Race as a Diagnostic Tool: \textit{Latinas/os} and Higher Education in California, Post-209

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As a diagnostic or evidentiary device, race helps identify the underlying problems affecting higher education.\textsuperscript{1}

INTRODUCTION

As the State of California enters a period of economic downturn and budgetary crisis, educational spending is once again on the chopping block. This is true at the primary and secondary school levels.\textsuperscript{2} California's institutions of higher education are also facing cuts.\textsuperscript{3}

The emerging budget crisis affecting California's public schools is, unfortunately, not the first financial challenge to face California's public education system. Once considered among the nation's most highly regarded public education systems, California's schools have seen their resources fall relative to the size of the general population over the past few decades.\textsuperscript{4} The

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3. Tanya Schevitz, \textit{CSU Chancellor Bemoans Proposed Budget Cuts}, S.F. CHRONICLE, Jan. 24, 2008, at B1 (reporting that Governor Schwarzenegger's budget proposal would result in a $312.9 million budget shortfall for the California State University (CSU) system and a $417 million budget shortfall for the University of California (UC) system). While the Governor's budget is not the last word, the existence of a $14.5 billion dollar state budget shortfall makes it a certainty that large cuts will be made to the state's education budget. \textit{Id}.

state has increasingly prioritized incarceration over education, increasing funding for the criminal justice system as relative expenditures on public education have fallen. As a direct result of budget cuts, the quality of education and counseling in public schools at the kindergarten through twelfth grade (K-12) level has declined.

The decline of governmental support for higher education came at the time when greater numbers of people were beginning to view higher education as a path to social advancement and self-improvement. As a consequence, public institutions of higher education, both in California and elsewhere, have been forced to become increasingly selective as they strive to allocate a scarce public good. Questions of race-based affirmative action in higher education have tended to dominate discussions over the proper allocation of that scarce resource. Unsurprisingly, in the mid-1990s, the use of race as a factor in admissions to public institutions of higher learning came under attack in California.

On November 5, 1996, the citizens of California voted to enact Proposition 209. The anti-affirmative action provision amended Section 31 of Article I of the California Constitution to read: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Proponents of Proposition 209 argued that the law was essential to preserve fair access to higher education. They presented the use of race-blind and gender-blind admissions in higher education as a necessary precursor to achieving educational equity.

A year before the passage of Proposition 209, Ward Connerly, a wealthy California businessman and member of the University of California's Board of Regents, had successfully invoked the same reasoning to urge the passage of SP-1, which prohibited the use of affirmative action in
University of California (UC) admissions.\textsuperscript{14} In garnering support, the proponents of SP-1 and Proposition 209 capitalized on the facts that public institutions of higher learning throughout the state had been employing many different kinds of affirmative action strategies, and that UC representatives were not well prepared to explain the nature and effects of their affirmative action programs.\textsuperscript{15} UC faculty were not unanimous in their support of affirmative action, but perhaps more problematically, many of the faculty had not been engaged or involved in shaping affirmative action programs on many UC campuses. Many faculty members had never grappled with the need to develop a principled and academically-based rationale for affirmative action.\textsuperscript{16} Persuasive explanations for the policy were therefore insufficiently developed to effectively refute the easy-to-understand mantra of racial "fairness" and neutrality espoused by proponents of anti-affirmative action measures.\textsuperscript{17}

At the time these laws were passed, Ward Connerly and other advocates of SP-1 and Proposition 209 were aware that deep inequalities plagued California’s public education system at the K-12 level. These opponents of affirmative action suggested that the only fair way to redress the under-representation of certain minority groups in higher education was to address the unequal opportunities in K-12 education and improve outreach.\textsuperscript{18} Although K-

\textsuperscript{14} DOUGLASS, \textit{supra} note 6, at 179. On July 20, 1995, the Board of Regents voted on two proposals introduced by Regent Connerly. Special Regental Action Number One ("SP-1") eliminated considerations of race, ethnicity, and gender in university admissions. SP-1 purported to "en[s]ure equal treatment" by requiring that "not less than fifty (50) percent and not more than seventy-five (75) percent of any entering class on any campus shall be admitted solely on the basis of academic achievement," measured by grades and standardized test scores alone. This "Policy Ensuring Equal Treatment Admissions" (SP-1) was approved July 20, 1995. REGENTS OF THE U. OF CAL., \textit{POLICY ENSURING EQUAL TREATMENT ADMISSIONS} (SP-1) (1995), available at http://www.universityofcalifornia.edu/regents/policies/sp1html [hereinafter SP-1] (last visited Jan. 23, 2008). Supplemental criteria for non-academic bases for admissions were to be developed by the University of California’s Office of the President, in consultation with the academic senate, and submitted for regental approval. DOUGLASS, \textit{supra} note 6, at 180; \textit{see also} Cruz Reynoso, \textit{A Survey of Latino Lawyers in Los Angeles County: Their Professional Lives and Opinions}, 38 U.C. DAVIS L. REV. 1563, 1619-20 & n.123 (2005) (discussing SP-1 and its effects).

Numerous amendments to SP-1 were debated over the course of a contentious thirteen hour meeting, but only one amendment was ultimately approved. DOUGLASS, \textit{supra} note 6, at 179. The sole amendment stated: "Because individual members of all of California's diverse races have the intelligence and capacity to succeed at the University of California," the purpose of SP-1 was to "reflect[ ] this state's diversity," through preparation and empowerment, rather than through "artificial preferences." \textit{Id.}

SP-1 was repealed in May 2001. SP-1, \textit{supra} note 14. Because of the intervening passage of Proposition 209, the rescission of SP-1 did not allow for the consideration of race in UC admissions, but supporters of the repeal hoped that it would send a welcoming message to students from underrepresented minority groups who might otherwise be discouraged by UC’s endorsement of the policy. DOUGLASS, \textit{supra} note 6, at 208.

\textsuperscript{15} DOUGLASS, \textit{supra} note 6, at 159-60.

\textsuperscript{16} \textit{Id.} at 160.

\textsuperscript{17} \textit{Id.} at 174.

\textsuperscript{18} \textit{Id.} at 189-90.
education reform would necessarily write off the generation of underserved students who presumably would not have the benefit of the promised post-209 school improvements, the proposal likely resonated with many voters as a promising alternative strategy for promoting more equitable access to higher education for all California students.

Unfortunately, the advocates who provided such sustained and powerful support for SP-1 and Proposition 209 never brought the same zeal to the fight for K-12 educational equality that they brought to ending affirmative action. Ward Connerly parlayed his increased media status into a national campaign to repeal affirmative action at all public institutions of higher learning—a campaign that led to Michigan’s Proposition 2, and has placed anti-affirmative action measures on the ballots in a host of other states. Other supporters of Proposition 209 have continued to fight what they perceive to be a back-door affirmative action campaign, but have not taken similarly high-profile steps to argue for the creation of a more equitable public school system.

Twelve years after the passage of SP-1, and eleven years after the passage of Proposition 209, educational inequalities in California continue to worsen at the K-12 level. California’s spending per pupil is among the lowest in the nation, and the gulf between rich and poor districts has widened. Public schools are increasingly segregated by race, and the schools are not simply

19. See, e.g., Ward Connerly, Wolverine Rights: Michigan Organizes to Fight Preferences, NAT’L REV., Mar. 3, 2004, available at http://www.nationalreview.com/comment/connerly200403030929.asp (“Whether the victim of racial discrimination is a black person denied admission to ‘Ole Miss’ because of skin color or a white person denied admission to the University of Michigan owing to race preferences, the injustice is no less.”); see also David Crary, Mixed Results for Divisive Ballot Measures, May 14, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/14/AR2008051402245.html (noting that Connerly sought to place anti-affirmative action initiatives on the ballot in Arizona, Colorado, Missouri, Nebraska, and Oklahoma, but has failed in Missouri and Oklahoma).


21. DOUGLASS, supra note 6, at 66 (“Today, the disparities are even greater among wealthy and poor districts. More generally, the overall funding per student in California tragically ranks near the bottom nationally.”).

"separate," but are also unquestionably unequal. In California, predominantly African American and Latina/o schools are increasingly the schools with the fewest resources, the highest rates of underqualified teachers, and the lowest number of college preparatory course offerings. At the same time, access to public higher education increasingly turns upon access to sufficient college preparatory courses in high school and adequate standardized test preparation. The implementation of Proposition 209 has done nothing to address the disadvantages faced by underrepresented minorities in California's primary and secondary education system. Instead, Proposition 209 simply has taken away one tool, however "artificial," that could have remediated some of those inequalities.

Many supporters and detractors of Proposition 209 view the current educational inequality in California not as a problem of racial inequality, but as a problem of class inequality. They urge proponents of affirmative action to shift the terms of the debate from race-conscious affirmative action to class-conscious strategies designed to address the inequitable distribution of educational resources. They contend that race-conscious strategies have been

23. Throughout this essay, I use the term Latina/o to refer to persons with nationalities or ancestries derived from the nations of South America, Central America, the Caribbean, and Mexico. In California, which is home to almost one-third of Latina/os in the United States, the group is predominantly of Mexican origin (about 84%), with a growing percentage of Latina/os of Central American origin (9%), and a small percentage of Latina/os from Puerto Rico, Cuba, and South America. PEW HISP. CTR., SURVEY BRIEF: LATINOS IN CALIFORNIA, TEXAS, NEW YORK, FLORIDA AND NEW JERSEY 1 (Mar. 2004), available at http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=10. The term Latina/o is imperfect, but still serves as a shorthand term for capturing the multiple identities encapsulated by its use. See Francisco Valdez, Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practice to Possibilities, 9 LA RAZA L.J. 1, 8 (1996) ("These group experiences include, but are not exclusively about, Mexican-American, Puerto Rican, and Cuban-American communities. Each of these (and other) Latina/o sub-groups not only comprises “different” national origins and cultures but also diverse spectrums of races, religions, genders, classes, and sexualities.") (citation omitted); see also Francisco Valdez, Under Construction, LatCrit Consciousness, Community and Theory, 85 CALIF. L. REV. 1087, 1090 & n.6 (1997) (defining and problematizing the term).

24. See Jeanne Oakes et al., U. OF CAL. ALL CAMPUS CONSORTIUM FOR RESEARCH DIVERSITY & UCLA INST. FOR DEMOCRACY, EDUCATION AND ACCESS, REMOVING THE ROADBLOCKS: FAIR COLLEGE OPPORTUNITIES FOR ALL CALIFORNIA STUDENTS 1 (2006), available at http://www.law.berkeley.edu/centers/ewi/research/highereducation/ ("Proposition 209 and ending affirmative action have produced neither the ‘results’ nor the opportunities that were promised. California’s Latino, African American, and American Indian students have not received the ‘the tools to compete.’").

25. See discussion infra Part II.

26. See, e.g., DOUGLASS, supra note 6, at 147; Peter Sacks, Tearing Down the Gates (2007); Peter Schmidt, Color and Money: How Rich White Kids are Winning the War Over College Affirmative Action (2007); Gary M. Lavergne, College Admissions and Conspiracy Theories, CHRON. HIGHER EDUC., NOV. 9, 2007, at B10. Indeed, many have argued that affirmative action is somewhat misguided in that it benefits affluent minorities, but does little to help the poor minorities. Stephen L. Carter, Reflections of an Affirmative Action Baby 80 (1991) (suggesting that this also works to disadvantage poor Whites); Antonin Scalia,
polarizing, and argue that this polarization has become increasingly pronounced as we face more difficult questions regarding which racial groups ought to be the beneficiaries of affirmative action. Since race-based solutions to educational inequality are no longer a legal option for remedying inequalities in California's public schools, heightened attention to class-based remedies are all the more necessary.

