flourishing of others. It covers the continuum of decisions and practices affecting who joins institutions, how people receive support for their activities, whether they feel respected and valued, how work is conducted, and what kinds of activities count as important work. The realization of full participation in higher education thus requires an institutional-transformation strategy that sustains ongoing improvement and integrates diversity, mobility, engaged scholarship, and student success with each other and with core values and priorities. This kind of transformation involves the cocreation of spaces, relationships, and practices that support movement toward full participation.

This architectural approach is both a mindset and a set of practices enabling institutional mindfulness. Integration and innovation requires an orientation toward understanding how practices and programs relate to a larger system. This orientation engages a wide

range of stakeholders in an ongoing practice of institutional design—how to construct spaces and practices that enable people of different backgrounds to enter, thrive, and contribute to using knowledge and transformative leadership to advance similar goals in both local and global communities. An architectural approach thus depends on developing institutional mindfulness—ongoing reflection about outcomes in relation to values and strategies—that enables people in many different positions to understand the patterns and practices and to use that knowledge to develop contexts enabling people to enter, flourish, and contribute value. Those who lead, teach, and shape institutions of higher education have the ability to make choices, determine commitments, and enact strategies that address change in organizational structures and cultures to achieve full participation for the next generation of students and faculty.

The Meyerhoff program at the University of Maryland, Baltimore County (UMBC), provides an example of a long-term architectural approach. UMBC harnessed a collaboration among students, faculty, administrators, philanthropists, business leaders, and other community members that is collectively committed to—and has a track record of success in—producing the next generation of diverse leadership in STEM fields. This process has been linked to a larger culture-change process that produces university research focused on the pressing problems of the day. UMBC has also become the anchor of a science and technology corridor and a generator of diverse midcareer leaders. This multigenerational collaboration resulted from a culture-change process that began in the late 1980s, in response to protests by African-American students who, along with African-American faculty, “perceived campus as ‘cold toward minorities’ and ‘racist.’”<sup>7</sup> The process began with data-based reviews of student achievement and focus groups initiating an ongoing dialogue within the campus community about race. This process pinpointed a problem of deep concern to UMBC and to the nation: students of color, particularly Black males, were systematically receiving lower grades and abandoning their interest in STEM disciplines. The inquiry process located the source of the problem, and the solution, in the institution, and more particularly, in its culture.

The institution embraced institutional transformation to empower students as learners and leaders, and faculty and staff as engaged

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<sup>7</sup> See Kenneth I. Maton, et al., *Enhancing Representation, Retention and Achievement of Minority Students in Higher Education: A Social Transformation Theory of Change*, in Marybeth Shinn & Hirokazu Yoshikawa, eds, *Toward Positive Youth Development: Transforming Schools and Community Programs* 115–32 (2008).

teachers and scholars supporting that process and producing knowledge that would connect to real-world problems. The Meyerhoff program fueled this process, and has become recognized as one of the most successful programs for increasing the participation of students of color in the STEM fields, while also increasing overall educational quality and academic success. That program initially targeted only minority students, but was subsequently expanded to include all students with a demonstrated interest in advancing racial and ethnic minorities in STEM fields.<sup>8</sup>

The strategies and infrastructure developed initially to support the Meyerhoff program served as a springboard for a larger culture change process at UMBC involving faculty and community economic development. UMBC supported faculty who were willing to devote time and energy to the mentorship of students and to engage in faculty research. It created contexts for students to collaborate regularly in supporting each other's success, in addition to working with students in the surrounding community. Over a fifteen-year period, the school experienced a 563 percent increase in Black graduates in STEM—from eleven to sixty-three.

This process, led by the president, has produced cohorts of students, faculty, and administrators that support students' success, including the success of African Americans as leaders in the STEM fields. The process has also engaged faculty, students, and community leaders in projects that produce significant research “to deal with global and national challenges involving the environment, security, health care, and the economy.”

#### B. Shifting from Rewarding Privilege to Cultivating Potential and Increasing Mobility

A set of higher education institutions—both public and private—have embraced the mission of promoting social mobility. Many public institutions were founded with this goal at their core, and their mission statements and charters identify the goal of promoting access and mobility as core to their purpose. Private higher education institutions also have identified the goal of promoting access and social mobility as a significant aspect of their mission.

Public policy has also encouraged access and mobility as a core mission of higher education. Beginning with the Morrill Act of 1862, federal

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<sup>8</sup> For a more extended discussion of UMBC and the Meyerhoff program, see Maton, et al., *Enhancing Representation, Retention and Achievement of Minority Students in Higher Education* (cited in note 7).

and state legislation has called upon colleges and universities to serve as “engines of prosperity and agents of social mobility” and “broad gauge providers of opportunity” for rural poor and working class students in their triple mission of teaching, research, and public service.<sup>9</sup> Many higher education institutions receive federal funds aimed at promoting higher education access for underrepresented groups. A number of state and private universities have reaffirmed the importance of creating access for underserved communities as core to their mission.

