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Remaking the Urban University for the Urban Student: Talking About Race

john a. powell* & Marguerite L. Spencer**

INTRODUCTION

Education is central to forming the citizen and supporting democracy. In the broadest terms, education is not just instrumental but is essential to constituting the individual. It is also a predicate for meaningful participation in the economic and political life of our society. Although the university has played many roles in this educational process over time, it is certain that providing access to education is central to the university mission. Unfortunately, access has not been made equally available to all communities—particularly communities of color. This Article examines the relationship of the urban university to these communities. It argues that the historical and recent trend of limiting minority access to education contradicts other university goals such as encouraging urban scholarship and fostering urban service collaboratives. It then concludes that the urban university must undertake a more integrated and transformative approach to urban education.

The first part of this Article explores the historically parallel roles of the land-grant and urban universities in relation to their communities. Early on, the federal government gave states large tracts of land with which to create universities. These “land-grant” universities, as they came to be known, were viewed as pivotal in helping to educate the states’ citizens as well as to build and maintain a strong state economy. They were not designed for the elite or the wealthy. Originally, the tuition, if there was any, was minimal with the goal being to make the university as open and accessible as possible and to educate as many

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citizens as possible. Similarly, the admission requirements were also minimal.

Historically, the role of the university shifted at the turn of the century and again in mid-century. Because the earlier needs of the states were rural and agricultural, the land-grant university's mission was originally framed to meet those needs. At the turn of the century, however, urban needs increased, particularly in New York. An increasing number of northern and eastern European immigrants settled in the larger cities. Education—including a university education—was believed necessary to bring this population into the mainstream. The urban university emerged at this time to meet these needs. In fact, some argue that a parallel can be drawn between the land-grant and urban university that commits the former to making education accessible within urban communities.¹ New York, for example, instituted the CUNY system which made education available to tens of thousands of urban poor, including many immigrants, at virtually no cost. Even at more elite schools, education was more accessible than it is today. A similar increase in urban students occurred after World War II after the introduction of the GI Bill provided funding for 2 million veterans to seek a higher education.² Access to education reached all incomes in greater proportions than ever before.

The second part of this Article examines how, despite this boom in urban education, the communities of color were excluded from it. Although the effort to provide a university education changed the life circumstances of many Americans, including Jews and immigrants, by and large programs were not extended to blacks and other minorities. Other than through the historically black colleges and universities (HBCUs), blacks were excluded from participation in the

¹ See John A. Dillon, Jr., The Evolution of the American Urban University, 15 URB. EDUC. 33 (Apr. 1980).

² See Reginald Wilson, GI Bill Expands Access for African Americans, EDUC. REC., Fall 1994, at 32, 35. Access to equal educational opportunities impacts student achievement. At the elementary and high school level, it has been found that poor children in high poverty concentration schools are two times less likely to score in the top half than poor children in low poverty schools. More surprisingly, nonpoor students attending schools with high concentrations of poverty perform, on average, less well than poor children attending nonpoor schools. See Richard D. Kahlenberg, Class-Based Affirmative Action, 84 CAL. L. REV. 1037, 1079 (1996). See also William L. Taylor, The Continuing Struggle for Equal Educational Opportunity, 71 N.C. L. REV. 1693, 1700 (1993). Furthermore, it has been shown that the educational tastes of one's parents and one's classmates and their parents have a large impact on educational achievement. See James S. Liebman, Voice, Not Choice, 101 YALE L.J. 259, 286 (1991).
democratization of education in this country. This exclusion was exacerbated by the migration of the blacks to the urban centers in the North. Even the GI Bill, which provided some benefits, failed to provide equal access. The results of this failure remain with us today, unjustifiably benefiting whites while disadvantaging blacks.

During the 1950s, and throughout the civil rights movements, as cracks developed in the formal segregation system and blacks demanded entry into formerly all-white institutions, the use of admissions standards, testing, increased tuition, and other screening devices abated to some degree. However, white resistance persisted, often in the form of tracking and other discriminatory devices. By the late 1970s, these gains began to erode and the use of exclusionary admissions mechanisms increased. The Bakke and Hopwood cases best exemplify this movement toward inaccessibility of higher education for minorities.

Furthermore, as blacks found themselves locked into the central cities and whites retreated to the suburbs with the aid of the government, many urban universities found themselves islands of whites surrounded by impoverished people of color. But rather than responding to the blacks in the way they had to the European immigrants, urban universities employed urban renewal strategies to keep them away.

The last part of the Article brings the past to the present. It examines the most recent trends among urban universities and calls for a renewed commitment on their part to make education accessible to all. While many of them foster urban scholarship and engage in service collaboratives—even to improve elementary and secondary education in the urban core—they still must wrestle with policies that reflect the recent Hopwood decision limiting minority access. This decision suggests that the university is not only separate from the community but from the rest of the state educational apparatus. The law school is not responsible for what goes on in the undergraduate school. And as the recent move at CUNY to limit remedial education suggests, the undergraduate school is not responsible for what goes on

3. There are a number of studies showing how the education of one's parents and the classmates of one's parents have a profound effect on educational achievement. See generally John a. powell, Living and Learning: Linking Housing and Education, 80 Minn. L. Rev. 749 (1996).


in the high school and so on. This lack of responsibility on the part of the urban university exacerbates the difficulties communities of color have obtaining education. Although Hopwood is limited to one circuit, the attack on minority access to the university is part of a national movement both political and judicial. A more integrated and inclusive approach to urban education—modeled after the original land-grant university—must be undertaken.

I. THE PARALLEL ROLES OF THE LAND-GRANT AND URBAN UNIVERSITY

A. The History and Purpose of the Land-Grant University

The land-grant university was created by the Morrill Act of 1862 to serve both an educational and economic purpose. The demands of a growing democracy suggested that the common people, particularly the farmers, needed a higher education. Whether the common people actually desired such an education has been debated, but what is certain is that educational and political leaders of the time sought to make "higher education more available and accommodating to the men of the field and of the machine." By donating tracts of federal lands to the states, railroads, and some small farmers for the purpose of establishing a university, the education of the ordinary population was undertaken. To further ensure this education, costs were kept to a minimum, admission and academic standards were lowered, and preparatory courses were offered.

But because four-fifths of the population engaged in agricultural and mechanical employment, the focus of this education required a shift from the classical Oxford-Cambridge model to one grounded in applied learning. As the act itself states, "the leading object [was to]
be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts." This shift reflected an idea from earlier in the nation's history in which such figures as Jefferson, Wayland, and Dana had called for a system of education designed to "fit the needs of all classes." The land-grant education would link the lecture-room with the laboratory to foster the material welfare and development of the new nation. In so doing, it would supply the nation with "people educated to build the bridges, plan the railroads, design the cities, and build the factories [necessary to] the industrial revolution." Education would no longer be for the elite, but for the majority of citizens. Even blacks would be educated, albeit in Negro Land-Grant Colleges.

The purpose of the Morrill Act, however, was not just to "democratize" higher education but to further federal economic policy. First of all, the federal government could raise revenue to pay off the national debt and support itself by disposing of public lands. And second of all, as Representative Justin Morrill of Vermont himself stated, the wealth and power of the nation could be enhanced by the development of agriculture:

"Agriculture undoubtedly demands our first care; because its products, in the aggregate, are not only of greater value than those of any other branch of industry, but greater than all others together; and because it is not merely conducive to the health of society, the health of trade and of commerce, but essential to their very existence."

The land-grant university seemed like the best place in which to educate "proprietors of the soil," who would then emerge and employ their practical knowledge to build up the great nation. This implied

11. Dillon, supra note 1, at 35 (quoting The Morrill Act, 7 U.S.C. § 301 (1862)).
12. Id.
13. See id.
14. Id.
15. See Key, supra note 6, at 198.
16. See id.
17. See id. at 199.
19. See id. at 212.
that service to the community was to be emphasized. As one scholar put it, the land-grant universities on the whole "were conscious of the great debt they owed to the public largess."²⁰

The land-grant university experienced varied results in achieving either its educational or economic goals. During the first forty years after its creation, difficulties such as lack of funding and lack of universal public elementary and high school education undermined its efforts. Moreover, critics of the land-grant university either felt that it was too traditional or that it strayed too far from tradition—and thus was inferior in quality to the classical university.²¹ Yet the institutions themselves acknowledged success in two major goals—the treatment of people with the utmost importance in their pursuit of the "American dream" through education,²² and "the performance of broad public services and participation in activities designed to serve both immediate and long-range needs of society."²³ The land-grant university also succeeded in adding to the nation’s supply of scientific and professional manpower, advancing scientific investigation, and developing rural leadership.²⁴

Both the educational and economic purposes of the Morrill Act—as well as the difficulties and successes experienced by the universities themselves—will provide us with ways in which to liken the land-grant university to the urban university of today. However, the history and role of the urban university must first be explored.

B. The Emergence of the Urban University

The urban university can be defined both broadly and narrowly. In the broadest sense, the urban university is one that is "located in and serving an urban community."²⁵ More narrowly speaking, the Committee of Urban Program Universities has recently defined the urban university as one that maintains the following: a campus located in a major urban area, a substantial number of commuters, programs

²⁰ Lawrence S. Cote & Mary K. Cote, Economic Development Activity Among Land-Grant Institutions, 64 J. Higher Educ. 55, 56 (1993) (quoting G.L. Anderson, Land Grant Universities and Their Continuing Challenge 33 (1976)).
²¹ See Dillon, supra note 1, at 35-36.
²² See Eddy, supra note 9, at 270.
²³ Id. at 269 (quoting Council of State Gov’ts, Higher Education in the Forty-Eight States: A Report to the Governor’s Conference 20 (1952)).
²⁴ See id. at 273-75.
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accessible to urban students, urban-oriented education, research and service strategies (the "triad"), professional and graduate programs, and a sense of responsibility toward its urban constituencies. Unlike the rural land-grant university which focused on agrarian training, the urban university focused on the professions and the industries.

Under either definition, it is not surprising that the urban university developed only recently in this nation. Unlike in Paris and in cities in Italy, the inclination during the early years of our nation was to locate institutions of higher learning in the countryside. This was consistent with the pastoral Oxford/Cambridge tradition in Britain which the founders tried to emulate. It also reflected the fact that concentrations of population were initially lacking in the New World. Not until the metropolis emerged around the turn of the nineteenth century did the urban university appear on the scene. That is, either a city grew up around an existing university, which then became aware of its urban environment, or a university was established in a city that had emerged without an institution of higher learning.

The earliest urban universities were privately or municipally supported. The privately endowed urban universities varied in character. Some were national in outlook and were founded before the urbanization of the nation in originally rural areas or during the 19th century on the edge of a city that grew with the university. Others were denominational. During the nineteenth and early twentieth centuries, however, few of the denominational universities were urban. A pastoral setting was more likely to foster morals and minimize corrupting distractions. The Catholic urban university, however, became more prominent at the turn of the century. The Jesuits in particular located their institutions in the cities—where the greatest

26. See Dillon, supra note 1, at 37.
27. See KLOTSCHÉ, supra note 25, at 2. The University of Paris has always been a part of the city and drew students from all over the world. In Italy, competition for leadership among cities was not just limited to commerce and the arts but included universities as well. In fact, it was a capital crime to transfer a university to another city in Italy.
28. See id. at 3-4.
29. See id. at 8.
30. See id. This group of urban universities includes Harvard, Yale, the University of Pennsylvania, and Columbia.
31. See id. This group of urban universities includes, among many others, George Washington, Western Reserve, New York, Boston, Johns Hopkins, the University of Southern California, Temple, and the University of Chicago.
32. See id. at 8-9. The few exceptions include American University and Southern Methodist University.
populations of Catholics were found.\textsuperscript{33}

The privately controlled technical institute also emerged as a response to the rapid industrialization and the failure of other universities to reflect the changing needs. By 1900 there were over forty technical institutes, many located in urban settings where logically the great industries were established.\textsuperscript{34} As the founder of the Massachusetts Institute of Technology observed, the relationship between the technical institute and its community was symbiotic—the two were intimately associated and capitalized on each other’s advantages.\textsuperscript{35}

As for the municipal urban university, that is, one supported by local taxation and administered by a local governing board, it too appeared in the nineteenth century.\textsuperscript{36} As the cities’ industrial, political, and social problems increased in complexity, the municipal university arose to address them through higher education.