Growing resistance to acknowledging the role of race in educational inequality, however, may prevent us from correctly diagnosing and devising solutions to the problems resulting from inequitable educational access. Lani Guinier has written about the important role of racial literacy in discussions about educational equality. She maintains that "[a]s a diagnostic or evidentiary device, race helps identify the underlying problems affecting higher education." Simply because race-based affirmative action is foreclosed by Proposition 209 does not mean that we should be blind to the disparate educational outcomes among racial groups, nor should we disregard the way race intersects with class and citizenship status in shaping these educational outcomes.

The examination of Latina/o students' access to California's public institutions of higher education provides an analytical lens for understanding the intersecting obstacles that some students face in their educational journey.


27. See, e.g., DOUGLASS, supra note 6, at 147; Lavergne, supra note 26.
28. For examples of recent works discussing the difficulty of identifying the appropriate recipients of affirmative action, see, e.g., DOUGLASS, supra note 6, at 154 (discussing the difficulties of targeting affirmative action policies in an increasingly mixed-race society); Deana K. Chuang, Power, Merit, and the Imitation of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School, 8 ASIAN L.J. 31, 39 (2001) (noting subgroup differences among Asian Americans which suggest the need for a more nuanced approach to policies toward Asian Americans); Angela Onwuachi-Willig, The Admission of Legacy Blacks, 60 VAND. L. REV. 1141 (2007) (discussing various competing viewpoints regarding the question of which Black students ought to be targeted by affirmative action policies); Sara Rimer & Karen W. Arenson, Top Colleges Take More Blacks, But Which Ones? N.Y. TIMES, June 24, 2004, at A1.
30. Guinier, supra note 1, at 120 ("Properly deployed, racial literacy, or the ability to read race in conjunction with institutional and democratic structures, may enable the building of a collation that starts a larger conversation at the point where educational selection and democratic values meet.").
31. Id. at 202.
32. I have chosen to center my analysis on Latina/os in California's public schools. In so doing, I do not in any way discount the severe underrepresentation of other groups, such as
Rather than discounting the salience and usefulness of class-based analyses and solutions, this article suggests that the experience of Latina/o school children, like that of the miner's canary, provides us with useful information about the prevailing social atmosphere that is obscured by a purely class-based analysis. What follows is an attempt to supplement a class-based analysis of educational inequality with a discussion of issues that might be overlooked in a race-blind account.

There are risks in using race as a "diagnostic tool." Cheryl Harris has cautioned:

[This framing] casts race as the diagnostic tool through which to get at the fundamental problem of class subordination. In this view, race becomes epiphenomenal, and the primary value of racial analysis is instrumental: race is a lens through which to identify 'real inequality' and to provide a basis for mobilizing against it.

It is not my contention that race is merely the visible marker that allows us to identify and analyze class inequalities. Rather, I will analyze the underrepresentation of Latina/o students in California's public institutions of higher education as a way of illustrating the shortcomings of a purely class-based analysis for explaining inequality in California schools. More importantly, I intend to illustrate how explicit governmental policy choices not only aggravate class differences, but also reinforce racial inequality.

Part I explores the demographics of higher education in California, and emphasizes the underrepresentation of Latina/os in California's public colleges and universities. Part I illustrates that Latina/o underrepresentation pre-dates the 1996 change in the law, but also demonstrates the negative impact that Proposition 209 has had on Latina/o enrollment.

Part II discusses the admissions criteria for California's selective public colleges and universities. These admissions criteria form an important part of any analysis of Latina/o underrepresentation, since Latina/o underrepresentation existed even when race-based affirmative action measures were permissible in California. As this section demonstrates, grades and test

African Americans and American Indians, in the UC or CSU systems. Disadvantages encountered by other racial minorities, including African American students, American Indian students, and Asian American students, as well as systematic studies exploring disadvantages related to class and geography, can and should be used to more fully elucidate the structural problems affecting the delivery of public education in California.

33. GUINIER & TORRES, supra note 5, at 11. Guinier and Torres discuss race as analogous to the "miner's canary," the bird that was taken into the mines because the birds, with weaker respiratory systems, would collapse before humans were affected by poisonous gases in the mine, giving miners the chance to escape before they too were harmed. "Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all." Id. Guinier and Torres attribute this metaphor to Felix Cohen, who used the same metaphor in describing the plight of the American Indian. Id. at n.1.

scores are generally the sole basis upon which eligibility is determined for admission to California’s selective public colleges and universities.  

Part III explains how the admissions criteria discussed in Part II, in combination with unequal access to educational resources at the K-12 level, result in lower admission rates for Latina/os. Part III.A explores the significant role socioeconomic status plays in Latina/o underrepresentation, and highlights how socioeconomic status often overlaps with race. Part III.B explores the way that migration patterns, language ability, and immigration status all play an important part in any examination of Latina/o underrepresentation. These factors, along with the effects of racism, compound class-based differences, but cannot be understood solely in class terms.

Part IV discusses how Proposition 209 has impeded effective discussions about the solutions to these problems. Far from achieving its stated goal of equalizing access to educational opportunities, Proposition 209 has given rise to a public discourse that precludes a more appropriate and holistic assessment of students applying to institutions of higher learning while simultaneously ignoring state policies that discriminate against underrepresented minority youth at the K-12 level. Part IV concludes by suggesting that California’s educational policy and its policies toward immigrants are intertwined in ways that render attitudes toward Latina/o immigration an important part of a racially literate account of educational access in the state.

This Article is not a call for a return to the educational and admissions system that California had in the period before Proposition 209. One of the benefits of Proposition 209 is that it has required institutions to examine more searchingly the issue of educational equity along the axis of socioeconomic status. It has also forced institutions concerned with educational equity to think about that concept outside of the narrow context of admissions decisions. We need not turn back the clock to a time when the moment of admissions was the primary site for rectifying the broader failings of society through race-based affirmative action. On the other hand, it is also inappropriate and artificial to ignore the problem of racial inequality in the educational system. The modest ambition of this article is to contribute to the integration of information

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35. As this article goes to press, UC is debating significant changes to its eligibility criteria. The proposed changes would include the elimination of the SAT II test requirements, a guarantee of admission to students with a GPA based on approved courses unweighted for honors or AP courses that places them in the top 12.5% of their high school, and a guarantee that all students with an unweighted GPA of 2.8 and a submitted SAT or ACT test score will have their applications reviewed for admission. Bd. of Admissions and Rel. with Schools, U. of Cal., Revised Proposal to Reform UC’s Freshman Eligibility Policy, Board of Admissions and Relations with Schools (2008), available at www.universityofcalifornia.edu/senate/underreview/sw.rev.eligibility.02.08.pdf [hereinafter BOARS’ REVISED ELIGIBILITY REFORM PROPOSAL]. Because this policy proposal is still in development and has not yet been approved, this article does not attempt to assess the impact of the policy on Latina/o student admissions and enrollment in the UC system. However, several components of the proposal address significant barriers identified in Part II.
regarding Latina/o underrepresentation in California’s schools into the larger dialogue about educational access, and to provide some suggestions as to what we might learn from racially literate analyses of educational inequality.

I

LATINA/O UNDERREPRESENTATION IN CALIFORNIA’S PUBLIC COLLEGES AND UNIVERSITIES

Relative to their numbers in the general population, Latina/o students have been underrepresented at colleges and universities for generations at the national level.\textsuperscript{36} Nationally, Latina/os have the lowest educational attainment rates of any racial group.\textsuperscript{37} The percentage of Latina/os in higher education remains small, even as their presence in the general population booms.\textsuperscript{38} While the Latina/o population of the United States has more than doubled since 1980, the number of Latina/os enrolling in college increased only 5\% during the same period.\textsuperscript{39} This trend is worsening rather than improving.\textsuperscript{40}

Latina/os also lag in college and university graduation rates. In 2000, only 10.4\% of Latina/os nationally aged twenty-five or older held at least a bachelor’s degree, which means they had the lowest degree completion rate among all racial groups.\textsuperscript{41} White students attending college are twice as likely to graduate from college compared with their Latina/o peers.\textsuperscript{42}

A. The Demographics of Higher Education in California

California’s statistics on Latina/o educational achievement are even worse than the disheartening national statistics. Latina/os in California have high

\begin{itemize}
\item \textsuperscript{36} See William G. Bowen & Derek Bok, \textit{The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions} 1-10 (1998); Beatrice L. Bridglall, \textit{A Misguided Debate About Affirmative Action?}, 67 Ohio St. L.J. 15, 16-27 (2006) (discussing underrepresentation of certain racial minorities in higher education and the adoption of affirmative action).
\item \textsuperscript{39} Id. This number puts Latina/os far behind the increase in enrollment by Whites (14\%) and African Americans (11\%) during the same period. \textit{Id}.
\item \textsuperscript{40} \textit{Id.} at 2 (citing \textit{Harvey & Anderson, supra} note 38) (noting declining rates of college completion among Latina/os in the 1990s).
\item \textsuperscript{41} \textit{Id.} at 3. In contrast, 11.5\% of American Indians, 14.3\% of African Americans, 26.1\% of Whites, and 44.1\% of Asian/Pacific Islanders aged twenty-five or older held at least a bachelor’s degree. \textit{Id}.
\item \textsuperscript{42} \textit{Id.} at 2 (citing Richard Fry, Pew Hisp. Ctr., \textit{Recent Changes in the Entry of Hispanics and White Youth into College} (2005)).
\end{itemize}
school graduation rates below the rates of other racial groups, and well below the rates for Latina/os nationally. This trend persists in higher education. College and university graduation rates among Latina/os in California are also below those of other racial groups and below the national average for Latina/os.

In the UC system, the underrepresentation of Latina/o students, along with African American students, existed long before the advent of Proposition 209. In 1995, 38% of high school graduates where Latina/o or African American, but these groups made up only 21% of entering UC freshmen. In other words, Proposition 209 did not create the problem of underrepresentation. However, the initiative did contribute to the under-enrollment of underrepresented minorities in California's public institutions of higher learning.

**B. The Impact of Proposition 209**

After the passage of Proposition 209, Latina/o enrollment in public colleges and universities declined even further relative to their presence in the general population of California. For example, from 1996 to 2006, the number of Mexican American registrants at UC Berkeley fell by 14%. UC Los Angeles (UCLA) also experienced a sharp decline in the enrollment of underrepresented minority students, including Latina/os, after the passage of Proposition 209. The problem of declining Latina/o enrollment is not limited


44. Id.

45. As of July 1995, the UC Regents already had adopted SP-1, which barred the “use of race, religion, sex, color, ethnicity or national origin as a criterion for admission to the university or any program of study.” Reynoso, supra note 14, at n.123. Even though the measure was not implemented by the UC system until 1997, its passage appears to have had a chilling effect on minority applications, admission, and enrollment, which dropped after 1995. See, e.g., DOUGLASS, supra note 6, at 210 fig.8.3. The UC system has relied upon a matrix of grades and test scores in admissions since 1979, and by the late 1980s required a set of course requirements and a minimum GPA of 2.82. See UC ELIABILITY AND ADMISSIONS STUDY GROUP, FINAL REPORT TO THE PRESIDENT B1-B2 (2004), available at http://www.universityofcalifornia.edu/news/compreview/backgroundmaterials0505.html. Given disparate access to secondary educational opportunities, UC’s eligibility criteria were cutting out large numbers of Latina/o students well before 1995. DOUGLASS, supra note 6, at 156.


to the most selective UC campuses. In 1995, the difference between the percentage of underrepresented minorities graduating from high school and the percentage entering the UC system was 17%. In contrast, by 2004, the difference was 27%.