The narrative of creating higher education to advance the public good plays a particularly foundational role in the university-based professional schools. Partly through the Morrill Acts of 1862 and 1890, occupations securing a place in universities hinged the legitimacy of professional authority in part on the obligation of professional experts “to utilize knowledge in service of the public good.” Universities “endowed these professionalizing occupations with the moral authority and sense of purpose inherited from the university’s own founding logic.”<sup>10</sup>

The Fisk-Vanderbilt Master’s-to-Ph.D. Bridge program offers a case study of a program that put this mobility mission into practice, as part of an effort to increase the participation of underrepresented minorities in the sciences. It did this by forging a long-term partnership between a Ph.D.-granting R-1 institution (Vanderbilt University) and a “research active historically Black university, both of which are located in Nashville, Tennessee. The Bridge Program is intended for students who have completed baccalaureate degrees in physics, chemistry, biology, or engineering, and who are motivated to pursue a Ph.D. but who require additional coursework, education, and/or research experience.”

This Bridge program successfully shifted the usual mindset of filtering applicants on the basis of proven ability to one of identifying applicants with unrealized potential that can be honed and nurtured. Rather than relying primarily on proxies such as test scores, “[t]he Bridge admissions process explicitly searches for the qualities that will produce excellent researchers who will obtain Ph.Ds. and join

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<sup>9</sup> Nancy A. Cantor, *A New Morrill Act: Higher Education Anchors the Remaking of America*, The Presidency (Fall 2009). See also Scott Peters, *Democracy and Higher Education: Traditions and Stories of Civic Engagement* (2010).

<sup>10</sup> Rakesh Khurana, *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession* 81, 83 (2010).

university faculties, and/or will become high quality teachers who can teach diverse students, and/or will become leaders within the higher-education and scientific communities.” The Bridge program faculty conducted an extensive inquiry enabling them to identify markers for success in the Ph.D. program: “[p]assion, strong motivation to succeed, intense drive, hard work[ing], willingness to take risks, ability to overcome hardship, leadership capabilities, collaboration skills, and the ability to succeed in the classes that serve as gatekeepers to the Ph.D.”

By building a cohort of faculty and staff committed to the program involving both Fisk and Vanderbilt, the program has developed the capacity simultaneously to identify and recruit students with the capacity and potential to succeed in the Ph.D. program and to provide the holistic support and culture that fosters academic success and thriving. As part of admission to the Ph.D. program, GRE scores are considered but are not dispositive. There is an understanding that if a Bridge student has passed all of the core courses in the Master’s program, has collaborated with a research adviser at Vanderbilt, and has proved that they can handle Ph.D. level work, they are admitted.

The Fisk-Vanderbilt program has built a long-term partnership between Vanderbilt and Fisk Universities, based on the recognition of the mutual benefits of shared resources. “Vanderbilt is resource rich and Fisk is resource-ful.” The partnership created a vehicle for Vanderbilt to share its enormous material resources, and for Fisk to share its access to students of color and its effective strategies in promoting resilience and building a culture supporting and mentoring students of color. Like the program at UMBC, the Fisk-Vanderbilt bridge to Ph.D. emphasizes “a formal multi-tiered mentoring structure to provide each Bridge student with ‘scaffolds of support’ that help to ensure a successful transition across the bridge, including a full fellowship (tuition, stipend, and insurance), individual research-based mentoring relationships between Bridge students and graduate faculty, a strong cohort community, and opportunities for professional development and networking.”

The success of the bridge programs at Vanderbilt and Fisk and other graduate programs has invited departments around the country to experiment with decreased reliance on the GRE, both as a cutoff and a basis for rejecting otherwise promising candidates. In the wake of the pandemic, many HEIs, including highly selective institutions, have suspended or discontinued use of the SAT in their selection process for the 2021 admissions cycle. This development opens up the possibility for experimentation with admissions strategies that account for metrics other than test scores.

### C. Building Partnerships Enabling Systemic Approaches to Increasing Educational Access and Success

Finally, the capacity to make good on these institutional missions will require privileged HEIs to find ways to share rather than hoard their outsized resources. Ideally, this move will be encouraged by public policies incentivizing or requiring highly resourced institutions to support students from lower socioeconomic backgrounds, as well as institutions serving students of color that have a history of underinvestment, through institutional collaborations and partnerships. Higher education institutions can initiate this process by forging partnerships and collaborations with differently resourced institutions in a position to advance a common aim related to increased mobility and full participation.