Whatever its character, the urban university, emerging around the turn of the nineteenth century, did not experience its growth for another couple of decades. For example, in New York City, the population in 1900 was over three and one-half million people, yet Columbia University enrolled only 2,452 students.\textsuperscript{37} Not until the twenties and thirties did the urban university assume major proportions. By 1924, 15\% of all colleges reporting to the Commissioner of Education were located in cities of over 100,000 and were serving more than 40\% of the nations’ college level students.\textsuperscript{38} As the Chancellor of the University of Buffalo noted, “cities [were taking] the lead in the national industry of building universities.”\textsuperscript{39} This growth can be traced partly to the enormous influx of northern and eastern European immigrants to the nation during this time. The recruitment of this immigrant workforce created a need to mold ex-peasants and

\textsuperscript{33} See id.

\textsuperscript{34} See id. at 10. Among these urban technical institutes are the Massachusetts Institute of Technology, Cambridge, the Carnegie Institute of Technology, Pittsburgh, Case Institute of Technology, Cleveland, and the Illinois Institute of Technology, Chicago.

\textsuperscript{35} See id.

\textsuperscript{36} See id. at 11.

\textsuperscript{37} See id. at 4. The University of Chicago enrolled only 3,174 students although the city’s population was over one and one-half million. Of the ten largest cities in the United States in 1900, only four had universities with enrollment exceeding 2,000. See id.

\textsuperscript{38} See id. For example, City College of New York reported only 1,694 students in 1900. In 1930, it listed 35,189 students. See id.

\textsuperscript{39} Id. at 5 (quoting S.P. Capen, Program for Progress in Education, EDUC. REC., Jan. 1923, at 6-7).
ex-artisans into productive citizens.\textsuperscript{40}

It is important to note here that philanthropy also fostered this early growth. Contingent grants, primarily from the Carnegie Foundation, were awarded to institutions of higher learning provided they met certain requirements—requirements that created a tension between the goal of educating the masses and the goal of preserving academic rigor. In order to receive Carnegie money, a college had to demand that its applicants pass a high school course made up of 16 "carnegie units" of 120 classroom clock hours for each subject. Subjects were defined by a College Entrance Examination Board which was voluntarily created by comrades of Andrew Carnegie. All of this standardization culminated in the creation of a "lead system" of colleges that determined, and continues to determine, the academic hierarchy. Colleges serving poor and minority students—as urban universities tended to do—were given short shrift. As one scholar argues, this entire system, despite the push toward educating the masses, ensured "the continuance of a structure of institutional inequality."\textsuperscript{41}

Even more growth occurred during the post-World War II era.\textsuperscript{42} This was mainly due to the GI Bill, or 1944 Serviceman's Readjustment Act,\textsuperscript{43} which financially enabled millions of working class veterans to go to college.\textsuperscript{44} Its impact cannot be underestimated. "Any person, any study,"\textsuperscript{45} became more of a reality as ordinary Americans were given vouchers for all tuition and costs associated with acquiring a higher education (or vocational training).\textsuperscript{46} As a result, enrollments increased from 1.5 million to 2.7 million between 1940 and 1950.\textsuperscript{47} The land-grant university was also affected by this growth. Although most often located outside the large population centers,\textsuperscript{48} dramatic

\begin{footnotesize}
\textsuperscript{40} See Sherry Gorelick, City College and the Jewish Poor: Education in New York, 1880-1924, at 53 (1981).
\textsuperscript{41} Id. at 56-57.
\textsuperscript{42} See KLOTSCH, supra note 25, at 5.
\textsuperscript{43} Montgomery G.I. Bill, 10 U.S.C § 2131 (1983).
\textsuperscript{44} The GI Bill also extended other benefits to veterans including priority in jobs, financial support during job searches, small loans for starting up businesses and low-interest home loans.
\textsuperscript{46} See Wilson, supra note 2, at 39.
\textsuperscript{47} See Kerr, supra note 45, at 27.
\textsuperscript{48} See KLOTSCH, supra note 25, at 14. There were a few exceptions. For example, Minnesota, California, and Washington established land-grant universities in developing populated areas. See id.
\end{footnotesize}
changes took place as returning GIs sought an education. As a result, state land-grant universities began assuming more responsibility for education in the urban areas. Urban campuses or extension centers were created throughout the nation.  

During the 1960s, many of the municipal and some of the private urban universities became part of the state systems. This shift brought with it tuition reductions and greatly expanded, greatly diversified enrollments. The passage of the Higher Education Amendments of 1972 which provided for “basic educational opportunity grants” also ensured greater access. These changes also caused difficulties. The complexity of the urban problems, although similar to, exceeded those associated with agriculture and the rural land-grant university.

C. Parallels Between the Land-Grant and Urban University

Important parallels can be drawn between the land-grant and the urban university. First, both types of university greatly expanded access to education. Just as the land-grant university provided major opportunities for rural students of middle income families, so the urban university, especially the publicly supported one, provided opportunities for students of urban, lower income families. The urban university began to do for the urbanite what the land-grant colleges had done for the nation’s farm population: take the knowledge of the scholar into the community and extend its influence to all phases of urban life. Equally important, it made education accessible to the urban poor by minimizing costs, altering standards, and providing remedial services to the students.

Second, both types of universities emerged to address pressing national needs. Indeed, the federal government had a hand in both developments. The land-grant university was explicitly set up to foster agricultural and mechanical advances necessary to the growth of what was then a very rural nation. The applied knowledge that emerged from these universities would be used to build up the agrarian infrastructure of the nation. Similarly, the urban university was set up

49. See id.
50. 20 U.S.C. §§ 1058-1070 (1990). These grants are now known as Pell grants.
51. See Dillon, supra note 1, at 38.
52. See id. at 38-39.
53. See KLOTSCHE, supra note 25, at 6-7.
54. See Key, supra note 6, at 211.
to foster industrial advances necessary to what was now a developing urban nation. Knowledge was needed to build up the nation's urban infrastructure as well. And although the federal government did not donate land for its creation, it did aid in the development of the urban university mid-century with the passing of the GI Bill.

In addressing national needs, both types of universities also furthered federal economic policy. Representative Morrill could just as easily have said of the urban university what he said of the land-grant—that the wealth and power of the nation could be enhanced by the development of its particular body of knowledge. The work of the urban university was just as necessary to "the health of society [and] the health of trade and of commerce" as the agricultural work of the land-grant university. "Proprietors of the soil" would now be joined by "proprietors of urban life."

Lastly, both types of university also experienced obstacles. Just as land-grants were called "cow colleges" in the past, "urban" began to be used derogatorily when describing the university serving the city. At the heart of this criticism lay the tension between classical, elitist, exclusive education and more practical, non-elitist, accessible education or education with a "useful relevance" as Morill described it. Many elitist educators argued that more education for more students was not necessarily better. Higher education would be demoralized, they argued, if enrollment was not held down to 20-25% of the traditional college-age group. Robert M. Hutchins, president of the University of Chicago at the time of the passing of the GI Bill, argued that "education [s]hould not be used as a substitute for a dole or a public works program." Admitting that fewer students would be able to attend university, Hutchins argued that the GI Bill should place financial aid in the hands of the institutions rather than in the hands of the veterans themselves. Institutions should then be required to

56. Id. at 212.
57. Dillon, supra note 1, at 40.
58. Traditionally, higher education focused on the professions: medicine, law, theology, and teaching. New emphasis was then placed on technical education, engineering, and business management. See Kerr, supra note 45, at 29.
59. EDDY, supra note 9, at 280.
60. See Kerr, supra note 45, at 27.
"ascertain through a series of national examinations" whether applicants had "reasonable chance of benefiting from [their] educational program."  

James B. Conant, president of Harvard University, similarly stressed the need for states and college presidents to control the funds and determine which colleges should be eligible to reject them and which students should be admitted. Instead, control over how and where to spend tuition reimbursement under the GI Bill remained with the students. As Congressman John Rankin put it, the GI Bill was "a bill for veterans, not educators."  

These arguments were rejected. Instead, control over how and where to spend tuition reimbursement under the GI Bill remained with the students. As Congressman John Rankin put it, the GI Bill was "a bill for veterans, not educators."  

These similarities between land-grant and urban universities cannot be minimized; in fact, they have significant implications for the urban university today. The land-grant university provides us with a paradigm after which to model the urban university into the future. To begin with, the urban university must make education as available as possible to all students, of all incomes and, as will be argued in the next sections of this Article, of all races. The urban university must also make a concerted effort to bring education to people where they live—in countryside or city—at a minimum of financial sacrifice.  

The recent efforts to limit access must be reversed and the mentality of the land-grant university and post-GI Bill urban university recaptured. This may require the urban university, as it did with the early land-grant university which lacked a strong eliminator and secondary public school to support it, to reexamine its admissions standards and provide remedial programming.  

More importantly, the urban university must educate the urban student to the fullest degree possible. As the former Chancellor of the University of Wisconsin-Milwaukee, J. Martin Klotsche, argues, the urban university must be a capstone of American higher education by making this ideal a reality.  

If intelligence susceptible of training is our most valuable  


63. See Wilson, supra note 2, at 34.  

64. Ironically, Hutchins's arguments were strongly opposed by two of the most conservative sponsors of the GI Bill, Congressman John Rankin, a segregationist from Mississippi, and Senator Bennet Champ Clark, an anti-New Deal Democrat. See id. at 32, 34.  

65. Bennet, supra note 61, at 11.  

66. See KLOTSCHE, supra note 25, at 8.  

67. See id.
resource, and is to be found at all levels, then the search for it everywhere, but especially among the disadvantaged, could well result in a significant discovery of undeveloped talent, at present being lost but essential to the furtherance of our nation's welfare.68

Klotsche also suggests that the urban university must function like the land-grant university by fostering the well-being of the nation. While the land grand university focused on agrarian issues, the urban university must undertake studies and projects that have not only local significance but that can also contribute to solving the urban problems everywhere.69 What W.J. Kerr demanded of the land-grant university in a 1931 address must be demanded of the urban university today, "That land-grant institution . . . that most fully surrenders itself to the state and nation in a spirit of service, that institution shall truly be greatest among us."70 If the land-grant university is hard to distinguish from other universities today, it is because other institutions have adopted its basic concepts: democratization of education, applied research conducted to benefit the people, and service rendered directly to these people.71 Of course, however much research is conducted or however many service collaboratives are undertaken, if access is limited, then the well-being of the nation is undermined.

II. LIMITED ACCESS FOR COMMUNITIES OF COLOR

Although both the land-grant and urban university took strides to democratize education, access to higher education has been limited for communities of color in many ways. It is important to examine these limitations in order to demand more of our urban universities today.

A. Segregation: Negro Land-Grant Universities and HBCUs

Segregation made it difficult for blacks and the Thirteenth Amendment to access higher education following the Emancipation Proclamation. Between 1865-75, 24 private black colleges sprang up,

68. Id. at 6.
69. See id. at 24.
70. Eddy, supra note 9, at 271.
71. See Cote & Cote, supra note 20, at 56. There are 72 land-grant universities today. They make up approximately half of the 149 members of the National Association of State Universities and Land-Grant Colleges (NASULGC).
funded by church groups, the Freedman’s Bureau, and black individuals. A few public black institutions were established by the states at this time as well. Upon passage of the Morrill Act, several Southern states set aside part of their endowment for the establishment of “Negro Land-Grant Colleges.” The remaining states ignored the issue of black educational opportunity until forced to change. In 1890, a second Morrill Act was passed that conferred upon existing land-grant universities an additional endowment and annual payment. However, it also guaranteed that “Negroes” would benefit from the Act. States that had used original funds to educate only white students were forced to allow blacks to enroll or to open up separate, equitable institutions for them. New all black land-grant institutions sprang up as a result, some of which had already existed but were subsequently renamed as such. Many Southern states even took over existing public or private colleges and created land-grants out of them. In all cases, the institutions, which came to be known as Historically Black Colleges and Universities (HBCUs), were inadequately funded.

