



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 10 | Number 4

Article 5

12-1-2007

The Door to Higher Education: Accessible to All - Whether State-Funded Merit-Aid Programs Discriminate against Minorities and the Poor.

Erin Oehler

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Law Commons](#)

Recommended Citation

Erin Oehler, *The Door to Higher Education: Accessible to All - Whether State-Funded Merit-Aid Programs Discriminate against Minorities and the Poor.*, 10 THE SCHOLAR (2007).

Available at: <https://commons.stmarytx.edu/thescholar/vol10/iss4/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**THE DOOR TO HIGHER EDUCATION: ACCESSIBLE TO ALL?
WHETHER STATE-FUNDED MERIT-AID PROGRAMS
DISCRIMINATE AGAINST MINORITIES AND THE POOR**

ERIN OEHLER*

I.	Introduction.....	500
	A. The Spirit of <i>Brown</i> in Higher Educaiton	502
	B. The Higher Benefits of Higher Education	503
	C. The Government Role in Access to Higher Education	505
II.	Legal Background.....	507
	A. Roots: A History of Financial Aid in America	507
	B. The Fight for Education During the Civil Rights Movement	509
	C. From Need-Based to Merit-Based Aid: An Evolution	513
III.	Legal Analysis	516
	A. The Merit Scholarship Train: Why States are Hopping Aboard	516
	B. A Closer Look at Merit Programs from the States	520
	1. The Business of Merit-Aid Programs	520
	2. Federal Merit Assistance	521
	3. Georgia HOPE	523
	4. Following Georgie’s Lead: Michigan Nevada and Tennessee	526

* St. Mary’s University School of Law, Candidate for Juris Doctor, *with Honors*, May 2008; Texas State University, Master of Arts, Legal Studies, May 2005; St. Edward’s University, Bachelor of Arts, Political Science, May 2000. I would first like to thank God for blessing my life with the following people, all without whom neither this Comment nor my completion of law school would have been possible. To my husband, Brian – your love all these years, support in everything without waver, and being an amazing father has made me a better person, wife, and mother. To our sons, Jacob and Collin – for understanding all those days and nights Mommy had to study and for your hugs and kisses getting me through on the roughest of days. To my parents, Lonnie and Claudette Cannon – for loving, supporting, and helping me throughout my life in ways words can’t express. Especially for my mother – you’ve always taught me to be compassionate and that lesson is why this Comment is what it is. To my father and mother-in-law, Jerry and Cindy Oehler – for loving your daughter-in-law enough to commit to helping us whenever we needed and then some.

C. Evaluating the Success of Merit Scholarship Programs Outside the United States	529
D. Race and Scholarship: A Case Analysis	531
E. Survival of the Fittest: The Social Darwinist Approach to Financial Aid	533
F. Cost is Slamming the Door on Access	534
1. University Focus is on Competition, Not Access...	536
2. Who is Getting the Reward? A Look at the Racial Disparities of Merit-Aid	540
a. Re-examing Michigan MEAP	540
b. Judging the "Gold Standard": How HOPE Really Stacks Up	541
IV. Conclusion	544

I. INTRODUCTION

"And it is a truism that education is no longer a luxury. Education in this day and age is a necessity."¹

Take two young women pursuing college degrees at the same university, both with the help of government financial aid.² One, from an upscale suburb, had her education completely paid by a state-funded merit-aid program amounting to approximately \$50,000.³ The other, from a working-class neighborhood, will still owe approximately \$14,000 at the end of four years after taking out student loans and participating in work-study program.⁴ These two women represent a growing number of high

1. President Lyndon Baines Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), *available at* http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu_whca370-text.shtm (discussing how the Higher Education Act would make a college education attainable for families that could not afford it). The Higher Education Act is an initiative provided for the establishment of scholarships, interest-free loans, and work-study programs to assist students in paying college tuition. *Id.*

2. Robert A. Frahm, *Who Should Get the Aid? Debate Centers on Whether to Award Merit or Help the Needy*, HARTFORD COURANT, Apr. 11, 2001, at A1 (introducing the story of two students who were both attending the University of Connecticut with the help of financial aid).