The intensive partnerships over the past two decades between Clark University, the Main South Community Development Corporation, and the University Park Campus School (UPCS) provide a window into how communities and universities can work together to make universities more inclusive, revitalize neighborhoods, and enable local schools to better connect students to opportunities. Clark University and the City of Worcester opened a school together, drawing on the shared resources of a research and teaching university, a community development corporation, and community advocates. “The partnership evolved into a mission for neighborhood stakeholders—Clark, the city of Worcester and community groups—to transform the area around the University through the rehabilitation of housing and commercial spaces, economic development, public safety and recreational activities for area residents.” UPCS became a school “run by the Worcester Public Schools, partnering closely with Clark on professional development enhancements and other ways to make it successful.” The school is open to anybody who lived in the neighborhood, and admission is by lottery. “Qualifying UPCS students attend Clark tuition-free, a pact the University has made with the neighborhood residents.”

Today, [UPCS] serves 250 students in grades seven to twelve, 80 percent of whom qualify for free and reduced lunch and another 70 percent who don’t speak English as a first language. Despite these challenges, the 10th graders typically meet or outperform state and district averages on testing, and the school boasts a 100 percent graduation rate. You can count on one hand the number of those graduates who did not go on to college in the last two decades.

Through collaboration with intermediary organizations and communities, HEIs can build systemic change with communities into their design. A growing number of HEIs have embraced their role as anchor institutions: “entities having a large stake in a city, usually through a combination of internal missions and landownership.” These HEIs use their economic and intellectual social capital and influence to “form effective local partnerships to improve the social and economic conditions of the metropolitan areas in which they are located.” For example, under the leadership of Nancy Cantor, who started this work when she was Chancellor at Syracuse University, Rutgers University has joined forces with other anchor institutions in Newark to form the Newark City of Learning Collaborative (NCLC) hosted at Rutgers-Newark’s Cornwall Center for Metropolitan Studies: “NCLC brings together all the higher education institutions in the area, the Newark Public Schools (traditional schools and public charters), some 30 college pipeline programs, a youth advisory board, and the local corporate anchors and philanthropies, to raise the post-secondary attainment rate in Newark to 25% by 2025, as part of the Lumina Foundation’s 75 metro city initiative to increase that rate nationwide to 60% by that year.” In Chicago, Newark, New York City, Cincinnati, Baltimore, Los Angeles, Texas, and around the country, collaboratives including HEIs have emerged to revitalize schools, communities, and metropolises.

The three strategies described above—taking an architectural approach to full participation, pursuing mobility through cultivating potential, and forging partnerships that collectively advance community-level higher education access—provide a blueprint for strategies that use a racial lens to understand and address the dynamics affecting access, mobility, and participation of people of color and low-SES individuals. This approach, combined with academic freedom principles’ invitation to ongoing reflection, encourages higher education institutions to understand when, why, and how race is needed to advance their educational mission, and thus to justify the use of racial classifications as part of a broader strategy.

#### D. Innovating at the Intersection of Legality and Institutional Transformation

Taking a more holistic and structural stance will also pave the way for HEIs to expand the justifications for race-conscious approaches and to document the need to use affirmative action in admissions decision-making.

This move invites a both/and approach to framing race, one that both considers race and insists that race be connected and justified in

relation to more general values rooted in higher education's mission. This move is not the same as color blindness. Instead, it nests race—and other social categories that operate to shape levels of participation and engagement—within a broader set of educational goals and values. It legitimates the specification of affirmative goals and strategies and invites inquiry about the relationship of race (and other categories of difference) to the realization of those goals and values.

Justice Anthony Kennedy has suggested that race-conscious efforts that do not use racial classifications to allocate benefits do not warrant strict scrutiny. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy's concurrence states that public school districts seeking to promote a racially integrated educational environment "are free to devise race-conscious measures to address the problem in a general way" that avoid the use of racial classifications. Strict scrutiny applies to racial classifications that allocate benefits to individuals based on race. However, the Court's jurisprudence suggests that strict scrutiny may not apply to decisions or practices that are race conscious but do not classify individuals based on race or allocate benefits or opportunities to individuals based on race. As Justice Kennedy stated in the context of K–12 education:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

Kennedy goes on to articulate a greater zone of movement and autonomy from scrutiny for structural mechanisms that do not allocate benefits to individuals based on racial classifications:

These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible . . . Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial

classifications is quite a different matter; and the legal analysis changes accordingly.

Many of the strategies described in this Part also employ various forms of race-consciousness to take account of the ways that institutions and policies erect barriers to full participation by people of color, and to forge long-term partnerships with the communities and institutions invested in the success of people of color. These strategies are less likely to trigger strict scrutiny and reflect long-term institutional commitments to antiracist culture change.

### **III. Conclusion**

This Essay suggests that there is a way to reconcile the demands both to pursue antiracist institutions and to support affirmative action in the face of legal challenges to race-consciousness. It involves a sustained, demonstrable commitment to culture change. There is no silver bullet, no quick fix. The most legally defensible approach involves changing the norms of our most privileged higher education institutions from prestige to purpose, from exclusivity to inclusivity, from privilege to potential. That is the surest way to make good on the legacy of affirmative action.

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