Despite the requirement of access to white institutions or creation of separate but equal ones under the second Morrill Act, blacks were still unable to take full advantage of educational opportunities. Often they were not in positions from which they could easily transition to higher education. Blacks were commonly tenant farmers, domestic servants, or low-level industrial workers. Some educators noted that it was hard to convince them to take advantage of the practical education offered at the land-grants because they perceived manual labor, with

73. Six separate colleges for blacks emerged between 1860-1879: Alcorn in Mississippi, Lincoln in Missouri, Arkansas, Alabama, Prairie View in Texas, and Kentucky. See id. at 50.
74. See id. at 44.
75. See EDDY, supra note 9, at 102. Each state would receive an additional $15,000 as well as $1000 annually up to $25,000. The money was to be used for instruction but not construction or preservation. For monitoring purposes, the federal government required annual reports from the presidents of the institutions. Some states used the money for vouchers so that students could attend schools in other states.
76. The Act provided that no money would be provided to a state or territory who used it to support and maintain a college where a distinction of race or color was made in the admission of students. See id. at 258.
77. See id. at 103. These institutions included Virginia, Tennessee, Princess Anne in Maryland, North Carolina, West Virginia, Langston in Oklahoma, Georgia, Florida, Southern in Louisiana, Delaware, and South Carolina.
78. See A Future in the Balance, supra note 72, at 50.
which they were all too familiar, as lacking in dignity. Private black colleges, in the meantime, were oriented more toward the liberal arts—very much like the elite white institutions. In addition, there was a grave lack of public education in place for blacks, especially in the South. Consequently, many of the land-grants had to educate at the elementary and secondary level. Quality teachers were lacking and facilities inadequate and even unsanitary. In many ways these conditions are similar to those in K-12 education today. Not until the 1930s did the states begin to assume more fiscal responsibility for the HBCUs. Equally prohibitive, however, was the public perception that public funds should not be expended on “Negro education” because of their lack of ability and personality to benefit fully from it.

Ironically, HBCUs have always been open to all students. They have never engaged in race-exclusive admission policies. Nonetheless, they have served a unique function in educating blacks. They are more experienced in remediating students with weaker secondary schooling backgrounds. This increases the chances of students graduating by improving their skills. Although they have been perceived to be of “lower quality” than “white” institutions, it has been shown that a higher percentage of black students who attend HBCUs eventually obtain bachelor degrees—even if they were supposed to be less likely to obtain them.

Although traditionally a significant vehicle by which blacks access higher education, the future of the HBCUs is uncertain. In 1992, in United States v. Fordice, the Supreme Court ruled that practices traceable to the old system of segregation in Mississippi needed to be justified or eradicated. The most obvious outgrowths of the segregated system are the black public colleges and universities. Nothing in the

79. See EDDY, supra note 9, at 259.
80. See id. at 261.
81. See id. at 260. As late as 1915, only 64 public high schools for blacks existed in the entire South. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES (1991).
82. See EDDY, supra note 9, at 260. In 1914, the black land-grant schools enrolled a total of 5997 students, of whom only 12 were of collegiate grade level.
83. See id. at 261. Two surveys conducted by the U.S. Office of Education prompted the states to act more equitably. In 1937, in the 17 Southern states with separate black land-grant schools, only $504,767 was expended on them compared with $13,360,598 on white ones.
84. Id. at 259.
85. See A Future in the Balance, supra note 72, at 49.
ruling ensures the continuing existence of these accessible institutions.  

B. The GI Bill and Blacks

Before World War II, blacks still lacked equal access to higher education. The majority of them were educated at the segregated HBCUs of the South. Furthermore, those with degrees represented only 1.2% of all college-educated Americans. Although some headway had been made to desegregate at the college and graduate level, higher education was still very segregated.

The GI Bill did work to the benefit of blacks to some degree. Because the Bill was designed to put money directly into the hands of veterans and not the states, HBCUs were protected from almost certain discrimination from southern state leaders. The Bill also provided for unemployment benefits for all veterans for up to 52 weeks, regardless of the unequal wages for blacks and whites at the time. In addition, a companion bill provided funding to relieve acute shortages of educational facilities that would arise after the main provisions went into effect. Because black enrollment increased by approximately 50% compared to only 29.4% for whites, and because HBCUs were in much greater need of repair or expansion than white institutions, they were funded accordingly. But even with these improvements, over 20,000 black veterans were unable to access higher education simply for lack of space. Thousands of black veterans also attended

88. See A Future in the Balance, supra note 72, at 50. The Court reasoned “that an institution is predominantly white or black does not in itself make out a constitutional violation.” Fordice, 505 U.S. at 743. Nevertheless the Court suggested closings and mergers as remedies. See id. In a concurring opinion, Justice Clarence Thomas did however admit that “[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.” Id. at 749.

89. See Wilson, supra note 2, at 34. 79% of the total black population resided in the 17 southern states and D.C. and 65% of them with college degrees or more lived in those states. See id.

90. See id.

91. See id. See also infra Part II.C.

92. See Wilson, supra note 2, at 35. This provision was, ironically, secured largely due to the arguments of Congressman Rankin, who was known to be a segregationist. See supra note 64.

93. See Wilson, supra note 2, at 35.


95. See Wilson, supra note 2, at 35. Black institutions were funded for 33.4 square feet per veteran compared to 17.4 for white institutions. See id.
predominantly white universities in the North and West. This gain was also attributable to the GI Bill—suddenly blacks were able to pay for tuition and were considered attractive to the universities.

It is important to note that all veterans were accommodated in more ways than just financially. Here the universities, rather than the federal government, played a role by giving additional points on admissions tests, waiving admissions requirements, granting credits for special training received in the military, and providing tutors. As a senior scholar at the American Council on Education, Reginald Wilson, argues, when these policies were put in place, black veterans flocked to higher education and did well academically. Many of them would argue, says Wilson, that they would not have been able to go to college if it weren’t for the GI Bill. Furthermore, Wilson claims the “Bill was largely responsible for developing a tiny group of [black] professionals into the large, stable and growing ‘black bourgeoisie.”

Unfortunately, the Bill could not and cannot cure all the educational ills created by systemic, persistent discrimination. Although the GI Bill still provides veterans with financial assistance, its buying power has diminished significantly. Wilson fears that the scholars of the post war era will not be replaced in the same numbers today because “graduate schools are neither recruiting nor graduating [blacks] as aggressively.” More lasting change had to come from litigation and civil rights legislation.

C. Civil Rights Gains and Access

Prior to the civil rights movement, minority access to predominantly white institutions of higher learning was limited. The landmark case in increasing minority access to education, Brown v. Board of Education, was the product of a long, deliberate strategy to challenge the “separate but equal” standard set out in Plessy v. Ferguson.

96. See id. at 36.
97. See id. at 37.
98. Id. at 38.
99. The Bill today covers one-half of college expenses but the veteran must contribute $100 a month for 12 months to take advantage of it. See id. at 39.
100. Id. at 38.
103. 163 U.S. 537 (1896).
Stipulating that the educational facilities in question were equal, the parties explicitly attacked the "separate" part of the standard. Unlike in *Plessy*, the Court in *Brown* acknowledged that the psychological stigma of segregation deprived minority children of equal educational opportunities in violation of the equal protection clause of the 14th amendment. Separate educational facilities were ruled "inherently unequal." As Chief Justice Warren argued,

> To separate . . . [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Unfortunately, in *Brown v. Board of Education (No. II)*, the Court failed to set out an immediate remedy. Instead, the Court permitted district courts individually to resolve problems involved in admitting minority plaintiffs to public schools "with all deliberate speed . . . ." For the next eight years, the Supreme Court refused to hear any new cases. Worse than nothing was done during this time. For example, in Alabama, the state constitution was amended so that desegregation efforts could be avoided. By 1963, in the South, only 1.1% of blacks attended desegregated schools. Even though *Brown* altered the status of blacks and fostered the civil rights movement, a decade after it was decided, the pre-existing pattern of white superiority and segregated facilities persisted. This lack of progress flies in the face of those who argue today that the nation has struggled with desegregation long enough and that it's time to try something new.

It wasn't until Congress enacted the Civil Rights Act of 1964 that racial discrimination in a number of areas, excluding education, was formally banned. Although Title II explicitly prohibits racial bias in public facilities, it was aimed at private entities offering goods or services to the public. Government services, such as education, were covered under Title VI which prohibits discrimination in programs receiving federal funds. Under Title VI, discriminatory effects are
actionable.

Even prior to the Civil Rights Act, the federal courts had attempted to integrate students at the university level. In 1938, the Supreme Court ruled that Missouri could not compel Lloyd L. Gaines to attend an out-of-state school, and instead, needed to supply equal legal education facilities for blacks and whites within the state borders.111 After the decision, the state appropriated money for a black law school at the HBCU, Lincoln University. The University of West Virginia and the University of Maryland also admitted a few blacks to graduate degree programs. In 1950, the Supreme Court went further and ordered the admission of a black student to the all-white University of Texas Law School.112 It also declared that the University of Oklahoma could not segregate a black student within the university.113

Throughout the 1960s and early 1970s, a variety of public and private efforts also increased access to higher education. Federal and state grant and loan programs, an increase in the number of post-secondary institutions and special admissions programs all led to an increase in minority enrollment. In fact, the racial gap in black enrollment all but disappeared: the rate of college enrollment by black graduates, which was 77 percent of the white rate in 1960, reached 98 percent of that rate by 1975.114 Although these were important victories, they didn’t always produce the expected gains. For example, the University of Texas Law School, even after it was ordered to desegregate, graduated only 50 blacks between 1950 and 1978.115

D. Challenges to Minority Access—The 1970s to Today

1. Setting the Stage for Bakke and Hopwood

Perhaps because of these perceived gains, whites began to turn their attention to admissions standards in the early 1970s.116 As Derrick Bell

113. See McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). McLaurin was made to sit in a special place in the classroom and library, and was not allowed to eat with other students in the cafeteria.
115. See BELL, supra note 108, at 543.
116. The first real attack on affirmative action in higher education was Defuns v. Odegaard, 507 P.2d 1169 (Wash. 1973). There, Defuns, a white male, was denied admission to the University of Washington School of Law. Defuns claimed that less qualified minority applicants received preferential treatment in violation of the Equal Protection Clause of the
claims, "white, upper-class bias . . . permeate[d] . . . (and still permeates) admissions decisions of almost all" institutions of higher learning. In an attempt to respond to this claim of biased standards during the civil rights movement, colleges and professional schools began adopting affirmative action admissions programs. Minorities who would not have been admitted based on regular academic and financial criteria were given greater opportunities under these special programs. Administrators chose to use minority status as a positive admissions factor rather than reformulate admission standards generally. Such a reformulation, it was argued, would have been viewed as too drastic and as leading to a harmful weakening of academic standards. Schools instead insisted on retaining admissions standards which, if used in the employment setting, might well have been held to violate Title VII of the Civil Rights Act of 1964. This is the same debate in which land-grant universities and urban universities historically engaged when determining how to make education available to all.

As expected, white students objected (and still object) to these admissions programs that benefit minorities on several levels. At one level, white students viewed minority admissions as a threat. According to Bell, working class whites feared that assistance to blacks might threaten the traditionally hierarchical relationship between the two groups. Post-Reconstruction segregation laws—largely passed at the insistence of poor whites—had confirmed that they were entitled to permanent superior status. Now that these laws were gone, whites, especially the economically disadvantaged ones, fought to preserve power over their public facilities, including their universities.

At a different level, Darryl Brown argues, white students believed

Fourteenth Amendment. The trial court agreed and ordered the law school to admit him. See id. at 1177. The Washington Supreme Court reversed. See id. at 1188. The court found that promoting integration and eliminating racial imbalance met strict scrutiny. The U.S. Supreme Court granted a stay of judgment and eventually declared the case moot (Defunis was in his final term of law school by then). See Defunis v. Odegaard, 416 U.S. 312, 315-20 (1974).

117. BELL, supra note 108, at 659.
118. Id. at 658.
119. See id. at 652 (quoting Brief for Sanford H. Kadish, Dean of the School of Law, University of California, Berkeley; Pierre R. Loiseaux, Dean of the School of Law, University of California, Davis; William D. Warren, Dean of the School of Law, University of California, Los Angeles; Marvin J. Anderson, Dean of Hastings College of the Law, University of California, as Amici Curiae, On Petition for a Writ of Certiorari to the Supreme Court of California at 5 [hereinafter cited as Law Deans' Brief]).
121. See BELL, supra note 108, at 657-58.
that admissions criteria based on grades, test scores, and the status of one's high school are objective, fair, and neutral indicia for college admissions. Faith in this meritocratic process led whites, especially upper class whites, to question the legitimacy of black presence in higher education. Ironically, admissions standards also "posed a serious barrier to lower-class whites as well as to minorities." The open admissions program at CUNY, for example, although "implemented as a result of minority pressure," chiefly benefited lower middle-class whites.