3. *Id.* (illustrating the type of financial aid a student from a middle-income family received to fund her education). The student received a Nutmeg Scholarship, a merit-aid program funded by the state of Connecticut, which paid for her entire college education. *Id.*

4. *Id.* (distinguishing the type of financial aid a lower-income student received to fund her education from that of a middle-income student). The student relied on mix of loans, grants, and a job to fund her education. *Id.*

school students who find themselves similarly situated as several states adopt or plan to adopt merit-based financial aid programs.⁵

Rising tuition costs and limited financial resources make the decision to pursue a college degree nothing short of difficult. Yet, considering the graduation, dropout, and college preparedness rates, minority children have little choice but to pursue higher education if they wish to succeed.⁶ With technological advancements stimulating job growth, the need for a bachelor's degree weighs in favor of equal opportunity for all, but attainment of a postsecondary degree continues to be difficult for minority and low-income families because access to financial resources is severely limited.⁷

President Lyndon B. Johnson signed the Higher Education Act of 1965 (HEA), which provided government financial assistance to defray the cost of college tuition.⁸ However, more than forty years after the signing of the HEA, minority and low-income students are still feeling the crunch of affording a college education. This is because government resources that were once used to help students based on need are being increasingly

5. *Id.* (quoting a study conducted by a committee which advised Congress). The study reported that since 1993, state merit-aid funding grew almost four times the rate of need-based aid. *Id.*

6. JAY P. GREENE & MARCUS A. WINTERS, LEAVING BOYS BEHIND: PUBLIC HIGH SCHOOL GRADUATION RATES 3 (2006), available at http://www.manhattan-institute.org/pdf/cr_48.pdf (reporting on statistics that show that while roughly seventy-eight percent of white students graduated from high school in 2003, only fifty-five percent of Black students graduated from high school in the same period). In calculating graduation rates for the states and multiple school districts, the authors used enrollment and diploma information taken from the United States Department of Education. *Id.* See also Jay P. Greene & Marcus A. Winters, *Public High School Graduation and College-Readiness Rates: 1991-2002*, at 21-23, 25-27 (Manhattan Institute for Policy Research, Working Paper No. 8, 2005), available at http://www.manhattan-institute.org/pdf/ewp_08.pdf (showing that just twenty-three percent of African American students graduated from high school prepared for college in 2002 compared to forty percent of White students for the same period).

The criteria used in our calculation of college-readiness rates are designed to reproduce the minimum standards of the least selective four-year colleges. There are three hurdles that students must get over in order to leave high school with the qualifications necessary to be considered for college admission. Students must graduate with a regular diploma, have completed a minimum set of course requirements, and be able to read at a basic level. *Id.* at 6.

7. DONALD R. MCCOY & RICHARD T. RUETTEN, QUEST AND RESPONSE, MINORITY RIGHTS AND THE TRUMAN ADMINISTRATION 60 (1973) (describing the difficulties minorities faced with such limited resources to attain a college degree). "Only some twenty thousand of about one hundred thousand Negro veterans eligible for college under the G.I. Bill were able to find an institution that would accept them." *Id.*

8. President Lyndon Baines Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), available at http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu_whca370-text.shtm.

diverted to fund merit-based financial aid or scholarships. These merit programs reward a student's meritorious performance in high school without regard to financial need by paying, in whole or in part, their college tuition to a state university.⁹ The increasing practice is causing a "growing debate across the nation about whether such scholarships help the well-to-do at the expense of the needy."¹⁰

Prior to strides made by the President John F. Kennedy and Lyndon B. Johnson administrations for civil rights, the United States Supreme Court handed down the landmark *Brown v. Board of Education*¹¹ decision, simultaneously advocating the importance of education for needy, under-represented students and providing the platform from which virtually all future education initiatives would spring.

A. *The Spirit of Brown in Higher Education*

The United States Supreme Court's holding in *Brown v. Board of Education* put forth not only the doctrinal position that separate-but-equal had no place in public education, but also the policy position that the opportunity for education was important for all children.¹² In *Brown*, Black students attending public elementary schools brought suit against several school districts in various states, seeking admission to public schools on a non-segregated basis.¹³ The Court held that the separate-

9. Thomas C. Green, *Financial Aid, Access, and America's Social Contract with Higher Education*, 80 C. & U. 9, 10 (2005) (describing how merit scholarship programs work using Georgia HOPE as an example).

[T]he Georgia HOPE scholarship program, was introduced with the express purpose of increasing the number of students who would remain in the state of Georgia for higher education. Unlike previous state grant or scholarship programs, the criteria for eligibility were not based on financial need. Rather, merit requirements were used.
Id.