By 2006, the representation of Latina/o, African American, and American Indian students in the UC system as a whole had rebounded to the pre-Proposition 209 level, but this took place as the presence of those groups in California's general population had grown from 38% to 45%. Even though Latina/os now constitute more than 50% of the student body at K-12 public schools in California, Latina/o representation in the UC student body hovers around 13%. In short, the overall representation of Latina/o students in the UC student body has stagnated, and even contracted slightly, in the face of a 61% increase in the number of Chicana/os and Latina/os in California over the past ten years. This underrepresentation also exists, albeit in less dramatic fashion, in the California State University (CSU) system.
Proposition 209 certainly has contributed to the continued underrepresentation of Latina/o students in California's public colleges and universities. However, Latina/o underrepresentation among students eligible for selective institutions of higher education in California pre-dated Proposition 209. To understand what accounts for this long history of underrepresentation, it is useful to understand how the eligibility and admissions process has operated in California's public colleges and universities over the past few decades.

II
CONDITIONS FOR ELIGIBILITY: BUILT IN BIAS?

California's public colleges and universities use complex criteria to make admissions decisions, and these criteria are different at the three levels of public higher education in California—the California Community College (CCC) system, the CSU system, and the UC system. California's Master Plan, adopted in 1960 and modified through subsequent legislative action, differentiates the functions of these public postsecondary education institutions. The UC system is designated as California's "primary academic research institution," and selects from the top one-eighth (12.5%) of high school graduates in admitting its undergraduate class. The CSU system's primary mission is "undergraduate education and graduate education through the master's degree including professional and teacher education." In selecting its students, CSUs are to select "from among the top one-third (33.3%) of the high school graduating class." Finally, the CCC system's primary mission is "providing academic and vocational instruction for older and younger students through the first two years of undergraduate education." CCCs are charged with admitting "any student capable of benefiting from instruction."

After the Master Plan was drafted in 1960, subsequent policy
modifications provided that all California students in the top one-eighth of their high school graduating class who timely applied to UC would be guaranteed a place at one of the campuses in the system. Students in the top one-third of the statewide high school graduating class who timely applied would be guaranteed a place somewhere in the CSU system. Thus, a student's eligibility for enrollment in both the UC and CSU systems turns on the methods employed for determining the "top" of high school graduating classes.

In accordance with the Master Plan, the UC system currently guarantees a slot at one of UC's nine college campuses to students who meet certain eligibility criteria. Eligibility for the UC system is distinct from admission to a particular UC campus. Eligible students who are not admitted to a campus to which they applied are placed in a "referral pool," from which all UC campuses can draw.

The criteria to determine the top one-eighth of the high school graduating class that qualifies for UC eligibility has changed over time. At the time when the Master Plan was devised, the UC system rejected reliance on standardized test scores in admissions determinations, in part because administrators believed that the scores lacked sufficient predictive value. However, standardized tests now play a prominent role in eligibility determinations. UC eligibility currently requires a combination of grades and standardized test scores that cumulatively place the student above a numerical cut-off.

With limited exceptions, the UC eligibility criteria take into account not only the SAT I or the ACT test, but also two additional SAT subject area tests (SAT

64. UCOP MASTER PLAN DESCRIPTION, supra note 57.
65. Id. Students are not guaranteed admission to the campus of their choice. Id.
67. Id.
68. U. OF CAL. OFF. OF PLANNING AND ANALYSIS ET AL., AN ENROLLMENT ISSUES HANDBOOK 12 (2001), available at http://www.ucop.edu/planning/enrollmenthandbook01.pdf [hereinafter ENROLLMENT ISSUES HANDBOOK]. At this time, UC Merced and UC Riverside are non-selective, meaning that they accept all UC-eligible students who apply, and also accept UC-eligible students who are placed in the referral pool when they are denied admission at the campus of their choice. See, e.g., Marisa Agha, UC Riverside remains a safety net for some UC-eligible students, PRESS-ENTERPRISE (Riverside, Cal.), June 13, 2007, at B3. These "nonselective" institutions typically wind up admitting the students from the referral pool. Interestingly, only about 6% of students who are placed in the referral pool actually enroll at a UC school. Minutes of Meeting, Univ. of Cal. Board of Admissions and Relations with Sch. 4 (Nov. 3, 2006), available at www.universityofcalifornia.edu senate/committees/boars/boars.110306.minutes.pdf.
69. DOUGLASS, supra note 6, at 90.
70. ENROLLMENT ISSUES HANDBOOK, supra note 68, at 10-11; see also infra note 78 and accompanying text (explaining the partial exception for the top 4%).
71. Students who graduate in the top 4% of their high school graduating class (as defined by the UC system) are admitted without regard to their test scores, although students still have to take the tests. See infra note 78 and accompanying text. There is also a provision for admission on the basis of exceptional test scores alone. University of California, Undergraduate Admissions http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission /exam.html.
In contrast, eligibility for enrollment at a CSU requires only the SAT I or ACT, and this requirement is waived for students with a grade point average (GPA) of 3.0 or higher.  

A student must also complete fifteen or more courses in seven different subject areas (known as “a-g courses”) in high school in order to be eligible for UC admission. GPA is calculated based only on grades in a-g courses. An extra grade point is awarded for up to eight a-g courses that are classified as advanced placement (AP) courses or UC-approved honors courses. Students must have a weighted a-g GPA of 3.0 or higher to be UC eligible. Since 1999, students in the top 4% of their high school graduating class, based on their weighted a-g course GPA, are eligible regardless of test scores, but they must complete all tests in order to remain eligible. These eligibility requirements have been revised over time to cap eligibility among the high school graduating class to around 12.5%.

A small number of ineligible students are admitted to some campuses in a process called admission by exception. UC policy allows campuses to admit up to 6% of the entering class from students who do not meet the UC eligibility criteria. Most campuses, however, fall well below the 6% cap for admissions by exception.

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75. Id.
76. Id.
77. Id.
79. DOUGLASS, supra note 6, at 98-99, 116-17.
82. BOARS REVISED ELIGIBILITY REFORM PROPOSAL, supra note 35, at 5 (noting that university-wide only “about 2% of all freshman admission offers [go] to technically ineligible students”); see, e.g., Robert Faturechi, Program Targets Applicants with Special Circumstances, DAILY BRUIN (UCLA), May 24, 2005, available at http://www.dailybruin.ucla.edu/news/2005/mag/24/program-targets-applicants-wit/ (noting that UCLA admits only 2% of students by exception, and that the bulk of these students are athletes).

The concept of admission by exception has deep historical roots. After World War I, the UC Academic Senate formalized and expanded its already existing policy of admitting “by exception” those students who did not meet the basic academic criteria for admission. These students
Ultimately, in 2003, only 16% of Latina/o high school graduates were eligible to enter the CSU system and fewer than 7% of Latina/o high school graduates were eligible for admission to a UC campus. These percentages are significantly below those of other groups. These statistics use high school graduates as the baseline figure. The disparity is even more troubling when high school dropout rates are taken into account because the Latina/o high school dropout rate is extremely high. In short, the purely numeric eligibility criteria results in Latina/o eligibility at rates much lower than their presence in the general population. The reasons Latina/os are unable to meet the eligibility criteria still must be explored.

III
EXPLORING THE CAUSES OF LATINA/O UNDERREPRESENTATION IN CALIFORNIA’S PUBLIC COLLEGES AND UNIVERSITIES

The simple explanation for the low rates of Latina/o enrollment at UC and CSU schools is that, in the aggregate, Latina/o students have lower test scores and high school GPAs than White and Asian American students in the included war veterans, exceptionally talented musicians and artists, students in rural areas, and students from disadvantaged families. DOUGLASS, supra note 6, at 39. In the late 1960s and 1970s, racial segregation in housing gave rise to a pattern where certain racial minorities, particularly Latina/os and African Americans, attended underfunded K-12 schools. Id. at 64-65. At the same time, the UC system raised its academic requirements and began to use standardized test scores in admissions decisions, which had a predictable impact on students in disadvantaged schools. Id. at 93-119. Partly in direct response to these inequalities, and partly in response to political pressures from lawmakers, the UC system began to integrate race into its admissions decisions, including admission by exception. Id. Over time, considerations of race grew more central to the “subjective” considerations for admission by exception. To some extent, the proponents of SP-1 and Proposition 209 were responding to perceived abuses in this regard. Id. at 159-74 (arguing that the focus on racial equality, to the exclusion of other subjective considerations, left the University vulnerable to the attacks of Ward Connerly).


As previously noted, for the most part, the CSU admissions criteria are similar to the UC criteria. However, CSU does not require the SAT II tests. Cal. St. U., Eligibility Index—California Residents, supra note 73. Instead CSU eligibility is determined by a numerical composite of high school grade point average (calculated by using a method similar to that used by the UCs) and an SAT or ACT score. Id.

84. IHEP STUDY, supra note 83, at 34-35. In contrast, half of Asian American high school students graduated eligible for admission to CSU and one-third graduated eligible for admission to UC. Id.

85. For every one hundred ninth graders entering California’s high schools, only sixty-nine graduate, and only twenty-six graduate having completed the required a-g courses. Among American Indians, African Americans and Latina/os, however, only fifty-eight graduate, and only fifteen have completed the required a-g courses. OAKES ET AL., supra note 24, at 13-14.

86. It is important to note that the category of Asian Americans encompasses an extremely broad group of students, and that some of these sub-groups do not do as well in the aggregate as
aggregate. But this description of the problem does not constitute a thorough explanation of its causes. Educational inequalities throughout the K-12 public school system in California, particularly when compounded by the effects of standardized testing, render these outcomes a foregone conclusion. Many of these inequalities turn on socioeconomic factors. The socioeconomic barriers to accessing higher education are explored in Part III.A. But socioeconomics alone do not paint a complete picture. Part III.B thus supplements the analysis of Part III.A by discussing unique barriers faced by Latina/os and providing texture to the socioeconomic analysis, which sheds additional light on the obstacles Latina/os face in accessing higher education.

A. Barriers to Higher Education: A Socioeconomic Analysis

Students of all races with lower socioeconomic status indicators face significant barriers to accessing higher education in California. These class-based barriers play a significant role in explaining racial disparities in higher education because certain underrepresented minority applicants are more likely to come from families with lower socioeconomic indicators. Latina/o students as a group are more likely than the general population of students to have parents without a higher education and with a low family income. In fact, African Americans, Latina/os, and American Indians, all traditionally underrepresented minority groups, are all overrepresented among households with low socioeconomic status indicators in contrast to Whites and Asian Americans. Thus, socioeconomic barriers are of acute significance for Latina/os, and help explain why the general underrepresentation of poorer students ensures that certain minority groups are underrepresented in California’s public higher education system.

the category of Asian Americans as a whole. See also Victoria Choy, Note, Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger, 38 U.C. DAVIS L. REV. 545, 569 (2005) (noting how the Supreme Court implicitly accepts these generalizations). See generally Chuang, supra note 28. The data that I have drawn from tends to treat Asian Americans as a single group, but the figures cited here should not be read to suggest that various sub-group of Asian Americans access higher education in monolithic fashion.