At yet another level, whites resented special minority admissions because they thought in terms of costs to themselves rather than in terms of the necessity of relief for minorities. "Conceding that blacks have been harmed by slavery, or segregation, or discrimination," whites asked whether and exactly which of them should pay the price to rectify that harm. They failed to see how racial discrimination did not simply disadvantage blacks but privileged whites as well. Instead, they adopted the view of white innocence. In reality, excluding blacks created an affirmative action plan for whites.

It is interesting to note that some have argued that women have been the primary beneficiaries of affirmative action. The major opposition, then, focused on minorities as recipients of affirmative action. Three major claims were made by this opposition. One was that those admitted under affirmative action were not qualified. Students who benefited were consequently labeled "affirmative action students." A second was that the beneficiaries of affirmative action were not those discriminated against and were often the most privileged minorities. A third was that the institution that adopted the affirmative action plan did not engage in any unlawful discrimination toward the applicants. The Court in Regents of the University of California v. Bakke endorsed all three of these claims. But before that case is

123. See id. at 314.
124. BELL, supra note 108, at 658.
125. See id. at 660.
126. Id. at 648.
examined, some background must be provided.

In a series of cases, the Supreme Court laid the foundation for the exclusion of blacks from schools and exhibited a willingness to turn a blind eye to white privilege and hierarchy. The first case was Keyes v. School District No. 1, Denver, Colorado.\(^{131}\) There, over a strong dissent, the majority adopted the requirement of intentional discrimination in education cases under the 14th Amendment.\(^{132}\) Shortly thereafter, the Court extended this doctrine to all 14th Amendment cases in Washington v. Davis.\(^{133}\) In some respects, this case was even more surprising because the Court had only recently found that disparate impact and not intent was enough to raise a prima facia case under Title VII in Griggs v. Duke Power Co.\(^{134}\) A number of commentators argued that there was not a principled justification for adopting a different standard in Washington.\(^{135}\)

After adopting the intent standard, which made it more difficult to prove discrimination, the Court raised the bar for seeking racial justice even higher in Milliken v. Bradley.\(^{136}\) There the Court rejected the use of an interdistrict remedy to end segregation in the Detroit schools, despite clear proof of such segregation under the intent standard.\(^{137}\) Instead, the Court fragmented Detroit from the suburbs. It did not draw any inference from the fact that the suburbs were virtually all white, while minorities were limited to the "inner city." Indeed, one of the reasons the Court refused to allow an interdistrict remedy was the concern for the "innocent whites." In effect, the Court told whites that if they could get to the suburbs, they would not be burdened by the full reach of Brown.\(^{138}\)

While the term "innocent whites" was merely a subtext in Milliken, it took center stage in Bakke and City of Richmond v. J.A. Croson Co.\(^{139}\) The promise of racial justice to end white privilege and supremacy announced in Brown and Loving v. Virginia\(^{140}\) was replaced

\(^{131}\) 413 U.S. 189 (1973).
\(^{132}\) See id. at 208-09.
\(^{137}\) See id. at 744-45.
\(^{139}\) 488 U.S. 469 (1989).
\(^{140}\) 388 U.S. 1 (1967).
by a concern for not disturbing the expectations of whites. The Court failed to notice that the very expectation was one of dominance and exclusion. In Croson, the Court not only continued the long line of cases concerned with innocent whites but also made racial classification, not racism, the major evil to be eradicated. A number of commentators noted that the promise of the civil rights movement and victories in earlier cases were hemmed in by the Court constitutionalizing the concept of white innocence. This concept asserts that only those who engage in intentional discrimination are "not innocent." Not only that, it fails to address the fact that just as blacks are the negative subject of racial exclusion, whites are the beneficiaries of the same system.

2. Bakke

In 1971, the University of California at Davis Medical School began using a special admissions program for minority applicants or those self-designated as "economically and/or educationally disadvantaged." Between 1970-1974, 27 blacks and 39 Mexican-Americans were among 452 applicants admitted. Without the special program, it was estimated that only one black and six Mexican-Americans would have been accepted. The Admissions Committee testified that all admitted minorities were fully qualified for admission and fully qualified to contribute to the school and the profession. Bakke, a white applicant who failed to win admission in 1973 and 1974, claimed his rights were violated under the 14th Amendment and Title VI of the Civil Rights Act of 1964. On appeal from the California courts, which granted relief, the Supreme Court held that preferential policies of the "naked racial quota" variety would not win judicial support where:

1. they were not based on a specific finding of past racial discrimination;
2. minorities benefiting had not themselves been victimized by this discrimination;
3. identifiable whites who did not contribute to or directly

141. See generally Thomas Ross, Innocence and Affirmative Action, 43 Vand. L. Rev. 297, 298 (1990) (examining the "invocation of the 'innocent white victim' of affirmative action").
142. See Bell, supra note 108, at 654.
143. See id. at 654-55.
benefit from discriminatory policies were seriously harmed by the preferential policy.

In the end, the Court permitted the use of race-conscious criteria if it was but one of a number of factors involved.\textsuperscript{145}

Upon analysis, the \textit{Bakke} case raises an important question concerning access to higher education. That is, what if Bell is right and the criteria being used, some of which may be constitutionally race-conscious, is in itself biased towards whites? Take, for example, the Medical College Admission Test (MCAT). Impressive evidence shows that it is not a valid indicator of minority performance in medical school and that U.C.-Davis was justified in attempting to compensate for the anti-minority bias.\textsuperscript{146} There is also impressive evidence that grades and test scores cannot predict success in the practice of law and medicine. According to the deans of California’s public law schools, most minority students admitted with relatively low grades and scores “do satisfactory work and a number of them outperform regular admission students whose records appeared much better.”\textsuperscript{147}

Because blacks are being excluded from both primary and secondary schools, as well as from universities and graduate schools, \textit{Griggs v. Duke Power Co}.\textsuperscript{148} might suggest an inference of discrimination can be made. But the Court in \textit{Bakke} inferred instead that this exclusion has no significance. On the other hand, if the effects test were adopted, we would be called upon to look at the mechanisms being used to select students and deny admission into institutions of higher learning. Instead, the Court unreflectively assumed that the selection mechanisms were both fair and neutral. It is the blacks who are deficient. This position is not only inconsistent with \textit{Griggs}, it is also inconsistent with how much of the world approaches similar issues. The inferences one draws from racial disparity in our society is not driven by an internal constitutional doctrine but by one’s world view and ideology.

3. Hopwood

More recently, rather than acknowledge the need to transform

\begin{footnotes}
\textsuperscript{146} See \textit{BELL}, supra note 108, at 651.
\textsuperscript{147} \textit{Id.} at 653 (quoting Law Deans’ Brief at 4).
\textsuperscript{148} 401 U.S. 424 (1971).
\end{footnotes}
admissions requirements so as to take race into account in a meaningful way, some courts have decided to ignore race and institutional racism altogether. In *Hopwood v. Texas*, the Fifth Circuit ruled that the use of race as a factor in the preferential admission policy of University of Texas Law School violates the Equal Protection Clause of the 14th Amendment. \(^{149}\) The Court found no compelling justification to allow the school “to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.” \(^{151}\)

In essentially overruling *Bakke’s* holding, the Court held that securing a diverse student body is not a compelling interest. \(^{152}\)

At issue was the Law School’s two-track admissions process which treated blacks and Mexican-Americans differently than other applicants. Most significant in the Fifth Circuit’s eyes was the lowering of the required composite scores to qualify these minority students for admissions. \(^{153}\) The scores, made up of the LSAT and GPA, were used to rank candidates and to predict their “probability of success in law school.” \(^{154}\) Although the Law School considered other factors, the Court could not move beyond a mechanistic emphasis of the importance of these scores. Because the Law School is so competitive, reasoned the Court, “numbers are . . . paramount for admission.” \(^{155}\) Yet, just as in *Bakke*, if Texas had used a race-neutral, merit-based admissions program in 1992, it would have admitted only nine blacks and eighteen Mexican-Americans rather than the forty-one and fifty-five, respectively, that it did admit. \(^{156}\)

In fact, at the time of the *Hopwood* challenge, only one student out of 280 black applicants would have had a number high enough to put them in the school’s category of presumptively admitted. Moreover, of all minority

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149. 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996). Similar lawsuits in Washington and Florida are pending. See also CAL. CONST., art. 1, § 31(a) (1996) (dubbed Proposition 209).

150. See *Hopwood*, 401 U.S. at 944-46.

151. Id. at 934.

152. See id. at 944.

153. The composite scores were called the Texas Index (TI) and were made up of the GPA and the LSAT calculated according to a particular formula. The scores were used to categorize applicants as “presumptive admit,” “presumptive deny,” and “discretionary zone.” Id at 935. E.g., whereas whites and non-preferred minorities needed a TI of 199 to gain presumptive admission, blacks and Mexican Americans needed only 189. See id. at 936.

154. Id. at 935.

155. Id.

candidates applying to all law schools in the nation, only 289 blacks scored high enough to place them in the law school’s discretionary zone.\textsuperscript{157}

Although the \textit{Hopwood} ruling is only binding in the Fifth Circuit, scholars widely acknowledge that it marks “the beginning of the demise of affirmative action as it is currently being applied by colleges and universities nationwide.”\textsuperscript{158} In Texas itself, the state Attorney General and University of Texas attorneys “banned all minority scholarships, recruitment and retention efforts and tuition programs.”\textsuperscript{159} Louisiana and Mississippi are in the same circuit and risk actual and punitive damages if they continue to use overt racial classifications; however, they are both “under court orders to desegregate their public universities.”\textsuperscript{160} In Georgia, the state “Attorney General [has] urged state universities . . . to bring their admissions policies into compliance with” \textit{Hopwood}.\textsuperscript{161} Other states have also taken swift action in response. For example, both Arizona and Florida have decreased the number of minority scholarships, while Colorado has ceased providing race-based grants entirely.\textsuperscript{162} Similarly, the University of California, in response to a 1995 measure passed by their board of regents, has begun to phase out preferential treatment for graduate students.\textsuperscript{163}

\textsuperscript{157} See id.


\textsuperscript{159} Mercedes Lynn De Uriarte, In the Aftermath of Affirmative Action, the Whitewash of America’s Campuses Has Begun, ST. PAUL PIONEER PRESS, Sept. 14, 1997, at A23.

\textsuperscript{160} See Wright, supra note 158, at 904.

\textsuperscript{161} Id. at 903.

\textsuperscript{162} Id. at 903 n.234 (citing Lincoln Caplan et al., The Hopwood Effect Kicks in on Campus, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 26, 27). See also Douglas Lederman, University Alters Minority Scholarships on the Advice of the Education Department, CHRON. HIGHER EDUC., Apr. 11, 1997, at A30 (“Florida Atlantic University has altered several scholarship programs that it had reserved exclusively for minority students. The scholarships will now be available to students of all races—a change made at the urging of the U.S. Education Department.”) In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (Podberesky II), a Hispanic student successfully challenged a university scholarship program open only to black students at the University of Maryland at College Park. The goal of the scholarship program was remedial—however, the Fourth Court ruled that “remedying any present effects of past discrimination . . . cannot be used to lower the effective minimum criteria needed to determine the applicant pool.” Id. at 157. Again, one notes a court’s obsession with numbers. See supra text accompanying note 155.

\textsuperscript{163} Tim Golden, California’s Ban on Preferences Goes Into Effect, N.Y. TIMES, Aug. 29, 1997, at A1. Golden’s article dealt with the California Civil Rights Initiative, dubbed Proposition 209, an amendment to the California Constitution that was passed by a margin of 54% to 46% of nearly 9 million Californians casting ballots. It provides: “The state shall not
The limitations these changes place on minority access to higher education are already being felt. For example, only eleven blacks were admitted to the University of Texas School of Law for the fall of 1997 compared with sixty-five the year before. All eleven chose to attend elsewhere, some because of rumors of declining minority enrollment. "[O]nly 14 black students were selected among 792 admissions" at the law school at the University of California at Berkeley, none of whom had chosen to enroll as of July. Similarly, enrollment of blacks and Latinos in California state colleges has dropped precipitously since 1995. This is not only happening in Texas and California, however. Nationwide, graduate schools have become increasingly white. "[A]ccording to the American Council on Education, in 1994 only 21,037 blacks and 11,913 Latinos earned master's degrees, while 288,288 whites did." Not only do changes in admissions procedures foster resegregation and increase racial friction, they also deny minorities access.