10. Robert A. Frahm, *Who Should Get the Aid? Debate Centers on Whether to Award Merit or Help the Needy*, HARTFORD COURANT, Apr. 11, 2001, at A1 (questioning whether "the numbers of students whose need is not being met" is growing as the number of merit awards increases).

11. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

12. *Id.* at 493 (establishing the importance of education to American children). "Today, education is perhaps the most important function of state and local governments . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*

13. *Id.* at 487-88 (explaining how the denial of admission to Black students to White public schools is against the law). Students alleged the segregation of the public schools deprived them of Fourteenth Amendment Equal Protection. *Id.* Plaintiffs appealed the separate-but-equal doctrine upheld by the lower court in each of the cases, with the exception of the Delaware case, brought before the United States Supreme Court. *Id.* Under the separate-but-equal doctrine, "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." *Id.*

but-equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴ The majority posited the importance of an education for a child to succeed in later life by stating: “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹⁵ Despite the Court’s refusal to designate education as a constitutional, fundamental right protected by the Equal Protection Clause,¹⁶ the spirit of the Court’s policy message resonates by helping make the case for equal access to postsecondary education in the twenty-first century.

B. *The Higher Benefits of Higher Education*

In 2004, the United States Census Bureau projected that by 2050 nearly half of the United States population will be comprised of minorities.¹⁷ Given such precipitous demographic shifts, the educational performance of African-Americans, Hispanics, and Asian-Americans should concern all Americans because society depends on their success.¹⁸

Experts in higher education estimate that a bachelor’s degree is worth over \$1,000,000 in total lifetime earnings.¹⁹ The figure reflects a shift from the traditional view that a college education benefited society to a modern view that a college education is “a personal investment in which

14. *Id.* at 495 (reasoning that separate educational establishments are inherently unequal). Ultimately, the United States Supreme Court held that such inherently unequal education establishments violated the equal protection of laws guaranteed by the Fourteenth Amendment. *Id.*

15. *Id.* at 493 (reiterating the importance of education for children and the role of the government in facilitating equal opportunity for education).

16. Bernard James & Julie M. Hoffman, *Brown in State Hands: State Policymaking and Educational Equality After Freeman v. Pitts*, 20 HASTINGS CONST. L.Q. 521, 535 (1993) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973)). The Court refused to give education fundamental status because it was not “the province of [the] Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.” *Id.* Parents, acting on behalf of their children who were students in one of San Antonio’s poorer school districts, filed a class action suit challenging the school finance system in Texas. *Id.* The Court rejected granting education fundamental status because of the difficulty involved in articulating a new standard of review. *Id.*

17. ALLIANCE FOR EXCELLENT EDUC., FACT SHEET: AFRICAN-AMERICAN STUDENTS AND U.S. HIGH SCHOOLS 1–2 (2007), available at http://www.all4ed.org/publications/AfAm_FactSheet.pdf (“U.S. schools are now [forty-one] percent nonwhite and the majority of the nonwhite students attend schools that show substantial segregation.”).

18. *Id.* at 1 (noting that sixteen percent of the population in public schools in 2004 were African-American).

19. INST. FOR HIGHER EDUC. POLICY, INVESTING IN AMERICA’S FUTURE: WHY STUDENT AID PAYS OFF FOR SOCIETY AND INDIVIDUALS 5 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/d9/fc.pdf (noting the strong correlation between an individual’s median annual salary and that same individual’s academic credentials).

the public has limited interest.”²⁰ However, the modern view remains misguided as research shows a direct correlation between education and poverty. While “it is clear that education is one factor that increases income,” access to education is also a critical component in poverty prevention.²¹ States would therefore be wise to make college access a priority in the war on poverty.

In fact, the interest of access to education to the states and society goes beyond economics. Studies show college graduates exhibit “motivation to participate in activities that affect . . . the political structure, as well as . . . community service” more so than individuals who do not attend college.²² Community participation, especially volunteerism and civic leadership, is a means by which college graduates give back to the state and society that afforded them access to higher education. Higher education access to the many rather than the few means more graduates, and more graduates translate into higher community participation from which society benefits.