87. WATSON SCOTT SWAIL ET AL., EDUC. POL’Y INST., LATINO YOUTH AND THE PATHWAY TO COLLEGE 28 (2004), available at www.educationalpolicy.org/pdf/Latino_Youth.pdf. These factors put students at greater risk for lower educational attainment. Id.

1. Socioeconomics and GPA

On the whole, students of lower socioeconomic status are considerably less likely to be high academic achievers as measured by test scores and GPA.\(^89\) Unfortunately, course offerings in California’s public schools are distributed in a way that compounds any pre-existing educational differences that might occur as the result of a lack of educational advantages in the home. In California’s public schools, courses available at the high school level are distributed between schools in an unequal fashion, and this has a direct effect in shaping which students become eligible for admission to UC and CSU campuses.

The calculation of GPA for UC admission offers a prime example of this phenomenon. The GPA calculation includes only a-g courses and rewards AP and honors level course work.\(^90\) Unfortunately, a-g courses and approved AP and honors level courses are not evenly distributed across high schools in the state of California. They are less likely to be offered at schools with lower socioeconomic status indicators.\(^91\) Because such a high number of Latina/o students and African American students attend these schools,\(^92\) the burden of unequal course distribution falls disproportionately on these groups. Indeed, the data show that a-g courses are less likely to be offered at schools that serve primarily African American and Latina/o students.\(^93\) This not only means that some students have a greater ability than others to shape their UC-eligible GPA.

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89. Id.; Rebecca Zwick, Fair Game? The Use of Standardized Admissions Tests in Higher Education 133, 134 tbl.5-5 (2002).
90. See supra Part III.A.
91. Lisa Chavez & Gabino Arredondo, U. of Cal., Berkeley Ctr. for Latino Pol’y Res., Access to the University of California for Graduates of Low-API High Schools 1 (2006), available at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1015&context=issc/clpr (noting limited access for students in low Academic Performance Index (API) schools, where “nearly 60 percent of students were eligible for free or reduced meals and only 18 percent came from families with at least one college/professionally educated parent”).
92. Id.
93. Oakes et al., supra note 24, at 16, 20-23. For instance, only 30% of schools enrolling 90-100% of African Americans and Latina/o students have sufficient college preparatory courses, in comparison to 55% of schools where White and Asian students are in the majority that offer a sufficient number of such courses. Id. at 21. Overall, less than half of the comprehensive high schools in the state of California meet the minimum threshold of a-g courses required to provide all students with the opportunity to enroll in sufficient college preparatory courses. Id. at 20. See also Lisa Chavez, et al., U of Cal., Berkeley Ctr. for Latino Pol’y Res., Is the Bay Area Preparing Latino High School Graduates for College? A Statistical Portrait of College Preparation in the San Francisco Bay Area 4 (2007), available at http://repositories.cdlib.org/issc/clpr/pr/ChavezMedinaArredondo2007/. Chavez, et al., found that in 1985, only 16% of Latina/os in the Bay Area satisfactorily completed a-g coursework, compared to 26% of the general population, and that:

Ten years later, more Latino graduates completed the a-g coursework series (23 percent) yet they were still less likely to do so in comparison to all graduates (35 percent). The a-g completion rate for Latinos and African Americans has remained relatively flat since 1995, a time period when the state was purportedly mandated to ensure that “all California children are provided with the tools to compete in our society” in the wake of Proposition 209. Id. at 3.
through careful course selection, but it also means that students in poorer, predominantly African American or Latina/o schools have greater difficulty even satisfying the course pattern that the UC and CSU systems require for eligibility. Even those minority students who are able to meet the a-g course requirements may be disadvantaged in the selection processes at their campus of choice, since taking extra a-g courses is often advantageous in the selection process.  

The ability of students to garner “bonus points” in the calculation of their GPA by completing approved honors-level course work also varies significantly across high schools on the basis of socioeconomic status. Consequently, underrepresented minority students as a group have less access to coursework that will count toward or boost their UC-calculated GPA. This, in turn helps to explain why these students are underrepresented among the population that meets the UC and CSU cut-off for eligibility. It also helps to explain the prevailing gap in GPA between underrepresented minorities like Latina/os and their White and Asian counterparts, who are less likely to attend schools with lower socioeconomic status indicators.

2. Socioeconomics and Standardized Tests

Standardized test score outcomes compound the problems of GPA inequalities for underrepresented minorities. As a general rule, the more schools rely upon standardized tests in making admissions decisions, the greater the adverse effect on racial and ethnic minorities and the socioeconomically disadvantaged.

Data reveals that standardized test performance is highly correlated to socioeconomic status. A variety of explanations are possible. For example,

94. Oakes et al., supra note 24, at 12; see also id. at 21-22 (discussing racial disparities in access to advanced a-g courses).

95. Id. at 23 (citing a study finding that “once school size was taken into account, the relationship between the racial composition of the schools and AP offerings was strong: the larger the percentage of African American and Latinos, the fewer the AP courses schools offer”); see also Richard Frankel, Proposition 209: A New Civil Rights Revolution?, 18 Yale L. & Pol’y Rev. 431, 433-35 (2000) (summarizing the Rios v. Regents of the University of California class action lawsuit filed in 1999, which alleged that the University of California’s admissions policies, and particularly the extra point for honors and AP coursework, had a disproportionately negative impact on underrepresented minorities); Roslyn Arlin Mickelson, Segregation and the SAT, 67 Ohio St. L.J. 157, 183-84 (2006) (discussing the relationship between AP course availability and the racial composition of California high schools).

96. Zwick, supra note 89; see also Sigal Alon & Marta Tienda, Diversity, Opportunity, and the Shifting Meritocracy in Higher Education, 72 Am. Soc. Rev. 487, 488 (2007) (“[B]lack and Hispanic students average lower scores on their College Board exams compared with Asians and whites.”); Guinier, supra note 1, at 146 & n.135.

97. Peter Sacks, Standardized Testing: Meritocracy’s Crooked Yardstick, in Learning From Change, 331 (Deborah DeZure ed., 2000); see also Nicholas Lemann, The Big Test: The Secret History of the American Meritocracy 155-56 (1999); Zwick, supra note 89, at 133 (noting correlation between socioeconomic status and test scores as well as grades); Susan
students from more affluent families are able to afford expensive test preparation programs. Perhaps more importantly, the same disparities that exist in access to college preparatory classes that impact an applicant's a-g GPA is also likely to impact test preparedness. I would speculate that there is also an advantage to having educated parents who understand what tools are needed to prepare for standardized tests and who are able to transmit their knowledge to their children over the course of their lives. Regardless of the reasons for the gap, its existence is not in dispute, and neither is its impact on Latina/os in greater proportion than the general population.

Admissions tests offer modest predictive value of college success at best, and only marginal additional value to the high school record. This fact, considered alongside the impact that testing has on the eligibility of certain underrepresented minorities and students from families with lower socioeconomic indicators, has spurred several proposals to eliminate or modify the testing requirement. Nevertheless, for now at least, test scores continue to play a significant role in defining UC eligibility.

3. Socioeconomics and Eligibility: Declining Outreach

Another reason that eligibility rates are so low may result from the lack of outreach to socioeconomically disadvantaged students. Outreach programs help inform students about the eligibility requirements for California's public colleges and universities, and provide them with tools to meet their selective requirements. Proposition 209 not only eliminated affirmative action in the admissions process, it also ended race-based outreach programs designed to

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98. Zwick, supra note 89, at 162 (noting, inter alia, that "coached students tended to come from more educated and affluent families"). Of course, the extent to which coaching and test preparation actually improves scores is a matter of some dispute. Id. at 159-67. Regardless, the test preparation industry is booming in California. See Seema Mehta, Students Believe in the SAT, L.A. Times, Mar. 1, 2008, at B1.


101. See, e.g., BOARS Revised Eligibility Reform Proposal, supra note 35; Douglass, supra note 6, at 214-33 (discussing UC President Atkinson's proposal to end the use of the SAT in UC eligibility determinations); Larry Gordon, UC Panel Seeks to Drop SAT Tests from Admissions Requirement, L.A. Times, Mar. 16, 2008, at B1 (discussing UC's Board of Admissions and Relations with Schools (BOARS) proposal to eliminate the SAT II from UC eligibility criteria).
reach underrepresented minority students. In the wake of the passage of Proposition 209, the California legislature briefly attempted to mitigate the loss of these programs by bolstering race-neutral outreach to socioeconomically disadvantaged students. Unfortunately, early efforts to increase outreach to the socioeconomically disadvantaged have been rolled back. In fact, outreach has declined even as standards for admissions have become more rigorous. So not only did Proposition 209 end race-based outreach, but there have been no sustained efforts to provide comparable outreach to socioeconomically disadvantaged students.

4. Socioeconomics and Access: Rising Costs

Obviously, not every student who is eligible to attend a UC or CSU school will actually attend. For eligible students, particularly those who are socioeconomically disadvantaged, cost may be a barrier to access even if the student is admitted to a UC or CSU campus. Unfortunately, the same budgetary challenges that resulted in cutbacks to outreach also resulted in the curtailment of need-based financial aid.

Nationally, the price of higher education has risen markedly in recent years. Between 1980 and 2000, college costs increased much faster than income growth for most families; only the very wealthy escaped this trend. For families in the bottom income quintile, the price of tuition essentially doubled as a percentage of income. Increases in federal and state financial aid have not kept up with tuition increases.

Historically, California has followed its own path in the pricing of higher

103. DOUGLASS, supra note 6, at 193-99.
106. HELLER, supra note 37, at 10 (noting that the tuition increases of the 1980s and 1990s were unprecedented in size).
108. Id. For a two-year college, the cost rose from 6% to 12% of income, while for a four-year college, the cost rose from 13% to 25% of income. Id. Between 1993 and 2004, average tuition at private, nonprofit four-year colleges rose 81%, a rate more than double the rate of inflation. Jonathan D. Glater & Alan Finder, In a New Twist on Tuition Game, Popularity Raises with the Price, N.Y. TIMES, Dec. 12, 2006, at A1.
109. LOSING GROUND, supra note 107, at 6, 9. Moreover, while need-based aid has declined relative to overall tuition, programs for students without demonstrated financial need have been on the rise. Id. at 6.
education. In the past, California's public colleges and universities have charged low tuition, while offering little financial aid. At the end of the 1990s, California students paid tuition well below the national average, and in 2000, California students still paid tuition and fees significantly below national levels. That year, California received one of only five “A” grades in the country in the affordability category of Measuring Up 2000, a national report card on state performance in higher education.

Unfortunately, the affordability of higher education at California’s public institutions has since declined. Between 2000 and 2007, fees at the CSUs rose 51%, while at the UCs, fees rose 116%. Tuition at CCCs also rose significantly, more than doubling between 2002 and 2004. California's current budget crisis will likely lead to further increases in student fees and funding cuts for higher education. This trend makes it more difficult for low-income students to attend college. Moreover, there are reasons to believe that rising tuition and fees will particularly disadvantage Latina/o students.