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." CAL. CONST. art. I, § 31(a) (1996) (emphasis added). The Ninth Circuit held that the provision did not violate the Equal Protection Clause of the U.S. Constitution. See Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1440 (9th Cir. 1997). The constitutionality of this amendment is not completely resolved. Constitutional amendments barring affirmative action in employment were proposed in Colorado, Florida, Oregon, Massachusetts, Michigan, and Washington, but were unable to make it onto the ballot. See Karen L. Ross, Note, Combatting Racism: Would Repealing Title VII Bring Equality to All?, 21 SETON HALL LEGIS. J. 153 n.60 (1997).

164. See Kate Thomas, More 'Hopwood' Fallout: Minority Enrollment Down at Two Public Law Schools; Further Drops Expected, NAT'L L.J., June 9, 1997, at A6. Similar dramatic drops in admissions have occurred in California as a result of the University of California Board of Regents' decision to curtail preferential admissions. See, e.g., University of California Has Plan for Reversing Drop in Minority Enrollment, N.Y. TIMES, May 23, 1997, at A20 (Boalt Hall, the law school at the Berkeley campus, documented a drop in admissions of 81% for blacks and 50% for Hispanics).


167. See Lani Guinier, The Real Bias in Higher Education, N.Y. TIMES, June 24, 1997, at 19. The campuses at Irvine, San Diego and Davis showed sharp declines compared with last year. For example, at U.C. San Diego, "203 blacks were admitted for the fall [of 1998], compared with 373 in 1997; 979 Hispanic students, compared with 1,427, and 66 American Indians, compared with 105." Visible Shift Seen in Admissions In California, N.Y. TIMES, Mar. 18, 1998, at A19.

168. De Uriarte, supra note 159, at A23. Blacks also received far fewer doctorates as well. "Only 1,287 blacks and 916 Latinos earned doctorates, while 23,811 whites did." Id. These numbers are falling still. See id.
E. Urban Renewal and Isolation—Another Way to Limit Access

Much has been said thus far about access to higher education, but little has been said about the neighborhoods in which the urban universities are found and from which the minority students come. The nation’s cities continue to reflect the historical realities of segregation. Minority neighborhoods lack the quality of services and wealth of opportunities that exist in white neighborhoods.\textsuperscript{169} Douglas Massey and Nancy Denton argue that construction of the black ghetto, in particular, did not come about by chance.\textsuperscript{170} Cities have been “locked into a spiral of decline” largely due to federal housing policies, institutional practices, and private behaviors.\textsuperscript{171} By the 1950s, as poor blacks migrated to the north in large numbers, middle-class whites fled the city to the insulated suburbs.\textsuperscript{172} Ironically, this flight was fostered by none other than the GI Bill itself, which enabled five million veterans to move to the suburbs.\textsuperscript{173} Meanwhile, in the cities, the growing need for social services drove up taxes, further increasing white flight.\textsuperscript{174}

However, most cities retained some of their middle and upper classes.\textsuperscript{175} Elite institutions such as hospitals, businesses, foundations, and universities were financially tied to the city and wanted to stop the deterioration.\textsuperscript{176} The federal government provided these institutions with some relief under the guise of “urban renewal.”\textsuperscript{177} Under housing acts of 1949 and 1954, local authorities were provided federal funds to acquire, clear, and redevelop slum properties—provided that they replaced housing for displaced families.\textsuperscript{178} Public housing fit this purpose perfectly.\textsuperscript{179}

During the 1950s and 1960s, universities and other elite institutions “manipulated . . . urban renewal legislation” to protect themselves from

\textsuperscript{170} See id. at 19.
\textsuperscript{171} Id. at 55.
\textsuperscript{172} See id.
\textsuperscript{173} See Bennet, supra note 61, at 8.
\textsuperscript{174} See MASSEY & DENTON, supra note 169, at 55.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} Id.
\textsuperscript{178} See id.
\textsuperscript{179} See id.
encroaching black neighborhoods.\textsuperscript{180} Displaced blacks were then housed in “multi-unit projects of extremely high density” away from the white business districts and away from white neighborhoods.\textsuperscript{181} Often black neighborhoods were razed in order to make more room for these projects, causing further displacement and concentration.\textsuperscript{182} “Urban renewal” had become “Negro removal.”\textsuperscript{183} By 1970, the black ghetto, characterized by extreme concentration of black poverty and social isolation, had been constructed by local and national government and sealed by private actions.\textsuperscript{184} It would now become self-perpetuating.\textsuperscript{185}

Urban universities often pursued their urban renewal plans even though minority residents were harmed. For example, in the 1960s, Suffolk University utilized urban renewal to expand.\textsuperscript{186} Tenants and home owners organized to oppose the plans.\textsuperscript{187} The University assumed that it could ignore community concerns.\textsuperscript{188} Its efforts, however, were blocked in court.\textsuperscript{189} Residents in Chicago during the 1970s fared more poorly. There the University of Illinois at Chicago was on the receiving end of an ambitious urban redevelopment project.\textsuperscript{190} Because the mayor had “committed the site to the University of Illinois before notifying the area’s chief neighborhood organization,” “there was limited neighborhood participation in [its] planning.”\textsuperscript{191} Substantial resentment emerged.\textsuperscript{192}

Urban renewal efforts also resulted in urban universities operating in isolation from their surrounding communities.\textsuperscript{193} Some urban universities, like the University of Chicago, turned themselves into
islands surrounded by black ghettos. This isolation fostered an elitism that hindered minority accessibility to a great degree. Ironically, as is discussed below, it is these same universities that are willing to engage in urban scholarship and urban community service collaboratives.

III. THE PAST MEETS THE PRESENT: THE URBAN UNIVERSITY TODAY

A. Research and Community Collaboratives—Not Enough Without Access

Urban universities are committed to a triad of goals—urban-oriented education, scholarship, and service strategies. For example, the University of Illinois at Chicago, in its “Great Cities initiative,” “direct[s] its teaching, research, and public service toward improving the quality of life in Chicago and other metropolitan areas.” Before examining educational goals more closely, it is necessary to explore the other two goals. Of course, the argument has already been made, and will be made again below, that without access to education all other goals are marginalized.

1. Urban Scholarship

The mission of the urban university is based less on the classical view of education in which “knowledge [is gained] through pure scholarship and basic scientific research” than on the populist view in which knowledge is shared with ordinary citizens in a practical way.


Ernest Lynton, Professor at the University of Massachusetts, Boston, approaches the discussion of urban scholarship by describing the learning process. Learning, argues Lynton, is not linear but part of an "ecosystem of knowledge." It is not found in the laboratory, library, or study to be stored, but is interconnected and interdependent, dynamically interacting with immediate issues and concerns. This implies that knowledge moves through the system in many directions with constant feedback and questioning. Learning, then, is "multi-dimensional, often messy and confusing." Meaningful urban scholarship reflects this messy but dynamic process, looking less like classical, static, laboratory work. The urban university must embrace this type of scholarship if it is to integrate itself fully with the community.

This alternative model is reflected in the work of four Chicago universities that initiated the "Policy Research Action Group" (PRAG). This group works to bring the community actively into the research process rather than treating it as merely a place to do research, a source of data, or a variable to be manipulated. In practice, PRAG matches researchers from local universities with community-based organizations, develops research apprenticeships within community-based organizations, encourages undergraduate and graduate students to consider career options in community-based research, and funds grassroots policy research projects identified by community activists. The organization is consciously community-driven. It will only fund and work on collaborative efforts where the desires of the community are clearly in focus.

198. See id.
199. Ernest A. Lynton, Knowledge and Scholarship, in METROPOLITAN UNIVERSITIES, supra note 186, at 87, 89.
200. See id. at 90.
201. Id. at 89.
202. See Ansley & Gaventa, supra note 197, at 47. The four institutions are Chicago State University, DePaul University, Loyola University of Chicago, and the University of Illinois at Chicago. See id.
203. See id. at 50.
204. See id. at 47. See also <http://www.luc.edu/depts/curl/prag/RESEARCH/listing/all.html>, for a list of organizations that PRAG has supported and a short description of the research projects. For example, PRAG has worked the Abraham Lincoln Center to study "successful" males form public housing projects," with the Center Sin Fronteras to study health care problems facing residents of Westtown, with the Chicago Institute on Urban Poverty to study the effect of regional transportation plans on low-income residents, and with the Chicago Legal Clinic to study contamination. See id.
The Community Partnership Center at the University of Tennessee, Knoxville, a large land-grant institution, also has begun to explore new research relationships and research methods linking its campus with the community.\textsuperscript{205} It does so by bringing together university researchers with low- and moderate-income communities in Knoxville and East Tennessee and by sponsoring interdisciplinary graduate seminars on collaborative approaches to research and community development. One such collaborative developed around the largest federal anti-poverty initiative of the decade, the Empowerment Zone and Enterprise Community (EZ/EC) program. In the process, it helped one community analyze input from local residents who attended planning meetings.\textsuperscript{206} Other collaboratives have addressed such issues as poisoned water, citizen access to the Internet, and coalition-building.\textsuperscript{207}

Urban scholarship can also be furthered through service learning. In addition to providing practical training for students in human services fields, service learning fosters collaborative research projects with community partners.\textsuperscript{208} For example, The Center for Community Partnerships at the University of Pennsylvania links academic research to the university's service obligations. The Center runs a seminar for graduate students whose research focuses on community-academic interaction in Philadelphia and supports numerous courses that involve collaborative and participatory research.\textsuperscript{209} At a more general level, Portland State University faculty are designing new general education curriculum containing significant service-learning activities for all students.\textsuperscript{210} More often, according to a 1994 survey conducted by the American Association of State Colleges and Universities (AASCU) and the National Association of Land-Grant Colleges (NASULGC), students act on their own initiative in securing community service positions.\textsuperscript{211} Only 27% of respondents reported that service learning is an institutional policy. Academic credit is awarded for student participation by only slightly more than half of the campuses.\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{205} See Ansley & Gaventa, supra note 197, at 48.
\item \textsuperscript{206} See id. at 49.
\item \textsuperscript{207} See id. at 50.
\item \textsuperscript{208} See Judith A. Ramaley, \textit{Preparing the Way for Reform in Higher Education: Drawing Upon the Resources of the Community-at-Large}, METROPOLITAN U., Winter 1995, at 34, 34-35.
\item \textsuperscript{209} See Ansley & Gaventa, supra note 197, at 47.
\item \textsuperscript{210} See Ramaley, supra note 208, at 34-35.
\item \textsuperscript{212} See id.
\end{itemize}
According to Fran Ansley and John Gaventi, when the urban university undertakes to democratize its scholarship, it will not be without difficulties. First, the urban university must address budgetary concerns. Real vision will be required to secure funding for new initiatives. Second, university leaders must avoid lumping research efforts into the category of "service" which often, rightly or wrongly, runs a distant third to the other two goals of the university. Third, administrators must support and provide incentives to faculty to engage in such research. This may mean making space and sharing power. Lastly, the urban university must be prepared for conflict. It must be prepared "to argue that it is their duty to take up the needs of all sectors of the society, not only those that can afford to pay."  

2. Community Service Collaboratives

In addition to fostering urban scholarship, the urban university is committed to serving the community as a partner. In some sense, both act out of self interest. The urban community turns to universities for answers to the increasing risks it faces. Recognizing that its relationship to the surrounding community is its essential rationale, the urban university actively responds. The mission statement of the urban university must acknowledge this relationship and place greater emphasis on community service, or it may be identified by faculty as being of low priority and as lacking in academic respect.