The U.S. Department of Labor projects that between 2000 and 2010 job growth “will overwhelmingly be in fields requiring a college education.”²³ Therefore, society maintains a vested interest in making higher education accessible to all. In fact, in accordance with an economic line of thought, society can maximize its return on investing in low-income students to the fullest extent because “[t]he failure to invest in college

20. JULIANNE MALVEAUX, WHAT’S AT STAKE: THE SOCIAL AND ECONOMIC BENEFITS OF HIGHER EDUCATION 1 (2003), available at http://www.pathwaystocollege.net/pdf/NDSFA_report2.pdf (stating that higher education used to be viewed as a public good that was valuable for society). This shift in attitude is affecting the ways in which postsecondary education should be funded. *Id.* The College Board reported that during 2001-2002, loans constituted fifty-four percent of total student financial aid, while grants were only thirty-nine percent, compared to twenty years ago when the reverse was true. *Id.*

21. *Id.* (citing statistics from the 2001 Census showing income figures). The figures were divided by race, gender, and education and pointed to ironies that elucidated the argument that more education increases income and improves occupational options. *Id.*

22. ALISA CUNNINGHAM, THE BROADER SOCIETAL BENEFITS OF HIGHER EDUCATION 4 (2005), available at <http://www.solutionsforourfuture.org/site/DocServer/07.Social-Benefits.pdf?docID=102> (comparing community and political participation rates between college graduates and those who do not graduate college). “[I]ndividuals who have had the opportunity to go to college have a greater probability of having the resources to develop into productive and engaged citizens.” *Id.*

23. INST. FOR HIGHER EDUC. POL’Y, INVESTING IN AMERICA’S FUTURE: WHY STUDENT AID PAYS OFF FOR SOCIETY AND INDIVIDUALS 7 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/d9/fc.pdf (illustrating that increasingly more jobs will be in sectors requiring a bachelor’s degree). “As the proportion of jobs that require a bachelor’s degree increases, the relative value of higher education will shift toward the public domain.” *Id.*

access for all . . . weakens the fabric of society and risks costing the nation more in the long-term.”²⁴

C. *The Government Role in Access to Higher Education*

There is little disagreement that the government bears responsibility to ensure access to higher education. The conflict arises as to the extent of the government’s responsibility. Advocates for public education believe that, “access to education should be part of the newly emerging list of fundamental rights,” but advocates also recognize that, “even if there were a right to an education, no particular level . . . would be guaranteed.”²⁵

Because no fundamental constitutional right to education exists, some need-based aid supporters take a different approach in addressing the fundamental role of government in education. Social contract theory, originated in Thomas Hobbes’s *Leviathan*²⁶ in 1651, is the idea that rational individuals enter into a social contract with others for enhanced freedom and security.²⁷ Drawing on John Rawls’s modernization of Hobbes’s social contract theory, need-based aid supporters point out “when students who otherwise could not afford to attend college are provided the means to do so, this may be referred to as our ‘social contract’ with higher education.”²⁸ According to Thomas Green of Seton Hall Univer-

24. *Id.* (emphasizing that the benefits of a college education to both individuals and society makes it clear why taxpayer dollars need to be invested in providing college access to everyone). The return to society on its investment into higher education is maximized when taxpayer dollars are focused on poorer students. *Id.* “Despite the future economic advantages conferred by a college degree, the financially neediest students simply cannot attend college without government intervention.” *Id.*

25. Bernard James & Julie M. Hoffman, Brown in *State Hands: State Policymaking and Educational Equality After Freeman v. Pitts*, 20 HASTINGS CONST. L.Q. 521, 537 (1993) (explaining the Supreme Court’s refusal to recognize education as a fundamental right). Even though there is no fundamental right status for education, so long as states do not rely on prohibited classifications or totally deny access to the public education system, their programs pass constitutional muster. *Id.*

26. THOMAS G. MORTENSON, THE REALLOCATION OF FINANCIAL AID FROM POOR TO MIDDLE INCOME AND AFFLUENT STUDENTS 1978 TO 1990, at 5 (1990), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/20/5a/b1.pdf (introducing the concept of the social contract).

27. Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2 (1999) (examining social contract theory and its relationship with the United States legal system). “Social contract theories provide that rational individuals will agree by contract, compact, or covenant to give up the condition of unregulated freedom in exchange for the security of a civil society governed by a just, binding rule of law.” *Id.*

28. Thomas C. Green, *Financial Aid, Access, and America’s Social Contract with Higher Education*, 80 C. & U. 9, 9 (2005) (connecting the social contract theory of John Rawls to higher education in America today). Rawls’s work draws from the ideas of French philosopher Rousseau, including the motto and themes of liberty, equality, and

sity, “it is important for us to inspect the role of financial aid and the social contract created by its practical applications.”²⁹ Reflective of social contract theory, Congress enacted the Higher Education Act of 1965 as part of President Johnson’s Great Society initiatives to equalize access to higher education for minorities and the poor. By providing scholarships, loans, and work-study programs, students who otherwise were not able to finance a college education now had such an opportunity. However, the optimism the HEA brought to underrepresented persons was short-lived as equal access to higher education for minorities and the poor stalled due to a political downswing.

In the late 1970s, Congress passed the Middle Income Student Assistant Act (MISAA).³⁰ Since then, practically every major change in financial aid benefit higher-income students.³¹ By the mid 1980s, the downswing on equal access continued, with traditional need-based financial aid programs giving way to merit-based aid. Merit scholarships awarded students’ meritorious performance in high school without regard to financial need. The growing use of merit-based aid at both the state and institutional levels, paired with the increasing proportion of financial aid available to higher income, families at all levels, broadens the original purpose of aid to benefit minority and low-income students.³²

fraternity. *Id.* “Inherent in this motto is an adoption of a social contract, in which certain goods and services are produced for the betterment of the entire society.” *Id.* See also JOHN RAWLS, A THEORY OF JUSTICE (1671), reprinted in GREAT POLITICAL THINKERS: PLATO TO THE PRESENT at 929 (4th ed. 1990) (expanding on Hobbes’s social contract theory).

[T]he guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established.

. . . .
 . . . Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. *Id.*

29. Thomas C. Green, *Financial Aid, Access, and America’s Social Contract with Higher Education*, 80 C. & U. 9, 13 (2005) (explaining the impact of the increasing use of merit-based scholarships on low-income populations, specifically minority populations).

30. THOMAS G. MORTENSON, *THE REALLOCATION OF FINANCIAL AID FROM POOR TO MIDDLE INCOME AND AFFLUENT STUDENTS 1978 TO 1990*, at 5 (1990).

31. *Id.*

32. Thomas C. Green, *Financial Aid, Access, and America’s Social Contract with Higher Education*, 80 C. & U. 9, 13 (2005) (“Greater use of merit aid at the state and institutional levels and the increasing proportion of aid available to middle and upper income groups at all levels has widened the original uses of financial aid for low-income and largely minority populations at the beginning of this time period.”).

Examination of the use of financial aid at the federal, state, and institutional levels over the last fifty years presents evidence of a shifting social contract for college aid.³³ The most notable shift occurred in 1993 when Georgia established the first comprehensive state-funded merit-aid program, the Georgia HOPE (Helping Outstanding Pupils Educationally) Scholarship Program.³⁴

This comment will analyze whether state-funded merit aid programs discriminate against minorities and the poor. The first section will discuss the history of financial aid, including its intended beneficiaries and why the government determined to expand student aid. The next section will discuss why proponents of merit scholarships believe such programs are not discriminatory. The last section will analyze how merit scholarships discriminate against minorities and the poor in terms of access and financial assistance, as well as evaluate possible solutions on how to balance need and merit-based programs.

II. LEGAL BACKGROUND

A. *Roots: A History of Financial Aid in America*

The roots of financial aid trace back to 1643 when Lady Anne Radcliffe Mowson established the first scholarship at Harvard University.³⁵ Her purpose was to reward a poor student.³⁶ Historically, scholarship programs sought to provide access to higher education for disadvantaged students; however, scholarships for the needy have evolved into comprehensive financial aid programs benefiting those without significant financial need.

The first federally funded financial aid program, known as the G.I. Bill, “is regarded as one of the great social experiments of the twentieth century.”³⁷ Enacted as part of President Roosevelt’s New Deal, the Servicemen’s Readjustment Act of 1944 (G.I. Bill) allowed World War II

33. *Id.* (evaluating the role of financial aid since *Brown v. Board of Education*).

34. GSFC: Student Eligibility for HOPE Scholarship, http://www.gsfc.org/hope/dsp_hopoes.cfm (last visited Mar. 21, 2008) (providing eligibility criteria for the HOPE scholarship).

35. Radcliffe College Archives, <http://oasis.lib.harvard.edu/oasis/deliver/~sch00814> (last visited Mar. 21, 2008) (providing a biography of Ann Radcliffe’s life).