**B. Barriers to Higher Education: A Race-Conscious Analysis**

The disproportionate representation of Latina/os among California’s poorest residents helps to account for Latina/o underrepresentation in California’s colleges and universities. Because of this, class-based remedies could be expected to have a positive impact on Latina/o eligibility, admission, and enrollment. But socioeconomics tell only part of the story. There is an achievement gap at all socioeconomic levels between Latina/os and the general

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110. Heller, supra note 37, at 20.
111. Id.
112. Losing Ground, supra note 107, at 23.
113. Patrick M. Callan & Joni E. Finney, State Policies for Affordable Higher Education, in Losing Ground, supra note 107, at 10. The other states to receive a grade of “A” were Illinois, Minnesota, North Carolina and Utah. Id.
114. Cal. St. U., Campus Mandatory Fees, http://www.calstate.edu/budget/FeeEnrl_Info/FeeInfo/Campus_Mand_Fees/Mand_Fees_ToC.shtml. The fee schedule link for the 2007-2008 academic year indicates that in that year, California resident fees were $2,772. Id. The fee schedule link for the 2000-2001 academic year indicates that in 2000, those fees were $1,839. Id.
115. U. of Cal. Off. of the President, Facts About Student Fees, http://budget.ucop.edu/fees.html. The link to the fee information for the 2007-2008 academic year indicates that in 2007, California resident fees were $5,850. Id. In contrast, the link to the fee information for the 2000-2001 academic year indicates that at that time, fees were $2,716. Id.
117. See, e.g., U. of Cal. Off. of the President, Key Points on Proposed Cuts to UC's Budget (2008), available at http://www.evce.uci.edu/budget/Budget%20talking%20points%201-22-081.pdf (proposing the need for both spending cuts and fee hikes to deal with pending budget reductions).
118. See discussion infra Part III.B.3 and accompanying text.
Much more empirical research is needed to diagnose the problems and develop solutions for this ubiquitous gap. We do know, however, that California's K-12 education system is plagued with racial inequalities that amplify the effects of socioeconomic disadvantage. Immigration status also contributes to and compounds the educational barriers that arise out of disadvantaged class status, especially for Latina/os.

1. The Racialized Impact of Admission Requirements

Latina/os—especially Mexican Americans and Puerto Ricans—along with African Americans and American Indians, are severely underrepresented compared to their White and Asian American peers among the nation's highest achieving students as measured by GPA, class rank, and standardized test scores. African Americans and Latina/os, on average, have lower GPAs than their White and Asian American counterparts. As discussed in Part III.A.1, in California, some of this is explained by the fact that these students are more likely to attend schools with lower socioeconomic indicators, which translates into less access to the college preparatory courses that can boost GPA. However, the data also illustrate that access to a-g courses, approved honors-level course work, and AP courses varies within high schools, depending on students' race and class, as a result of tracking. African American and

119. MILLER, supra note 88 at v, 2.
120. OAKES ET AL., supra note 24, at 24-26; cf Jonathan D. Glater & Alan Finder, Diversity Plans Based on Income Leave Some Schools Segregated, N.Y. TIMES, July 15, 2007, at A24 (noting that efforts to integrate public high schools along socio-economic lines did not necessarily lead to racial desegregation).
121. See infra at Parts III.B.2-4.
122. MILLER, supra note 88, at 2.
123. One study has shown significant GPA differences across race:

In a 1995 study, researchers from the National Center for Education Statistics calculated the proportion of college-bound high school seniors who met academic standards typically used by selective colleges in making admissions decisions. The analysis produced some striking findings about the percentage of students with grade point averages of at least 3.5: 29% of Asian Americans, 21% of whites, 10% of Latinos, and 4% of African Americans had GPAs this high, a hefty difference among ethnic groups.

Rebecca Zwick, Making the Grade: The SAT versus the GPA, NAT'L CROSS TALK (2001), available at http://www.highereducation.org/crosstalk/ct0701/voices0701-makingthegrade.shtml; see also ZWICK, supra note 89, at 133; BOWEN & BOK, supra note 36, at 272 ("Nationally, we know that blacks are only half as likely as whites to finish in the top 10 percent of the high school class and less than 40 percent as likely to earn an A average.").
124. See supra Part III.A.1; see also Goodwin Liu, Seattle and Louisville, 95 CALIF. L. REV. 277, 290-91 (2007) ("Black and Latino students who attend majority-white or majority-Asian public schools have significantly higher rates of eligibility for enrollment in the University of California (UC) than their counterparts in majority-black or majority-Latino high schools").
125. OAKES ET AL., supra note 24, at 24-25. For more detailed discussions of the tracking problem, see JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY xi, 191 (2d. ed. 2004); Jeannie Oakes & Gretchen Guiton, Matchmaking: The Dynamics of High School Tracking Decisions, 32 AM. EDUC. RES. J. 3, 3 (1995) ("[S]tudents are unevenly distributed
Latina/o students who "attend majority White and Asian schools where more advanced courses are offered" are less likely to find themselves enrolled in advanced courses compared to White or Asian students.\textsuperscript{126} And while one might hypothesize that all of these racial discrepancies would disappear once class is factored in, that does not appear to be the case. Ultimately, race is a better predictor of academic achievement than socioeconomic class.\textsuperscript{127}

Test scores also reveal racial disparities that are not entirely accounted for by socioeconomic status alone.\textsuperscript{128} When combined with socioeconomic effects, group differences in scores are significant. In the year 2000, for example, there were twenty-three times as many White and Asian American high school seniors who scored over seven hundred on the math section of the SAT I than there were African American, Latina/o, and American Indian students, even though there are only twice as many White and Asian students as there are students from these underrepresented groups.\textsuperscript{129} On the verbal section, there were seventeen times more White and Asian American students who scored over seven hundred than was the case for students from the underrepresented groups.\textsuperscript{130} Group differences observed on standardized tests exceed group differences in academic performance, often by a substantial margin.\textsuperscript{131}

The reasons for the race-based achievement gap, like many other issues surrounding testing, are a matter of dispute. Some scholars have raised questions about the psychometric analysis used to compile tests such as the SAT I.\textsuperscript{132} Choices made in designing standardized tests may misleadingly compound the perception of differential ability between racial groups.\textsuperscript{133} As among tracks, with low-income and minority students more likely to be in low ability classes for the non-college-bound."\textsuperscript{126}

\textsuperscript{126} OAKES ET AL., supra note 24, at 24-26; see also Angela Onwuachi-Willig, For Whom Does the Bell Toll: The Bell Tolls for Brown?, 103 Mich. L. Rev. 1507, 1528-29 (discussing a study finding similar tracking phenomenon in Shaker Heights, Ohio).


\textsuperscript{128} MILLER, supra note 88, at 20; see also Christopher Jencks & Meredith Phillips, The Black-White Test Score Gap: An Introduction in \textit{The Black-White Test Score Gap} 1-2 & n.3 (Christopher Jencks & Meredith Phillips eds., 1998) (noting that the Black-White test score gap persisted even after accounting for socioeconomic status).

\textsuperscript{129} MILLER, supra note 88, at 7.

\textsuperscript{130} \textit{Id.} at 8; see also \textit{Id.} at 9-19 (discussing gaps in AP test scores).


\textsuperscript{133} See William H. Angoff, Perspectives on Differential Item Functioning Methodology, in \textit{Differential Item Functioning} 3, 17 (Paul W. Holland & Howard Wainer eds., 1993) ("For if the criterion is itself biased to some degree, then the application of a DIF analysis will certainly be flawed; further, if bias is pervasive in the criterion, then any attempt to identify bias in its component items will inevitably fail.").
one team of researchers concluded, "Good intentions aside, facially neutral test construction has, for purely statistical reasons independent of discriminatory animus, the ultimate effect of contributing to—even guaranteeing—the lower performance of African Americans and Chicanos on the SAT." 134

Regardless of whether tests are designed in ways that promote invidious discrimination, 135 many underrepresented minorities perceive themselves as more likely to perform poorly on these tests than their White or Asian counterparts. Thus, another important factor in African American and Latina/o under-performance on standardized testing may be "stereotype threat." Professor Claude Steele and his colleagues have found evidence that many capable African American students underperformed at selective universities. Steele concluded that the trend was the result of stereotype threat—"the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would confirm the stereotype." 136 Stereotype threat adversely effects college performance, but it also may have a negative effect on test taking. 137 Although more research may be needed to determine whether stereotype threat applies to Latina/os, they are certainly exposed to many of the same factors that give rise to stereotype threat among African Americans. 138

Stereotype threat and lack of access to adequate educational resources in predominately Latina/o schools may also help to account for some of the differences in test taking behavior between underrepresented minority groups like Latina/os and their White and Asian American counterparts. The single most important factor impeding students who might otherwise be eligible from obtaining eligibility for admission to a UC is their failure to complete one or both of the needed SAT IIs in addition to the SAT I or ACT. 139 While an average of 54% of students who have completed the required coursework for UC eligibility also complete the required tests, this is true of only 38% of Latina/o students and only 35% of African American students. 140

In sum, disparities in access to a-g courses, AP, and approved honors course work, disparate patterns in test taking, and differential test performance

134. Kidder & Rosner, supra note 132, at 156.
135. This question is contested. See Zwick, supra note 89, at 109-42 (reviewing the arguments that tests "discriminate" against people of color, stressing the importance of proper item screening, and concluding that the test score differentials reflect disparate access to educational opportunity).
136. Claude Steele, Stereotype Threat and African-American Student Achievement, in Young, Gifted and Black 109, 111 (Theresa Perry et al. eds., 2003).
137. See Miller, supra note 88, at 24.
138. Id. at 25.
combine to ensure lower rates of eligibility for Latina/os. Although much of this disparity is probably the result of inequitable access to the most qualified teachers and the best classes—an problem that is highly correlated to socioeconomic status—these distinctions are not explained by socioeconomic status alone. Any effort to fully address educational inequality must take account of differential academic performance within class, and remain alert to the possibility of racial bias in the schools and the psychological effects racism has on students of color.

2. The Significance of Immigration Status and Educational Access

A more racially literate account of Latina/o underrepresentation should also take into account the effects of immigration status, immigration policy, and education policy as it affects Latina/o immigrants. Since about 40% of Latina/os nationwide are foreign-born, it is worth considering the role of immigration status in educational attainment at the K-12 level and the college level in analyzing Latina/o educational achievement.

a. Immigrants and K-12 Education: Early Problems

Immigrants as a whole have relatively high secondary school dropout rates. In 2000, for example, the foreign-born accounted for 25% of high school dropouts—a rate more than three times their proportion in the fifteen to seventeen year-old age group. Latina/o immigrants drop out of high school at extremely high rates even compared to other immigrants. The age profile of Latina/o immigrants might account for some of the group differences between Latina/o immigrant students and other immigrant students. Out of those immigrants who arrive in the United States between the ages of thirteen and forty-four, those between the ages of thirteen and nineteen have the lowest rates of educational attainment. Latin American countries send the highest percentage of teenage and young adult immigrants, dominating this at-risk category. Immigration during the teenage years also correlates with higher dropout rates in secondary school. Thus, the issue of Latina/o

141. Oakes et al., supra note 24, at 20-32.
144. IHEP Study, supra note 83, at 22.
145. Id. at 27.
146. Id. at 14.
147. Id.
underrepresentation in California’s institutions of higher learning stems in part from barriers associated with immigration status.\textsuperscript{148}

\textit{i. Language Barriers}

Many new immigrants do not speak English fluently, so language poses one obvious barrier to the completion of secondary school.\textsuperscript{149} English language learners are heavily disadvantaged in their efforts to meet the eligibility criteria for UCs or CSUs because in most high schools it is almost impossible for English language learners to meet a-g course requirements.\textsuperscript{150} Sixty-six percent of students labeled “Limited English Proficient,” a substantial majority, are Latina/o, so this has a significant impact on Latina/o eligibility.\textsuperscript{151}

\textit{ii. Migration Barriers}

Children of migrant workers, many of whom are Latina/o, face even more acute obstacles to higher education.\textsuperscript{152} These students must follow their parents as they move and change jobs.\textsuperscript{153} They frequently attend numerous primary and secondary educational institutions over the course of the school year.\textsuperscript{154} Over time, this severe lack of continuity in education presents another educational risk factor for as many as 800,000 migrant students in the United States each year.\textsuperscript{155}

In short, immigrant students may confront a variety of issues that not only jeopardize their chances for college eligibility, but impede their ability to

\textsuperscript{148} Citizenship status also plays a role. Among people in the college-going ages of eighteen to twenty-four, immigrants were only slightly less likely to be enrolled in college than the native born. However, this hopeful statistic masks the important role that citizenship plays in college enrollment. While 47\% of naturalized citizens were enrolled in college in 2005, only 22\% of non-citizens were enrolled. \textit{Id.} at 15.