Scholars agree that partnerships are most effective when they involve mediating institutions rather than having the university act as a direct service provider. Communities are then less likely to view the university as paternalistic. Three other considerations increase effectiveness of community service. First, universities must not form partnerships exclusively with the most vocal community organizations—the needs of the less vocal are often the greatest. Second, universities must appreciate the community role in the partnership and avoid acting as the experts. And third, universities must rely on the community to identify the problems and the needs

213. See Ansley & Gaventa, supra note 197, at 53.
214. Id.
216. See Hathaway et al., supra note 196, at 9.
217. See Scott & Ludwig, supra note 211, at 60.
218. See Bartelt, supra note 215, at 15, 24.
219. See id. at 25.
rather than assuming universities know what they are. These problems and needs lead to collaboratives in various areas.

Perhaps the most pervasive collaboratives deal with improving urban education. Such collaboratives acknowledge that the urban university and the urban schools share common concerns and goals—they are connected because of the student. At the most basic level, this connectedness involves the establishment of schools of education and the training of urban teachers. For example, in 1995, the University of Houston-Downtown established a new education-degree program designed to better prepare teachers for the realities of teaching in the urban schools. The program will give education majors three semesters of experience in Houston's inner-city schools. At another level it involves "readying the child to learn." As Ernest L. Boyer, President of the Carnegie Foundation for the Advancement of Learning, puts it, "education is a seamless web." The urban university's first responsibility is to the education of the child at all levels. This involves paying attention to everything from pre-birth issues, to preschool programming, to elementary, high school, and higher education.

Educational collaboratives are especially important in increasing access to higher education. Students are more likely to choose higher education and meet admissions requirements, however modified to take race and socioeconomic status into account, if they are "ready to learn." Students are also more likely to succeed in higher education if some of the barriers to effective education such as equitable funding, inadequate facilities and programming, concentrated poverty, segregation, discriminatory practices, and tracking—to name a few of the problems plaguing urban schools—are dismantled. The urban university must wake up to the fact that it needs to help at-risk children succeed academically in the surrounding neighborhood through working collaboratives if it wants to thrive.

One attempt at such a collaborative has been undertaken by six

220. See Kenneth A. Sirotnik, Making School-University Partnerships Work, in METROPOLITAN UNIVERSITIES, supra note 186, at 151, 152.
221. See UH Education-Degree Program Focuses on Urban Realities, HOUS. CHRON., June 21, 1995, at A18.
222. Ernest L. Boyer, How Do We Talk About Higher Education's Relationship to the Schools?, in METROPOLITAN UNIVERSITIES, supra note 186, at 180, 181.
223. Id. at 189.
224. See id. at 182-84.
urban and metropolitan communities under the title "Community Compacts for Student Success." This effort brings together leaders from all levels of education as well as community leaders to determine the "hows" and "whats" of the local, "bottom-up" education reform effort needed to complement the national emphasis on standards. At a less theoretical level, George Mason University initiated its Early Identification Program as a response to a notable decrease in minority applicants and an increase in applicants with inappropriate coursework or poor achievement in academic classes. In an alliance with three public school districts, the program fosters early, consistent intervention, and encourages at-risk minority students to complete a college preparatory curriculum and to enroll in college.

Urban universities also undertake collaboratives in such areas as health care, economic development, employment, quality of life issues, revitalization, housing, and the arts. For example, in 1993, the University of Illinois at Chicago declared that its new mission would be to refocus its academic resources to help improve the social and economic ills afflicting Chicago and other cities. More particularly, Trinity College in Hartford, to counter a reputation of being a good school in a bad neighborhood, joined with three hospitals and a public broadcasting corporation to lead a $175 million urban revitalization program in 1996. Brown University also undertook a plan in 1991 to promote a mix of programs from bike-riding police officers to home rehabilitation grants. Along different lines, the University of Texas at San Antonio (UTSA) recently formed a collaboration with the Guadeloupe Cultural Arts Center to offer a theater program on its downtown campus in an effort to breath "cultural, economic, and artistic oxygen into the surrounding business and residential communities." As Richard C. Levin observed, a potent force for

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228. See id. at 61-62.

229. See James Frank, Improved Cities are UIC Goal, CHICAGO TRIB., Dec. 3, 1993, at 2C.


231. See Doug Cumming, Trying to Heal an Ailing City, ATLANTA CON.&, July 8, 1993, at A10.

community revitalization is taking root throughout the nation because of the growing contributions of colleges and universities to economic and human development in America’s cities.233

B. Increasing Access

However much an urban university is committed to urban scholarship and service collaboratives, if it does not provide the urban student access to education, it has fallen short of its mission. A discussion of the admissions procedures students of color encounter as they attempt to access higher education is appropriate at this point.

1. Admissions Procedures

As noted earlier, when admissions procedures fail to take race into account, minority attendance dwindles.234 By the year 2010, more than two-thirds of the nation’s population increase will be black or Hispanic, with more than two million of them college-aged. Access to higher education, then, “is not an abstract concept . . . it is very real and pressing.”235 To be excluded from educational opportunities that affect career and financial success is unacceptable. The courts, however, seem less concerned about this reality than about preserving the integrity of the “numbers”—the tests and GPAs. That is not to say that standards—and all of the tools used to maintain them—must be disregarded. Rather, standards used in admissions procedures must be examined closely to determine whether they simply exclude or whether they attempt to include as well. Unfortunately, many schools persist in using the numbers in a mechanistic way that excludes. This must be avoided. Instead, an approach must be taken by each institution, depending upon its mission, to use standards appropriately so as to maximize access. Urban universities especially must work with this perceived tension between maintaining standards and increasing access—a tension that is not entirely resolvable but that has potential to produce positive results.


234. See supra Part II.D.

a. What Standardized Testing Can and Cannot Do

Admissions standards are not new. During colonial times, university presidents tested applicants using both oral and written components. University faculty took over the process around 1800. Each University had its own published entrance requirements that included books that students needed to master in order to pass the exam. Students often used a tutor or went to an academy to prepare themselves. Those who could demonstrate mastery were admitted. Those who were close to mastering the material were admitted only conditionally. All others were excluded. Admission by certificate also became popular in the late 19th century. Accredited high schools would furnish certificates to students who had completed the college requirements which would allow them automatic entry without testing. This reliance upon high schools resulted in increased access to higher education for those unable to afford expensive preparatory academies. Apart from academic competence, ability to pay tuition was also an important admissions consideration in the early history of higher education.

It wasn’t until the 20th century that institutions began to communicate about and standardize their admissions requirements. In 1900, Columbia University created the College Board to provide a forum for this standardization process. Originally the requirements were framed in terms of agreed-upon areas in which students should be proficient in order to make the transition to college and to perform well in the first year. Entrance examinations emerged only as a byproduct of the area requirements. In 1901, the Board began to administer essay examinations in nine such areas. Typically, applicants wrote eight papers each which were graded by committees of subject-matter experts.

237. See id. at 8.
239. See id. at 7.
240. See id. at 6.
241. See id. at 6-7.
243. See id.
244. See id. The nine agreed-upon areas were English, French, German, Greek, Latin,
By 1910, however, the tone of the exams began to shift towards more familiar territory. Rather than focus on factual knowledge in a specific area, the exams were directed at gauging reasoning capabilities. The first Scholastic Aptitude Test (SAT) was utilized in 1926. The results were not furnished to the students. By 1929, only verbal and math skills were tested. A decade or so later, all scores were “normed” so that they would be comparable from year to year. Aside from a renorming in 1995, the SAT has remained essentially the same since.

The American College Test (ACT) was first used in 1959 as an alternative in content and service to the SAT. Currently it provides tests in English, mathematics, reading, and science.

Tests were never meant to be definitive, however. The limitations associated with the use of these standardized tests were acknowledged by the College Board itself upon their initial administration of the SAT. The College Board stated that the test:

may help to resolve a few perplexing problems, but it should be regarded merely as a supplementary record. To place too great emphasis on test scores is as dangerous as the failure properly to evaluate any score or rank in conjunction with other measure and estimates which it supplements.

In other words, the SAT was never intended to be the primary factor employed in college admissions. Even today, in its guidelines, the College Board warns against using test scores as the sole basis for making decisions or as the basis for a decision when only small differences exist between these scores. Good evidence today suggests that while standardized tests may help predict first-year college grades, especially when used in conjunction with a student’s high school record, “no standardized test does especially well at predicting retention or graduation rates.” And even with testing, there is a variance in

chemistry, history, mathematics, and physics. - The first “standardized” test was used at Columbia, Barnard, Bryn Mawr, Cornell, Johns Hopkins, NYU, Rutgers, Swarthmore, Union College, University of Pennsylvania, Vassar, and the Women’s College of Baltimore. See Linn, supra note 236, at 8.

246. See Linn, supra note 236, at 10.
248. See id. at 5.
249. Id. at 4 (emphasis added).
251. Sedlacek, supra note 242, at 5.
first year grades, 82% of which must be explained by factors other than the SAT.\(^{252}\)

Tests also have a limited ability to determine success when used to rank rather than to qualify students. That is, a very low or very high test score will most often determine whether a student is qualified for admission. But test scores that fall in between are much less valuable as gauges of success. Nonetheless, schools use these scores to rank students with an eye to using ranking as a measure of whether the students are qualified for entry. Ranking then becomes a substitute for qualification when in reality a whole group of medium range test score recipients are still qualified.\(^{253}\)

Furthermore, it is well documented that the tests are not without bias. Students from families with higher incomes generally score better than students from families with lower incomes.\(^{254}\) In fact, the SAT was designed to measure attributes in a highly homogeneous population—just as the specific tests given by individual universities in the 19th century were designed to measure attributes of a particular caliber of student. Furthermore, while many of the tests purport to be neutral and colorblind, they are in fact white sensitive—sensitive not just culturally but to the preconditions that produce and prepare the white student. As applicants increase in diversity, especially in urban areas, the use of testing must be reevaluated. Success during the first year of college ensures neither success throughout college nor graduation. Alternatives must be sought to supplement standardized testing results.

b. Colorblind, Mechanistic Use of Standardized Tests

As noted earlier, both land-grant and urban universities utilized admissions standards. The Carnegie foundation even helped form them. However, it was also noted that both types of universities altered their admissions standards so as to make it possible for the masses to access higher education. Unfortunately, many universities today are not fully committed to such an alteration. Faced with confusing messages in \textit{Bakke}\(^{256}\) and \textit{Hopwood},\(^{257}\) these institutions are beginning to dismantle

\(^{252}\) See \textit{id.} at 7. No one can specify with any precision what these factors are.


\(^{254}\) See Sedlacek, supra note 242, at 5.


their minority admissions programs.

This dismantling is also fueled by the predominant colorblind position much of society embraces today. The colorblind position purports to be skeptical of racial categories and classifications. It assumes that the law recognizes only individuals, not groups, and that the law should not recognize race because it is irrelevant. Instead, it supports equal treatment without reference to context, history, culture. Its goal is to end all public racial classification, rather than to eradicate racism or racial hierarchy. Because the colorblind position appears to foster racial justice, it leads to conservative attacks on affirmative action and renders liberals unable to defend race-conscious strategies such as special admissions processes.258

Although it appears neutral, the colorblind position is pernicious in many ways. First, it treats differently situated persons similarly by failing to take into account that the disparities between blacks and whites are widening in nearly every social and economic indicator.259 The colorblind position also reads out history. It claims that racism is a thing of the past and that now there is a level playing field between races. This assertion is made without having to justify it. Any initiative that provides a benefit to one person or group is consequently viewed as unconstitutional. This undermines attempts at diminishing disparities and correcting the social, economic, and political advantages whites hold over others.260 When race does enter the discussion, it is used in a charged way to account for these disparities. The "culture of poverty,"261 or the unwillingness of blacks to pull their own weight262 are to blame, not white privilege. These explanations enable whites to view themselves as "innocent." As Massey and Denton point out, the missing word in the discussion of inequalities in the last several decades has been "segregation."263 Few whites appreciate the depth of black segregation or the degree to which it was manufactured and is

now maintained by ongoing institutional arrangements and patterns of individual actions.