36. *Id.* (describing the first scholarship as one hundred pounds).

37. Ronald Roach, Special Report, *From Combat to Campus: GI Bill Gave a Generation of African Americans an Opportunity to Pursue the American Dream – Servicemen’s Readjustment Act of 1944*, BLACK ISSUES IN HIGHER EDUC., Aug. 21, 1997, at 26, available at http://findarticles.com/p/articles/mi_m0DXK/is_n13_v14/ai_20031731 (commenting on the passage of the G.I. Bill).

Since its enactment, no single public policy has garnered more credit for the expansion of economic opportunity and higher education. Signed by President Franklin D.

veterans the benefit of resuming an education or vocational training by providing financial assistance for tuition, as well as living allowances during study.³⁸ Response to the program was astonishing. An estimated 7.8 million veterans took advantage of its provisions and received training or education.³⁹ Even more astounding was the impact on the African-American community. Enrollment at black colleges rose dramatically from 1.08% in 1940 to 3.6% by 1950.⁴⁰ Majority of African-Americans who benefited from the G.I. Bill secured employment in teaching and civil service.⁴¹

However, it soon became apparent that federal funding for education was insufficient and the United States was not keeping pace with other foreign countries. The 1957 launch of the Soviet spaceship Sputnik underscored that concern. Worries about national defense in the United States prompted the government to increase funding to science programs.⁴² To keep up with the developing Soviet Union and to encourage education in the physical sciences, Congress passed the National Defense Education Act.⁴³ There was much contention about whether the pro-

Roosevelt on June 22, 1944, the GI Bill paid for vocational training, and college and graduate school tuition for millions of World War II veterans. *Id.*

38. President Franklin Roosevelt, Statement of Franklin Roosevelt on Signing the G.I. Bill (June 22, 1944), available at <http://www.fdrlibrary.marist.edu/odgist.html> (detailing the financial assistance for education provided by the G.I. Bill). "It gives servicemen and women the opportunity of resuming their education and technical training after discharge, or of taking a refresher or retrainer course, not only without tuition charge up to \$500 per school year, but with the right to receive a monthly living allowance while pursuing their studies." *Id.*

39. Ronald Roach, Special Report, *From Combat to Campus: GI Bill Gave a Generation of African Americans an Opportunity to Pursue the American Dream – Servicemen's Readjustment Act of 1944*, 14 BLACK ISSUES IN HIGHER EDUC., Aug. 21, 2007, at 26, available at http://findarticles.com/p/articles/mi_m0DXK/is_n13_v14/ai_20031731 ("Thanks to the first GI Bill, an estimated 2.2 million veterans received education at colleges and universities in the aftermath of World War II. A total of 7.8 million veterans, or 50.5[%] of the World War II veteran population, received training or education under the bill.")

40. *Id.* at 26, 27 (citing statistics from the *Biennial Survey of Education 1948-1950* provided by the Office of Education Federal Security Agency). "Overall enrollment in Black Land Grant colleges, according to a 1948 edition of *The Journal of Negro Education*, increased by [fifty] percent between the beginning of the war and the journal's publication." *Id.*

41. *Id.* at 26–27 (paraphrasing Dr. Roscoe Brown, Jr., formerly of the Tuskegee Airmen). "G.I. benefits allowed Dr. Brown to pursue his master's and doctorate degrees full-time while supporting his family in the 1940s." *Id.*

42. Ed.gov, An Overview of the U.S. Department of Education (June 2002), <http://www.ed.gov/print/about/overview/focus/what.html> (last visited Mar. 21, 2008) (explaining why the government expanded education funding). "Beginning in the 1950s, political and social changes resulted in expanded federal funding of education." *Id.*

43. Interview by Donald A. Ritchie with Steward E. McClure, Chief Clerk, Senate Committee on Labor, Education, and Public Welfare (Jan. 28, 1983), available at <http://>

gram would be funded through federal scholarships or loans; but in the end, the U.S. House of Representatives denounced the scholarships as a socialistic waste of money.⁴⁴ Accordingly, Congress refused to become involved in education in light of the country's concern with global competition and national defense. This attitude toward scholarships indicated Congress's opposition to government involvement in education.