\textsuperscript{149} \textit{Id.} at 24-25 (reporting that immigrants are disproportionately likely to lack English proficiency).

\textsuperscript{150} \textsc{Oakes et al.}, \textit{supra} note 24, at III, 26. Even if they fail to meet eligibility and admissions criteria for a UC or CSU campus upon graduation from high school, English language learners can qualify for a position at a California Community College (CCC) by graduating from high school, and later securing a position at a UC (or a CSU) by completing a two-year term of study at the CCC. Due to cost, however, this path is becoming increasingly more difficult for low-income and Latina/o students to access. \textit{See infra} Part III.B.3.


\textsuperscript{153} \textit{Id.} (citing \textsc{Cynthia Salinas & Maria E. Franquiz}, \textit{Making Migrant Children and Migrant Education Visible, in Scholars in the Field: The Challenges of Migrant Education xi} (Cynthia Salinas & Maria E. Franquiz eds., 2003)).


\textsuperscript{155} Pabón López, \textit{supra} note 152, at 1382.
complete high school. While some students are able to overcome these significant disadvantages, the playing field is extremely uneven.

b. Immigrants and Higher Education: Enrollment and Persistence

The impact of immigration status on educational attainment does not end for Latina/o students with high school; immigration status may also impede the completion of an undergraduate degree. Immigrants have lower rates of bachelor’s degree completion than the general population. Significantly, the data also suggest that the barriers to higher education faced by immigrants are not experienced evenly across immigrant groups. Nationally, fewer than 15% of Latin American immigrants between the ages of eighteen and twenty-four are enrolled in college. In contrast, 47% of European immigrants, 52% of African immigrants, and 56% of Asian immigrants in this age group are attending college. In California, 54% of immigrants are Latina/o, but Latina/os comprise only 30% of immigrant undergraduates. In contrast, although Asians constitute 30% of the immigrant population in California, 43% of immigrant undergraduates are Asian. These disparities persist into the second generation.

Immigrant undergraduates are 23% more likely than the general undergraduate population to “have at least three risk factors associated with low persistence and attainment in higher education,” including low-income households, part-time attendance, and lack of English proficiency. These risk factors are evident among Latina/o immigrants. On average, parents of Latina/o immigrant students earn 12% less than the parents of Asian immigrant students and 29% less than the parents of White immigrants. Latina/o immigrant students are more likely to be enrolled part-time than their counterparts in other demographic groups. Finally, Latina/os dominate the


158. IHEP Study, supra note 83, at 15.

159. Id.; see also id. at 27 (comparing the representation of these immigrant groups in the general population with their representation in colleges and universities).

160. Id. at 35.

161. Id. at 35 (citing statistics from the U.S. Department of Education’s National Center for Education Statistics and the U.S. Census Bureau’s 2005 American Community Survey).

162. Id. at 30.

163. Id. at 24-25.

164. Id. at 28.

165. Id. at 29.

166. Nearly 85% of White students between the ages of eighteen and twenty-four are enrolled full time, compared to only 75% of Latina/o students. Fry, supra note 157, at vi.
Available data thus suggest that Latina/o immigrants face a series of obstacles to completing a bachelor’s degree in California. English language learners and migrant children often confront practical difficulties in completing the course requirements that lead to public higher education, and in graduating once they are in college. Even those who do qualify and who overcome other sources of educational disadvantage and might otherwise obtain a degree may confront serious cost barriers, particularly if they are not documented immigrants.

3. The Racialized Impact of Rising Costs in Higher Education

California’s public institutions of higher education, which used to follow a low cost model with little financial aid, are increasingly pursuing a high cost strategy, accompanied by increases in financial aid. In a world of perfect information, a higher cost strategy accompanied by sufficient increases in need-based aid would almost certainly benefit all lower income families. After all, low tuition at public colleges and universities effectively subsidizes wealthy parents willing to spend more for their children’s college education. If the funds from increased fees are redistributed through need-based aid, a high tuition/high aid model could actually benefit lower income students, whose education would essentially be subsidized by wealthier students.

Indeed, the profile of California schools suggests that higher aid was a part of the higher cost strategy. Between 1992 and 2002, state grant aid per student increased 56%.

Unfortunately, as a practical matter, the increase of grant aid that accompanied rising tuition does not offset the impact of higher fees for all students. In the aggregate, students from different racial groups react differently to different fee structures. Immigrants also react differently than the native born to these price structures. Studies of the collective behavior of Latina/o students and immigrant students suggest that, at the undergraduate level, the higher cost/higher aid strategy may discourage these students from pursuing higher education.

167. See supra note 151 and accompanying text.
168. See infra Part III.B.3.b.
171. See Edlin & Ayres, supra note 170.
172. LOSING GROUND, supra note 107, at 23.
Undergraduate African American and Latina/o students are more price responsive than White students; similarly, low-income students are more price responsive than middle- and upper-income students. Perhaps unsurprisingly, for reasons attributable to race and class status, higher tuition costs have a disproportionately detrimental effect on Latina/os. Although the rising availability of financial aid theoretically should offset tuition increases for students with financial need, Latina/o students in the aggregate lack information regarding financial aid. In a recent survey of Latina/o students between the ages of eighteen and twenty-four, the vast majority overestimated the cost of obtaining a UC or CSU education. The survey also suggests that some students are not receiving information about financial aid that might help them to make more accurate calculations of the actual price of higher education. It is therefore unsurprising that “financial aid alone may not be sufficient to positively affect college enrollment” among Latina/os in an age of rising fees. More outreach to Latina/o and immigrant students regarding the costs of education could be useful in increasing their enrollment in public institutions of higher education.

Moreover, while a high cost/high aid approach would theoretically spread the costs of public higher education more equitably, as a practical matter, universities are increasingly offering merit-based financial aid instead of need-based aid. Because Latina/os may score lower on traditional indicia of academic merit, it is likely that the effects of increased tuition on low-income Latina/o students will not be completely offset by rising financial aid. While some states may target underrepresented minorities for non-need-based aid, this is not possible in California due to Proposition 209.

As tuition rises and grant aid falls, students increasingly rely on loans to fund their education. In the 2004-2005 school year, students in the United

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173. Heller, supra note 37, at 8.
175. Muñiz, supra note 38, at 10-11.
176. María Estela Zarate & Harry P. Pachon, The Tomás Rivera Pol'y Inst., Perceptions of College Financial Aid among California Latino Youth 5 (2006), available at http://www.trpi.org/PDFs/Financial_Aid_Surveyfinal6302006.pdf. Fewer than 20% of them accurately assessed the costs. Id. Of those surveyed, 79% were high school graduates. Id.
177. Id. 45% of Latina/o youth who did not attend college had never heard of the Cal Grant program. Id. 51% of Latina/o young adults who did not attend college had never heard of Pell Grants, the federal grant program for low income students. Id.
179. Losing Ground, supra note 107, at 6.
180. See supra Part III.B.1.
States took out close to $13.8 billion in private loans, which is over ten times the amount borrowed a decade ago. In addition, there has been an important change in the way the federal government assists students in paying for higher education over the past two decades. In 1981, federal financial aid was 45% loans and 52% grants. In 2000, 58% was loans and only 41% was grants.

Since loans have become a more important vehicle for funding higher education, questions about access to loans are central to understanding the scope of potential cost barriers to higher education. Lenders’ decisions about whether and on what terms to lend to students effectively disadvantage poor and minority student loan applicants. There is also some evidence that lenders have simplified this calculus by charging higher interest rates to students who attend colleges with a higher percentage of minority students. If true, this means that students who attend colleges and universities classified as “Hispanic serving institutions”—institutions that have high concentrations (at least 25%) of Latina/o students—have already been disadvantaged by lending practices in their efforts to finance their college education.

Financial factors affect not only decisions about whether to go to college, but also may influence choices about where to go to college. Since the less selective public schools are less expensive than the more selective UC schools, this may mean that students are driven by financial considerations to attend less selective schools, where they will have a lower likelihood of degree completion.

Finally, given Latina/o students’ greater price sensitivity and greater likelihood of attending a two-year college, the substantial tuition increases at two-year colleges also has a significant impact on Latina/o students.
have seen significant fee increases in recent years.\textsuperscript{190} These price increases heavily impact Latina/os, who comprise 31% of the students at CCC campuses.\textsuperscript{191}

\textit{b. Rising Costs and Immigrants}

Latina/o immigrant students also react differently to the higher price/higher aid structure than the general population.\textsuperscript{192} Perhaps one reason is because, as a group, they have greater financial obligations to family members.\textsuperscript{193} In general, immigrants are particularly price sensitive because they are nontraditional students who work full- or part-time while attending school.\textsuperscript{194} These economic burdens may be further compounded by the need to send remittances to family members abroad.\textsuperscript{195} Nearly two-thirds of Latin American immigrants, most of whom are under thirty-five and making under $30,000 a year, send money to family members abroad.\textsuperscript{196} Traditional

\begin{itemize}
  \item \textsuperscript{190} See supra text accompanying notes 114-17 (discussing fee increases at California's institutions of higher learning).
  \item \textsuperscript{191} Rivas et al., supra note 53, at 1. Transfer from a CCC to a CSU or UC school is a small but important path by which some Latina/os ultimately obtain a four year college degree. See id. at 2. The authors note that while fewer than 10% of CCC students actually transfer to a four-year institution, 40% of CCC students indicate that this is their goal, and an additional 28% were undecided. Id. The authors suggest that better counseling may improve the number of students who transfer to four year college institutions. Id. To the extent cost becomes an increasing barrier to CCC access; this will negatively impact the transfer pipeline for Latina/o students from the CCCs to the CSU and UC systems.
  \item \textsuperscript{192} Because immigrant Latina/os are a subset of the Latina/os discussed in the previous section, some of the differential response of Latinas/os discussed in the previous subsection is attributable to the differential response of Latina/o immigrants discussed in this section. It is impossible to determine the degree of conflation among these two data sets without empirical study. Nevertheless, it is worth analyzing the distinct reasons that Latina/o immigrants (as opposed to Latina/os in general) may be hurt by rising costs.
  \item \textsuperscript{193} Mufiz, supra note 38, at 8.
  \item \textsuperscript{194} IHEP STUDY, supra note 83, at 20-21.
  \item \textsuperscript{195} Id. at 21.
  \item \textsuperscript{196} Id. (citing INTER-AMERICAN DEVELOPMENT BANK, SENDING MONEY HOME: LEVERAGING THE DEVELOPMENT IMPACT OF REMITTANCES (2006)). Remittances provide a critical source of revenue in some economies. In Mexico, for example, remittances account for one of the three largest revenue producing sources, along with oil revenue and tourism. Ranko Shiraki Oliver, In the Twelve Years of NAFTA, the Treaty Gave to Me... What Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States, 10 HARV. LATINO L. REV. 53, 100, 105 (2007). Until recently, remittances from the United States to Latin American countries have been on the rise. A 2006 study by the Inter-American Development Bank found that American migrants working in the United States sent around $45 billion to their homelands in that year, up from $30 billion in 2004. Press Release, Inter-American Development Bank, Migrant Remittances from the United States to Latin America to Reach $45 Billion in 2006, Says IDB (Oct. 16, 2006), available at http://www.iadb.org/NEWS/articleDetail.cfm?artid=3348&language=En. Over the last year, however, remittances from Mexican immigrants have fallen. The percentage of Mexicans who regularly sent money home fell from 71% in 2006 to 64% in the first half of 2007. Julia Preston, Fewer Mexican Immigrants Are Sending Money Back Home, Bank Says, N.Y. TIMES, Aug. 9, 2007, at A10. The change appears to be occurring because more immigrants are less certain about
calculations of financial need, used to determine how much aid to give to a student, may not adequately account for the actual financial obligations of many immigrant students.197