Although many political initiatives have been launched to combat segregation, all have been fought by a powerful array of people who benefit from the status quo. Special admissions programs are no exception. Opponents of race-conscious efforts argue that the new race-\textit{un}conscious methods are appropriately meritocratic and "race-neutral." If they have a disproportionate impact on applicants of color, it is because of "poor schooling or cultural differences."\textsuperscript{264}

Because racial considerations are now under attack, admissions directors are relying more on standardized tests to determine access.\textsuperscript{265} Some are even required to do so by their legislatures or other agencies.\textsuperscript{266} Not only has race been eliminated, but test scores have been fetishized.\textsuperscript{267} As Lani Guinier argues, the problem in higher education is not that affirmative action is—or was—being used, but that admissions are being based mainly on test scores. Too many people believe that students who do well on standardized tests are more qualified for admission.\textsuperscript{268}

This mechanistic approach to admissions is both erroneous and unfair. It incorrecally assumes that testing is the best predictor of academic achievement throughout the collegiate experience.\textsuperscript{269} It also disproportionately favors those who do well on such tests—white students of higher income families.\textsuperscript{270} Consequently, the exclusionary impact falls most heavily on minority and low income students.\textsuperscript{271} For example, on the 1996-1997 SAT, only 659 of the 110,000 black college-bound seniors who took it scored above 700 on the math section and only 900 scored above 700 on the verbal.\textsuperscript{272} Similarly, graduate school admissions tests such as the LSAT yield higher results

\textsuperscript{264} Daria Roithmayr, \textit{Deconstructing the Distinction Between Bias and Merit}, 85 CAL. L. REV. 1449, 1451 (1997).
\textsuperscript{265} See Sedlacek, supra note 242, at 5. Sedlacek points out the most colleges and universities require standardized tests, some of which embrace the tests enthusiastically, and others of which knowingly accept their limitations but depend on them as the most objective means of screening nonetheless.
\textsuperscript{266} See id. The National Collegiate Athletic Association requires the use of standardized test scores, for example.
\textsuperscript{267} See Segregation Anew, supra note 165.
\textsuperscript{268} See Guinier, supra note 167.
\textsuperscript{269} See Sedlacek, supra note 242, at 5.
\textsuperscript{270} See Guinier, supra note 167.
\textsuperscript{271} See Sedlacek, supra note 242, at 13.
\textsuperscript{272} See id. at 6.
among white upper-income applicants. This should not come as a surprise, argues Guinier, since many minorities come from economically deprived backgrounds and have been educated in school districts that are still largely segregated.273 Because the scores of both blacks and Hispanics significantly lag behind those of whites, increased reliance on these tests in admissions decision will only mean resegregation of higher education.274 The current president of the College Board, Donald M. Stewart, warns that "we're looking at a potential that could take away an entire generation. The social cost to that would be too high. America can’t stand it."275

All institutions, however, want to maintain standards and insure that incoming students can perform the academic work that will be required.276 This perceived tension between standards and increased access for students who may not score well on tests is an ongoing one, especially for urban universities committed to urban education. As James Traub argues in his discussion of City College, "[t]here's no perfect solution to this problem . . . merely a continual set of adjustments that try to reconcile these two ideals or favor one at the expense of other."277

c. Altering Admissions Procedures While Maintaining Standards

Admitting that there is no perfect solution, the urban university can still undertake several measures to increase access without entirely undermining academic standards. First, the university must examine and articulate its mission, purpose, and priorities.278 It also must define what "success" means for students at that institution.279 For an urban university, this is especially crucial. If its mission is truly aimed at democratizing education, and if success is to be defined as coming away with meaningful, practical skills with which to build up the urban community, then the composition of its student body must be consistent with that mission and that definition. The urban university cannot categorically exclude the urban, minority student because of low test

273. See Guinier, supra note 167.
274. See LEVIN, supra note 114.
276. See Sedlacek, supra note 242, at 3. When college admissions officers are asked what factors they consider when screening applicants they reply: (1) high school GPA, (2) admission test scores, and (3) type of high school. See Linn, supra note 236, at 15.
278. See Sedlacek, supra note 242, at 1.
279. See id. at 3.
scores, GPAs, or other standard indicators.

Second, the urban university must examine its admissions process carefully. At a minimum, this entails paying particular attention to how standardized tests are utilized, who is benefited or harmed by their use, and whether they are still valid indicators and of what.\textsuperscript{280} It also entails determining who is \textit{not} applying for admission because they assume their test scores are too low.\textsuperscript{281} This analysis will help determine to what extent standardized tests should be used in the future.

More importantly, the admissions process itself must be altered so as to make it equally valid for everyone. One strategy entails lowering test scores for certain applicants. Although utilized in the past, this strategy may compromise standards. Alternatively, the urban university can broaden the measures utilized to determine whether a student is qualified for admission. Supplemental criteria can be developed by which to gauge retention and graduation capabilities and with which to tap the academic potential of a more diverse applicant pool. The work of Robert J. Sternberg, a psychologist at Yale University, provides justification for the use of such supplemental criteria.\textsuperscript{282} Sternberg argues that ability is manifest in three ways, the first of which alone, the analytical intelligence, is measured by standardized tests. The experiential intelligence, or the ability to be creative and adaptive, and the contextual intelligence, or the ability to understand and negotiate a "system" to one's advantage, are not measured by standardized tests. The presence of these two intelligences, however, can be predictive of successful educational outcomes. But measuring them is a complicated task which must rely on such time-consuming and sometimes biased techniques as questionnaires, interviews, and the use of portfolios. Despite these hurdles, the urban university must consider altering the admissions process so as to make it more accessible.

\textsuperscript{280} See id. at 9. The National Center for Fair & Open Testing in Cambridge, Massachusetts is active in this area.
\textsuperscript{281} See id. at 3.
\textsuperscript{282} See id. at 7-8. Sedlacek's own research shows that one system of measuring noncognitive variables—the Noncognitive Questionnaire—works well in assessing creative and practical abilities among many different types of students. The correlation of college grades and retention were significantly higher when noncognitive variables were used with standardized tests and earlier grades. The questionnaire measures: positive self-concept, realistic self-appraisal, ability to negotiate the system, preferences of long-range goals, availability of strong support person, successful leadership experiences, community service and acquired knowledge. See id. at 11.
It is important to mention here that relying too heavily on high school achievement as a supplemental criteria can also limit access. Although high school curricula are important in influencing undergraduate success, differential placement into non-academic or academically diluted high school "tracks" compromises academic preparation. In other words, tracking skews the reliability of high school measurements for admissions. And it does so primarily at the expense of minorities. It is no coincidence that grouping students by ability resurfaced in the mid-1950s as desegregation efforts were gaining in momentum. Tracking served as a means by which whites could support integration without endangering their children’s privileged positions.

The urban university must be conscious of the effects of tracking and take it into account when making admissions decisions. It must also avoid requiring courses not offered at the surrounding schools. This obviously serves to screen out applicants. It is equally important for the urban university to influence the precollege course of study in these schools. If minorities have wider academic exposure in high school, they will be more eligible to apply to four-year colleges and less likely to need remediation.

Third, the urban university must talk about race. It must avoid buying into the colorblind position and instead acknowledge that persistent, systematic racism limits the opportunities of students of color. The language of Hopwood must not prohibit the urban university from considering race as a valid criteria by which to determine admissions until the issue is resolved definitively in each circuit. Meanwhile, it should turn to its legislature to salvage race consciousness. In Texas, for example, legislators have passed a bill requiring universities to accept the top 10% of graduates from all state high schools. And California has begun a program to link universities with poor inner-city schools. As the editorial board of the New York Times recently acknowledged, "[i]n both states, it is coming home that minority students are being systematically disadvantaged by abysmal and segregated public schools. The states inflict the damage and have a moral obligation to find a remedy.

Lastly, the urban university must determine what kinds of academic

284. See BELL, supra note 108, at 567-68.
285. See LAVIN & HYLLEGARD, supra note 283, at 240.
286. Segregation Anew, supra note 165.
and social-support programs students will need to succeed. Whether this be remediation, specific course loads and sequences of courses, advising, counseling, or other services, the university must be committed to providing it.  

2. What's Actually Being Done to Increase Minority Access

a. Admissions Standards

Many urban universities already employ strategies to increase access. Some universities give standardized tests less weight than they used to. For example, CUNY's Law School has initiated an Urban Legal Studies Program designed to admit future lawyers from inner city high schools. By focusing on criteria other than the LSAT, such as the social conscience and commitment for community service, the school has managed to admit the highest percentage of minority students outside of the traditionally black universities. Similarly, the University of California San Francisco School of Pharmacy largely ignores standardized test scores, and is able to maintain a high ratio of minority students. And, as mentioned above, the public universities in Texas now guarantee enrollment to the top 10% of all high schools in the state, regardless of whether the applicant has taken a standardized test or not.

Other institutions supplement admissions mechanisms. For the past ten years, Louisiana State University in New Orleans has trained its admissions committee in the use of noncognitive variables. As a result, minority enrollment has doubled to 21% with an 87% retention rate. More recently, North Carolina State University began to include a supplementary admissions application in its admissions package in hopes of assessing noncognitive factors.

b. Recruitment

Urban universities also actively attempt to recruit urban minority

287. See id.
289. See id. at 759.
291. See supra Part III.B.1.c.
292. See Sedlacek, supra note 242, at 11. More than 80% of the admissions committee members believed the use of noncognitive variables was worthwhile.
students. One way is for the university to work with the community. For example, Cleveland State University holds a Black Church College Fair at which potential candidates have the opportunity to meet faculty, students, and representatives from admissions and financial aid. In a more formal relationship, Oakland University and the Detroit Urban League have partnered to provide members of the Urban League College Club with ongoing admissions and financial aid counseling and current scholarship information.

Urban universities can also work with companies or non-profits to attract urban students. Philip Morris, for one, has instituted a nationwide university collaborative program to work with high school educators preparing students for the university setting, to help students transfer from community college to universities, and to increase student retention. More particularly, the National Science Foundation and National Institute of Health administer programs aimed at encouraging urban minority students to pursue advanced degrees in science. Community colleges can also be included in these collaborative efforts, primarily to make it easier for students to transfer into four year universities.

Yet another approach is to work closely with the high schools within the area. The University of Missouri-St. Louis, for example, has developed multiple plans under the umbrella name Partnerships for Progress. Project Compete targets economically disadvantaged students in preparation for higher education and trains teachers. The Bridge Program works in conjunction with the St. Louis schools to increase the number of students who complete high school and pursue college level math, science, and technology. Some institutions

293. See CSU Recruits Students, PLAIN DEALER (Cleveland, OH), Oct. 4, 1997, at 2B.
294. See Patric Keating, Oakland U. Partners with DUL, MICH. CHRON., Apr. 8, 1997, at 1A.
296. See Ron Schereer, Science PhD Programs Build Bridges to Urban Minorities, CHRIST. SCI. MON., Apr. 23, 1996, at 1. Similarly the Leadership Alliance is attempting to increase the number of minorities in academic leadership roles and to expand the pool of PhD's in this population. Karen A. Bordeleau, What Colleges are Doing About Diversity, PROV. SUN. J., June 1, 1997, at L6.
298. See Marguerite Ross Barnett & Donald Phares, The Metropolitan Students, in METROPOLITAN UNIVERSITIES, supra note 186, at 47.
299. See id. at 47-48.
develop 2+2+2 programs that provide seamless curriculum from high school, through community college and the university. The University of California has also expanded college preparatory programs in low-performing high schools, in hopes of reversing the downward trend in black and Hispanic college enrollments since affirmative action has ended.

c. Retention

In addition to altering admissions and improving recruitment efforts, urban universities also strive to increase retention rates. Some universities such as Southwest Texas State University use minority leadership conferences, mentoring, and diverse faculty to retain underrepresented student groups. As a result, its rate of retention of black and Hispanic students is significantly higher than the neighboring University of Texas, San Antonio. The University of Missouri-St. Louis also addresses issues of retention through its Continuous Quality Improvement program. Recognizing that out-of-class contact with faculty and peer group contact are crucial for student retention, the University of Texas at El Paso keeps its administrative offices open late and has fully integrated the library, computer center, and tutorial learning center so as to best reflect the non-traditional student’s use.

C. CUNY—A Case Study of the Urban University and Access

A close examination of one urban university’s struggle to democratize education may help clarify what’s been suggested so far. City College of New York, or Free Academy as it was originally

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300. See Hrabowski & Linksz, supra note 297, at 163. See also Charles L. Shom, Minority Access to Higher Education: The Precollegiate Response to Minority Economic and Social Enhancement, J. COL. ADMISSION, Summer 1991, at 16-19. There, Shom describes the federal government initiative, Upward Bound, which targets high school students from disadvantaged backgrounds, and the University of California’s Early Outreach Program, which targets junior high school minorities. Residential summer programs also have produced results at Boston College and the Texas University System.