Among Latina/o students, immigrant students may be particularly impacted by a lack of information concerning financial aid. In one California survey, over half of the Latina/o youth surveyed "thought that only American citizens (as opposed to legal residents) were eligible for federal and state financial aid, and 25 percent thought that their parents also had to be citizens for them to receive financial aid."198 The children of undocumented parents, including U.S. citizens, may also resist applying for financial aid because they fear exposing their parents’ immigration status in providing the information needed to complete the application process.199

Children in immigrant families are significantly more likely than children in the general population to be living in poverty.200 Seventy-one percent of dependent lawful permanent residents are in the bottom two fifths of the country in personal income.201 Immigrants are Pell Grant eligible at a rate higher than the general population, and the expected family contribution from immigrant families is lower than the contributions of families in the general population.202 Though increasing grant aid should at least partially offset the deterrence of rising tuition rates for these low-income students, the relative lack of information about college financial aid cuts against that outcome.

The shift in federal support from grants to loans203 may also shut out more immigrants from higher education. Immigrant students take out fewer loans than do the general college-going population.204 Finally, price increases also affect immigrant students who are overrepresented at two-year community colleges in California.205

their future in the United States given the rising tide of immigration enforcement and anti-immigrant sentiment. Id.

197. Previous studies have revealed that African American and White students in the same income bracket have very different economic profiles. See, e.g., Guinier & Torres, supra note 5, at 47 (summarizing accounts of these differences); Guinier, supra note 1, at n.115. More research may be needed to be done in this regard with regard to Latinas/os and immigrants.

198. IHEP Study, supra note 83, at 20.

199. Id.


201. IHEP Study, supra note 83, at 25.

202. Id.

203. See supra notes 182-84 and accompanying text.

204. IHEP Study, supra note 83, at 21, 25. This pattern does not hold true at the graduate school level. Id. at 27.

205. Id. at 35. In the 2003-2004 school year, for example, 70% of immigrant students in public higher education were enrolled at a CCC, compared with 62% of the non-immigrant student population. Id.
4. The Significance of Undocumented Immigrant Students and the Children of Undocumented Immigrants

Financial obstacles serve as roadblocks on the path to higher education for many poor and middle class students, but these obstacles are most acute for undocumented students. Approximately 65,000 undocumented students who have lived in the United States for at least five years graduate every year from high schools in the United States. The vast majority are low-income Latina/os, who face unique barriers to higher education.

Undocumented children are entitled to a primary and secondary education under the Supreme Court's 1982 decision in Plyler v. Doe. The Plyler ruling, however, did not expressly extend to higher education. Over the past decade, questions over the right of undocumented students to access public higher education have been a battleground in the larger political and cultural struggle over immigration.

Changes to federal law in 1996 sparked much of the current controversy. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) prohibited federal post-secondary grant, loan, and work-study assistance for undocumented students, and required that any state wishing to provide aid to such students affirmatively pass legislation to do so. Simultaneously, section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibited a state from offering any "benefit" to undocumented noncitizens unless the state also provided the benefit to citizens or nationals regardless of residency. Following the enactment of these laws, the states have concluded that they cannot provide financial aid, including campus jobs, to undocumented students.

206. Roberto G. Gonzalez, Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students, IMMIGR. POL’Y IN FOCUS, Oct. 2007, at 1, 2. Financial obstacles are compounded by legal exclusion from the workforce. Id. at 1.


210. But see Pabón López, supra note 152 (arguing that Plyler's reasoning today should be applied to higher education due to the changing nature of the economy).


In California, undocumented students are not eligible for Cal Grants, a grant program designed to assist low-income students with funding their college education. Nor can they receive the fee waivers that are offered to other low-income students in community colleges. However, California has passed legislation allowing undocumented students to pay in-state tuition, an option not available to undocumented students in all states.

Undocumented students face substantial financial challenges associated with their immigration status even when they are eligible for in-state tuition. They are not eligible for federal financial aid. In the UC system, they face having to pay around $25,000 for fees, room, board, and books without any access to federal or state aid and without legal avenues for work. In the face of these challenges, it is almost impossible for undocumented students to finance their education.

Since the 2003-2004 congressional term, several members of Congress have sponsored the Development, Relief and Education for Alien Minors (DREAM) Act, which would alleviate some of the obstacles faced by college-bound undocumented students. The bill would define residency requirements


214. IHEP STUDY, supra note 83, at 35.
215. Id.
216. CAL. EDUC. CODE § 68130.5(a) (West 2003).
217. The multiple disadvantages imposed by undocumented status may even be impeding the positive effect that in-state tuition might otherwise have on Latina/o educational outcomes. AIMEE CHIN & CHIHUI JUHN, RICE U. JAMES A. BAKER III INST. FOR PUB. POL’Y, DOES REDUCING COLLEGE COSTS IMPROVE EDUCATIONAL OUTCOMES FOR UNDOCUMENTED IMMIGRANTS? 3 (2007), available at http://bakerinstitute.org/Publication_List.cfm (noting that educational outcomes do not seem to be affected by in-state tuition and hypothesizing that “little time has elapsed since the state laws were passed and that unchanged federal policy on financial aid and legalization for undocumented students may dampen the state laws’ benefits”).
219. Birgeneau, supra note 213.
for in-state tuition without regard to immigration status, provide a path to legalization for eligible undocumented students, and guarantee federal financial aid for undocumented students.\footnote{223} In 2007, the DREAM Act was incorporated into a comprehensive Senate immigration bill that failed to become law.\footnote{224} Although undocumented students would still face considerable challenges to financing their education even if the DREAM Act were to pass, it would at least put them on closer footing with their peers. For the moment, however, undocumented students, the majority of which are Latina/o, struggle in the face of tremendous financial obstacles.

C. Implications and Conclusions

Assisting students from lower socioeconomic brackets in preparing and paying for college will address some of the barriers that Latina/os face in accessing higher education, but the foregoing analysis suggests that other issues also require attention. In particular, policy makers and educators need to think about how to address the educational needs of more transient student populations, how to better assist English language learners in completing a-g course requirements, and how to accurately evaluate the predictive value of the standardized test scores of new English language learners. They also need to think more systematically about how to provide more information regarding financial aid to minority and immigrant communities (particularly if there are few options for making college more affordable), and about how to provide educational opportunities for undocumented students. More broadly, policy makers and educators need to understand and grapple with the ways in which immigration law and policy impact immigrant students whether that be through the marginalization and destabilization of undocumented families or the unique economic demands facing young immigrants.


\footnote{223} 2008 NAT’L IMMIGR. L. CTR., supra note 222.

IV
THE LARGER LESSONS OF LATINA/O UNDERREPRESENTATION IN CALIFORNIA'S PUBLIC COLLEGES AND UNIVERSITIES

The foregoing analysis has identified some of the economic and social problems that impede Latina/o access to higher education in California. Taken as a whole, this analysis suggests that simple class-based remedies alone are unlikely to translate into equitable access to education across racial lines. Broader social issues must be considered before these remedies have a chance of eradicating racial inequality in education. This Part identifies two such issues. The first is the need for a reevaluation of the meaning of merit and the role of public institutions of higher education. Unfortunately, in the post-209 era, such conversations are difficult to sustain, since they are frequently cast as back-door efforts to implement what would otherwise be an impermissible "affirmative action" policy. A second issue, and one that has particular salience for Latina/o underrepresentation, is the need to develop a more systematic understanding of the interrelationship between immigration policy and education policy. Each of these issues will be explored in turn.

A. Redefining Merit and the Mission of Higher Education in a Post-209 World

Proposition 209 eliminated a tool, albeit an imprecise and blunt one, for redressing some of the problems created by inequitable K-12 education. Unsurprisingly, this further decreased the number of Latina/os enrolled in public institutions of higher education, particularly at the most competitive schools. But the impact of Proposition 209 is more profound than this. Proponents of Proposition 209 have successfully re-shaped normative understandings of what defines scholarly merit. The eligibility criteria for California's selective public institutions of higher learning are defined almost exclusively in terms of GPA and test scores. In the post-209 era, UC faculty and administrators have attempted to allow for space in the admissions process to consider non-numerical factors, but this has not altered the eligibility construct. In 2001, UC's Board of Admissions and Relations with Schools (BOARS) approved the use of twelve non-numerical, race-neutral factors as part of the admissions process at selective UC campuses, urging that every file be subject to a process of comprehensive review.

225. For a discussion of the problems of pre-209 affirmative action programs in California, see DOUGLASS, supra note 6, at 151-83.
226. See supra Part II.
227. Id. Professor Guinier refers to this construction of academic merit as "skinny merit." See Guinier, supra note 1, at 152.
The post-2001 "comprehensive review" process in UC admissions may reward students with special talents, immigrant students, students from low-income families, or students who have persevered to overcome obstacles such as learning disabilities and unsupportive families.\(^2\)\(^2\)\(^9\) Certain elements of these subjective criteria may help to address, in a race-neutral way, some of the systematic disadvantages faced by certain student applicants as they work to meet the academic standards for admissions. The inclusion of these subjective criteria in admissions decisions also allows campuses to select students who exhibit certain desirable characteristics that are not measured by standardized testing and GPA. However, comprehensive review only operates as a sorting function between selective campuses because it does not supplement or modify the UC eligibility criteria. Only a handful of students who do not meet UC eligibility requirements on the basis of GPA and test scores are admitted by exception\(^2\)\(^3\)\(^9\) to individual UC campuses that determine the student's merit on the basis of comprehensive review.\(^2\)\(^3\)\(^1\)

Consistent with UC's guidelines for comprehensive review, some UC campuses have also begun to consider GPA and test scores in a more holistic way in admitting students.\(^2\)\(^3\)\(^2\) This includes efforts to evaluate GPA in the context of the available resources at a given high school.\(^2\)\(^3\)\(^3\) Considering a


\(^{230}\) See BOARS Revised Eligibility Reform Proposal, supra note 35, at 5; U. of Cal., Admission By Exception, supra note 80.