304. See Arturo Pacheco, Bridging the Gap in Retention, METROPOLITAN U., Fall 1994, at 53, 54-55.

305. City University of New York (CUNY) incorporated City and the other municipal
called, was founded in 1847 to educate the youth of a growing working class. It was the first free municipal institution of higher education in the United States. At the opening ceremony, its president described the College’s mission as one of securing the highest grade of education for the masses—“the children of the whole people.” He also described it as an experiment. Could such a mission be carried out? Could such an institution be controlled by the “privileged many” rather than the privileged few? As James Traub observed:

What distinguished City from every other college at its level was its transformative mission. City did not reproduce privilege, as the Ivy League schools did. It gave poor, talented boys... the opportunity to make it into the middle class; it compressed into a few years a process that otherwise took a few generations. City was the most meritocratic of institutions; and because the idea that a man should get ahead according to his abilities, rather than the accident of birth or background, was the core principle of America’s free-market society, City had a moral status that no elite college could claim. City was... a promise that America kept.

This transformative mission did not mean that City College was without standards or that it provided an inadequate education. Indeed, the first students admitted had to have completed at least one year in the common schools and have passed an entrance examination. The acceptance rate, however, was better than 50%. During its first fifty years the graduation rate was less than 10%. This, however, was largely due to the times—many students left to work because their families could not support them; others went into business, teaching, medicine or the law, none of which required a four-year degree. Although most of the earliest students were native-born Protestants, poor Jews from Eastern Europe and Russia, as well as other

306. Robert E. Marshak & Gladys Wurtemburt, Part I: Open Access, Open Admissions, Open Warfare, CHANGE, Nov.-Dec. 1981, at 13. City College was established by a New York citizens vote under the name Free Academy. It was renamed the College of the City of New York in 1866. See David E. Lavin et al., Right Versus Privilege: The Open-Admissions Experiment at the City University of New York 1 (1981).
308. Traub, supra note 277, at 10.
309. See Lavin et al., supra note 306, at 2.
310. See id.
immigrants, flocked to City in the early 1900s.\textsuperscript{311} It offered them "an education suitable to their backgrounds, their hopes, their professional and cultural aspirations."\textsuperscript{3112} And, as James Traub puts it, "it wasn't second-rate goods, as the poor were accustomed to."\textsuperscript{3113} City was seen as one of America's great colleges and its education highly regarded. Between 1920 and 1970, only Berkeley had more of its graduates go on to receive Ph.D. degrees.\textsuperscript{314} City was seen as "a magic key to the good life . . . a living emblem to the American Dream," and an entryway into the middle class.\textsuperscript{315}

By 1950, however, the transformative mission of City was threatened. With the rising number of applicants, admission requirements became more stringent and less egalitarian.\textsuperscript{316} Enrollment at City and other municipal colleges did not reflect the dramatically increasing population of blacks and Puerto Ricans.\textsuperscript{317} The college-going rate for blacks was half of that of whites, with more than half of the blacks attending two-year institutions.\textsuperscript{318} The civil rights movement argued that minorities were being denied the right to acquire skills needed to compete in the marketplace.\textsuperscript{319} Indeed, a study by a black professor of political science at City offered evidence that the college's standards made it almost impossible for minority students to gain admission.\textsuperscript{320} This was despite CUNY's new "Holy Plan" to accommodate the "new immigrant populations" without greatly comprising standards. Under the plan, CUNY accepted the top 30\% of high school graduates, rather than the top 20\%.\textsuperscript{321} It was also despite CUNY's new SEEK program which provided intensive remedial instruction and counseling to minority high school graduates in order to prepare them for college curriculum.\textsuperscript{322}

\begin{thebibliography}{99}
\bibitem{311} See id. at 2-3. By 1905, the Jewish enrollment was close to 75\%. See id. at 3.
\bibitem{3112} Marshall & Wurtemburg, \textit{supra} note 306, at 13.
\bibitem{3113} \textsc{Traub}, \textit{supra} note 277, at 9.
\bibitem{314} See id.
\bibitem{315} Id.
\bibitem{316} See \textsc{Lavin et al.}, \textit{supra} note 306, at 3-4.
\bibitem{317} See id. at 4-5. Southern blacks migrated to Northern cities in the 1920s. "New York City's black population went from 150,000 in 1920 to 450,000 in 1940 to 1.1 million in 1960 . . . [a]fter WWII impoverished Puerto Ricans began to leave the island for New York." \textsc{Traub}, \textit{supra} note 277, at 44. Their population increased from 70,000 in 1940 to 720,000 in 1961. College enrollment among these students was only 5-6\%. See id.
\bibitem{318} See \textsc{Traub}, \textit{supra} note 277, at 45.
\bibitem{319} See id. at 10.
\bibitem{320} See id. at 45.
\bibitem{321} See id. at 46. The Holy Plan was unveiled in 1962 and promulgated in 1964. See id.
\bibitem{322} See id. at 46-47. SEEK, initiated in 1966, grew out of a 1965 pilot program. It
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In 1969, blacks and Puerto Ricans staged a campus shut-down "to demand vastly greater access for minority students." The students prevailed, and admissions standards were lowered. Admission to senior college was guaranteed to those "who graduated from high school with at least an 80 average (in academic, college preparatory courses) or who ranked in the top 50 percent of their high school graduating class." Everyone else was guaranteed admission at a community college. Those who were accepted at the senior level were allowed a grace period of one year during which they could not be dismissed for academic reasons. Mediation, supportive counseling, and similar services were also available. City was now open to those who had been excluded. "Open admissions" had arrived—but not without controversy. As Traub describes it:

City was engaged once again in a radical social experiment and in the deeply American labor of transformation. The European immigrants didn't need City anymore; it was the black and Puerto Rican citizens of Harlem, the people who for years had looked up the hill at the remote campus, who needed it now. Because of its history, its before and after [open admissions], City forced a comparison and a question: Could the forces of social mobility work on the new poor as they had on previous generations?

Traub later argues that, although admissions policies had to change, they didn't have to change over night. Without the shut-down, they would have evolved over a period of years, he maintains. Instead, they became the most radical of experiments, rather than reflecting more conservative assumptions about what college education could do for ill-schooled 18-year-olds. The California model is an example of an alternative admissions policy. California took a three-tier approach: tier one, the university level, accepted only the top 12.5% of the high

“grew almost immediately from hundreds to thousands of students, creating for the first time a real black presence” at City and other senior colleges in CUNY. Id.

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323. Id. at 10.
324. See id. at 10.
325. LAVIN ET AL., supra note 306, at 18.
326. See id.
327. See id. at 20.
328. See id.
329. See TRAUB, supra note 277, at 11.
330. See id. at 67-68.
school graduating class; tier two, the state college level, accepted the top one-third; and tier three, the junior college level, accepted all others. The more radical nature of CUNY’s open admissions policy was often misconstrued by the larger community as a complete removal of all entrance requirements.

The positive impact of open admissions, however, could not be misconstrued. In 1970, the incoming freshman class increased by 75%. Not only that, thousands of minority students who had thus far been underrepresented suddenly had access to higher education. During the initial years, the black and Hispanic enrollment quadrupled in the four-year colleges and nearly doubled in the two-year colleges. Over the long hall, the number of blacks earning B.A.’s tripled and the number of Hispanics doubled. As documented by David E. Lavin and David Hyllegard in their work Changing the Odds: Open Admissions and the Life Chances of the Disadvantaged, open admissions contributed to the growth of a college-educated class in New York City’s minority communities by augmenting the pools of minorities who received educational credentials. Although open admissions could not entirely erase inequalities that prevent minorities from attaining the same labor-market rewards as whites, it still contributed significantly to the promotion of educational and socioeconomic equity.

But what about the value of the degree as a result of open admissions? Lavin and Hyllegard argue that it did not diminish. Grades were not inflated, and CUNY did not turn into a “diploma mill.” The CUNY degree still carried weight. The majority of students who went on to obtain higher degrees did so outside of the system. CUNY graduates also fared well in the job market. Nonetheless, CUNY, like all institutions of higher learning, had to deal with the tension between rigorous standards and increased access.

Unfortunately the rhetoric of “academic standards,” which has

331. See LAVIN ET AL., supra note 306, at 19.
333. See LAVIN & HYLLEGARD, supra note 283, at 195.
334. See id. at 196.
335. See id. at 198.
336. See id.
337. See id. at 203.
338. See id. at 204-05. Half of the minority entrants and 40% of the white entrants never earned a degree.
339. See id. at 205.
become an acceptable device for keeping out "newcomers," prevailed over equity issues when CUNY was hit by a fiscal crisis in the mid-70s. At that time, admission to senior colleges became more difficult. Although one could still enter with an average of 80%, if one were entering by rank, one had to graduate in the top 35% rather than the top 50%. CUNY was also forced to charge tuition. Furthermore, the grace period for freshman was replaced by a more stringent retention policy requiring that all students maintain a 2.0 grade point average by the time they had earned twenty-five credits. Remedial testing was increased, and entry into the junior year was prohibited until passing grades were attained. According to Lavin and Hyllegard, these changes have led to decreased opportunities and decreased academic success.

Sadly, they argue, apart from the tuition hike, none of the changes were fiscally required. They resulted instead from a perceived academic crisis that never really existed.

Today, the same perceived and unsubstantiated crisis is being batted around by the media, only this time the entire remediation program is at stake. Mayor Rudolph W. Giuliani and other critics feel that CUNY dedicates too many resources to teaching basic skills that should have been taught in high school. In response, the CUNY trustees devised a plan. It calls for removing all remedial courses from the curriculums of the senior colleges over the next several years and for placing a one-year limit on remedial work at the community colleges. The bulk of the remedial work would be moved into special summer immersion programs and institutes outside the regular college framework.

The negative response to the plan has forced a delay in its adoption. This response gives CUNY time to reflect on two troubling aspects of the plan. First, the plan infers that universities are not responsible for what goes on in the high schools. This undermines

340. See id. at 209.
341. See id. at 210. Most low-income families were covered by New York State’s financial aid policy, the Tuition Assistance Program (TAP).
342. See id. at 211.
343. See id. at 212-38.
344. See id. at 238.
346. See id.
the urban university's goal to engage in educational collaboratives as well as its goal to provide access to all students. In opposition to the plan, faculty, students, and legislators alike argued that limiting remedial courses will keep disadvantaged students from getting an education. Not only that, it will undermine the notion that the urban university has a research as well as a service obligation to the public schools. One professor described the plan as "a cruel deception that will only serve to compound the neglect of the public schools."

Second, the plan focuses on a tension between academic standards and access which is not always real and has not been real in the history of CUNY. Without documentation of the loss of academic rigor due to excessive remediation, the plan appears to undermine the entire mission of CUNY as well. Recalling its calling as an urban university, CUNY must keep its promise to America by voting down the plan and remaining accessible to its community.

**CONCLUSION**

At the local level, there's a crying out in urban America for people to do for urban American what state universities did in the last century for rural America. We have the most productive agricultural system in the history of the world. It did not come about by accident. It came about through land-grant colleges... It came about as a result of the integration of the university system with the agricultural community. The benefits that accrued from that relationship fed not only America but the entire world.

A similar kind of relationship between universities and the cities is necessary.

Although the urban university has responded to the needs of the urban community in many ways that mirror the efforts of the land-grant university of old, it must become part of a larger movement that radically improves access to education for the urban minority poor. For all the urban scholarship conducted and for all the service collaboratives undertaken, if admissions standards, rigid uses of testing,

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348. Arenson, supra note 345 (quoting Peter Ranis, professor at York College in Queens and the CUNY Graduate Center).

349. Hathaway et al., supra note 196, at 8 (quoting Andrew Young, former Mayor of Atlanta).
and remediation cutbacks are used to keep the urban student out, then the democratization of education will end. The legacy of the Morrill Act, the GI Bill, and CUNY will fade into the distant past, and the momentum they provided come to a halt. There is no such thing as a fair and neutral way to exclude minorities from higher education, although many whites feel comfortable with the idea that there is. If ever a true "racial democracy" were to rise up out of the colorblind mess the courts have gotten us into, it will be by the hand of the educated citizens—citizens of all races and all incomes. The urban university must take the lead in welcoming and fully preparing future proprietors of the nation's soul.