\(^{231}\) The use of comprehensive review within the UC system operates as a form of "sponsored mobility" that supplements the otherwise purely numeric approach to eligibility. "Sponsored mobility" signifies a system in which fixed admission criteria are supplemented with discretion. Guinier, supra note 1, at 151. For her critique of sponsored mobility, see id. at 153-54.

\(^{232}\) See, e.g., U. of Cal., Berkeley, UC Berkeley Freshman Selection Process, available at [https://students.berkeley.edu/admissions/freshmen.asp?id=56&navid=N](http://students.berkeley.edu/admissions/freshmen.asp?id=56&navid=N) [hereinafter Berkeley Admissions] ("consideration is given . . . to an applicant's achievement relative to that of others in his or her high school"); U. of Cal., Los Angeles, Undergraduate Admissions and Relations with Schools, Freshman Selection—Fall 2007, available at [https://www.admissions.ucla.edu/Prospect/Adm_fr/FrSel.htm](http://www.admissions.ucla.edu/Prospect/Adm_fr/FrSel.htm) [hereinafter UCLA Admissions] ("In evaluating the context in which academic accomplishments have taken place, readers consider the strength of the high school curriculum, including the availability of honors and Advanced Placement courses, and the total number of college preparatory courses available, among other indicators of the resources available within the school. When appropriate and feasible, readers look comparatively at the achievements of applicants in the same pool who attended the same high school and therefore might be expected to have similar opportunities to achieve.").

\(^{233}\) See Berkeley Admissions, supra note 232; UCLA Admissions, supra note 232; see
student's academic record in context is critical to redressing the systemic disadvantages encountered by students in secondary education. Such considerations acknowledge the fact that not all students' opportunities and support networks are identical. Contextualized information about GPAs and test scores allows admissions officers to make more informed decisions about which students are prepared to participate in campus life.

To achieve greater equity, a comprehensive review process should be used in determining UC eligibility, and not just admission to specific campuses. This review should include considerations of the barriers confronted by students in obtaining their education and a review of their academic record in the context of the academic opportunities available. Given the inequities of public education, such factors are relevant in assessing the quality of a student applicant. But suggestions of this nature have not been warmly received in the post-209 era.

One of the unfortunate effects of Proposition 209 and other anti-affirmative action initiatives is that they stifle efforts to make admissions policy more sensitive to the inequalities of the K-12 school experience. This is true even when such policies are clearly race neutral, as they must be in the wake of the initiative. For example, UC changed its admissions policy in 1999 to make eligible all students whose weighted high school GPA in a-g courses placed them in the top 4% of their class, regardless of their test scores. Critics of affirmative action have portrayed this policy as a violation of Proposition 209, even though the race-neutral policy was designed to combat the many inequalities in California's K-12 public schools and provided no benefits that would give preference to one racial group over another.

Similarly, efforts to equalize access to higher education through more
holistic review processes have been simplistically dismissed by critics as elitist efforts to bypass majoritarian rule. This is evident in the media response to a recent BOARS proposal that would expand the number of students entitled to comprehensive review for UC admission. When the implementation of any policy may result in greater numbers of underrepresented minorities being admitted, such a policy will likely be depicted as a back-door affirmative action policy. This criticism puts pressure on schools to focus on decontextualized GPAs and standardized test scores, regardless of the fact that such a focus will hinder the admission of socioeconomically disadvantaged students of all races.

The reductionist post-209 discourse short-circuits conversations about the meaning of merit and the mission of California's public colleges and universities. The goal of increased enrollment of African American, Latina/o, and American Indian students at UC schools has been so delegitimized that any efforts to reach these and other disadvantaged student populations can be dismissed as efforts to "dumb down the entire university system." Only numbers can signify academic merit.

The irony of this situation is that the history of the use of "subjective" factors in UC admissions demonstrates that such factors have never been exclusively about, and at times did not at all address, the issue of racial equality. Rather, these subjective considerations were meant to infuse the admissions process with greater subtlety and accuracy, and to reflect certain normative assumptions about academic merit and the mission of California's public colleges and universities. One such assumption was that a student's...
ability could not be captured on the basis of grades and test scores alone, particularly given the disparities in educational resources at the K-12 level. A second assumption was that certain talents, such as athletic ability, music, art, and foreign language ability, were important educational resources that were not well measured by a grade-and-test rubric. A third assumption was that the UC system had a unique public mission to serve all communities in California, and that this required attention to access to students from all segments of California’s population. The vision was to provide access to students from all geographic regions, economic brackets and racial and ethnic groups, and to train an educated workforce that would serve those diverse regions and groups. Contemporary discussions of admissions policy must continue to emphasize and make greater efforts to implement the mission of serving California.\textsuperscript{243}

\textbf{B. An Intertwined Discourse: Education, Race, and Immigration}

Many supporters of Proposition 209 might justify their decision to end affirmative action by pointing out, as supporters did, that doing so would require the state to fix the problems that led to underrepresentation of certain minority groups in its institutions of higher learning. Unfortunately, that promise never materialized. California’s spending per pupil has descended from being among the top five states in 1960\textsuperscript{244} to near the bottom of the rankings today.\textsuperscript{245} Although more than one reason for the decline in spending certainly exists,\textsuperscript{246} numerous scholars and commentators agree that the passage of California’s Proposition 13,\textsuperscript{247} which limited property taxes, has had a major impact on education spending in the state.\textsuperscript{248}

Scholars dispute the motivations that drove voters to enact Proposition

\textsuperscript{243} For a discussion of the mission of public institutions of higher learning and the impact this should have on admissions policy, see Guinier, \textit{supra} note 1, at 125-36.
\textsuperscript{244} \textit{DOUGLASS, supra} note 6, at 66.
\textsuperscript{245} Liu, \textit{supra} note 4, at 2060-67.
\textsuperscript{246} See, e.g., Todd Donovan, \textit{Direct Democracy as “Super-precedent”?: Political Constraints of Citizen-Initiated Laws}, 43 \textit{WILLAMETTE L. REV.} 191, 216 (2007) (attributing California’s relative decline to “changing income levels, increased education spending in other states, 16 years of fiscal conservatives in the governor’s office (1983-99), . . . decisions about allocating revenues, as well as constraints imposed by citizen initiatives over the last 30 years,” but not Proposition 13).
\textsuperscript{247} \textit{CAL. CONST.} art. XIII A, §§ 1-6.
13. As a descriptive matter, however, it is clear that the tax revolt and educational funding cuts came at a time when California's schools were increasingly racially diverse and were responsible for the education of a growing immigrant class. Immigrant parents, many of whom were not eligible to vote, may not have been able to act to protect their own interests in the voting process.

In this way Proposition 13 can be seen as the beginning of a series of initiatives that, among other things, ultimately limited educational access for Latina/o students and those linked in the popular imagination with Latina/o immigrants. Proposition 187, which would have made undocumented immigrants ineligible for public benefits, is the most obvious example of such an effort. A key provision of the initiative was the denial of access to public education, a right constitutionally guaranteed to all children, regardless of immigration status. As Kevin Johnson has documented, this campaign, which purported to take aim at individuals based on their legal status, was rife with blatant anti-Mexican racial animus.

249. William Fischel, for example, contends that Proposition 13 was a response to the California Supreme Court's decision in Serrano v. Priest, a major school finance equalization decision. Fischel posits that voter's incentives for paying taxes decreased as the likelihood of redistribution of those taxes increased, and that their frustration was fueled by the inability of the California legislature to grant them relief from sharply escalating property taxes because of the need to fund schools as required by the Serrano decision. William A. Fischel, How Serrano Caused Proposition 13, 12 J.L. & Pol. 607 (1996). Kirk Stark and Jonathan Zasloff reject that theory. Kirk Stark & Jonathan Zasloff, Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?, 50 UCLA L. Rev. 801 (2003). Their model suggests the alternative causes of a "revolt of the haves" (not defined in terms of property wealth, but rather income) and the problem of seniors getting priced out of their homes by soaring tax bills." Id. at 830.

250. DOUGLASS, supra note 6, at 154 (noting the confluence of immigration and budget cuts).


253. Id.

254. See supra note 209 and accompanying text (discussing Plyler v. Doe).

255. See JOHNSON, supra note 252, at 42-46. This is not to discount the economic effect that undocumented migration has on the public fisc. In the short term, the taxation benefits that accrue through the taxation of the undocumented generally run to the federal government while the costs, principle among which is education, run to the states. ARISTEDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 392 (2006) (summarizing economic research); see also CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS (Dec. 2007) available at http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf (finding that in the aggregate, over the long term, tax revenues of all types generated by all immigrants exceed the cost of services that they use, but that certain state and local costs exceed what the immigrant population pays in state and local taxes); but see IMMIGRATION POLICY CTR., ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL (Jan. 15, 2008), available at http://www.ailf.org/ipc/factchecks/StateLocal07.pdf (concluding that findings of costs to states and localities do not adequately take into account long-term economic growth and development);
Tracing this thread, the passage of the anti-immigrant Proposition 187 is not isolated from, but related to, the later passage of Proposition 209. Indeed, Proposition 209 had the anticipated effect of decreasing the number of Latina/o students attending California’s institutions of higher learning at the very time when their numbers in the general population were increasing rapidly. The majority of voters may have seen the interests of a growing, largely Latina/o immigrant population as antithetical to their own.

If the majority of self-interested voters of California do not see the education of a new generation of immigrant children as in their interest—if they see the rising numbers of Latina/o immigrants and their descendants as somehow unrelated to their own success—then it is easy to account for not only the passage of Proposition 209, but also for the resistance to measures that would equalize educational resources or expand Latina/o access to higher education. A racially literate analysis of educational inequalities requires further exploration of the ways in which public choices on education policy reflect larger social attitudes toward migration, and particularly Mexican migration.

Nor is the need for this conversation limited to California. The crisis of Latina/o education is national in scope. And nationally, the states spending the least on education are responsible for educating a highly disproportionate number of Latina/o students.

CONCLUSION

In our society, the lack of a college education results in significant economic disadvantages throughout life. Proponents of California’s Proposition 209 successfully argued that its passage was essential to preserving “fair” access to the important resource of public higher education. They were not necessarily wrong to attack an admissions system that was in many ways piecemeal and opaque. But they were wrong to think that it was fair to dismantle that system without also reforming inherent unfairness in the purportedly objective criteria promoted as the alternative.

Commentators confronting the post-209 landscape correctly urge that


256. See supra notes 36-42 and accompanying text.

257. Liu, supra note 4, at 2067 (“[S]tates in the bottom third of spending, while enrolling 47% of the nation’s schoolchildren, serve 54% of all poor students, 75% of all Latino students, and 76% of all LEP [Limited English Proficiency] students.”).

258. Higher education correlates with higher income, both generally, and with respect to immigrants in particular. IHEP STUDY, supra note 83, at 16, 17; see also Guinier, supra note 1 (discussing the role of higher education in social mobility).

259. See, e.g., Connerly, supra note 19.
much of California’s current educational inequality can be remedied in ways that rely on enhanced access for the economically underprivileged, and that broader access for all Californians to quality higher education can help address the problems of underrepresentation faced by Latina/os, African Americans, and American Indians at California’s public colleges and universities. But economic approaches can obscure the need for and importance of having difficult conversations about race, immigration, and access. Class-based remedies in the absence of attention to the role that race still plays in America only postpone the need to address the social problems disclaimed by Proposition 209.