B. *The Fight for Education During the Civil Rights Movement*

National defense concerns of the 1950s gave way to racism and discrimination during the 1960s. Following the bus boycott in Montgomery, Alabama and the violence against school children in Birmingham, President John F. Kennedy poignantly told a torn nation that he would "ask the Congress of the United States to act, to make a commitment it ha[d] not fully made in th[at] century to the proposition that race has no place in American life or law."⁴⁵ Unfortunately, he did not have the opportunity to see such a measure come to fruition. The task shifted to President Lyndon B. Johnson whose "position on civil rights was unequivocal,"⁴⁶ exemplified by his signing of the Civil Rights Act of 1964 (Civil Rights Act).

senate.gov/artandhistory/history/resources/pdf/McClure4.pdf (explaining the creation of the National Defense Education Act). "If there are any words less compatible, really, intellectually, in terms of what is the purpose of education – it's not to defend the country; it's to defend the mind and develop the human spirit[.] *Id.*

44. *Id.* (describing the contention between the U.S. House of Representatives and the Senate as to whether the program should have been funded through scholarships or federal loans). Members of the House narrowed the issue of expanding federal education funding to a debate of scholarships versus loans. *Id.* Once the scholarship provisions were defeated, the bill passed. *Id.*

45. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE*, at xx (1985) (providing historical background on President Kennedy's position on civil rights). "Eight days later John F. Kennedy sent up to the Capitol a long overdue bill that would try to correct the wrongs of almost 350 years." *Id.* See also HARRY L. GOLDEN, *MR. KENNEDY AND THE NEGROES* 275 (1964) (quoting President Kennedy's message to Congress on February 28, 1963). "[I]t is obvious that the unconstitutional and outmoded concept of 'separate but equal' does not belong in the federal statute books . . . particularly with respect to higher education." *Id.*

46. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 78 (1985) (noting the importance of civil rights to President Johnson). See also RICHARD N. GOODWIN, *REMEMBERING AMERICA, A VOICE FROM THE SIXTIES* 286 (1988) (discussing the principles guiding Presidents Johnson's vision for the Great Society).

It recognized that a "cure" for poverty did not consist so much in a redistribution of wealth but a redistribution of power – to individuals and communities alike. An array of new programs, and innovative educational institutions, would allow the young to acquire the skills that, if matched to ambition, would allow them to become productive members of society. Knowledge was power – the strength to force open the door to American life. *Id.*

The principal value embodied by the Civil Rights Act “was the recognition finally – by the Congress of the United States – that the Negro was a constitutional citizen.”⁴⁷ Major provisions included voting rights, injunctive relief against discrimination in places of public accommodation, equal employment opportunity, and the desegregation of public schools.⁴⁸ Title IV permitted the then U.S. Office of Education to give financial assistance for the implementation of desegregation programs.⁴⁹ Further, it authorized the Justice Department to file suit to desegregate public schools or colleges.⁵⁰ The Civil Rights Act guaranteed certain rights to all Americans, but it did not automatically translate to the guaranteed attainment of a better life.⁵¹ “The effects of constant humiliation, substandard education, [and] inadequate . . . professional training . . . could not be overcome by the stroke of the President’s pen on a parchment handed him by Congress.”⁵² The issue of affirmative action epitomized this truth as it became one of the most divisive issues in equal rights.

Following the passage of the Civil Rights Act, President Johnson believed that removing the legal barriers confronting minorities was not

47. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 238 (1985) (quoting Roy Wilkins’s address to the NAACP’s fifty-fifth annual convention on the importance of the Civil Rights Act of 1964). “Without this fundamental right, the pursuit of happiness through political, social and economic progress could not begin.” *Id.*

48. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (2000) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

49. *Id.* § 2000c-4 (“The Secretary is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of—(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and (2) employing specialists to advise in problems incident to desegregation.”).

50. *Id.* at § 2000c-6 (granting to the attorney general the authority “to institute for or in the name of the United States a civil action” that “will materially further the orderly achievement of desegregation in public education”).

51. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 237 (1985) (commenting on the practical implications of enforcing the rights guaranteed by the Civil Rights Act). “Nor could the act erase three and one-half centuries of dehumanization.” *Id.* “It would be unreasonable, therefore, to assume that [B]lack Americans, in society whose economic rewards were derived from acquired skills, could achieve overnight the same standard of living as [W]hite Americans, who had a 350-year head start.” *Id.* at 238.

52. *Id.* at 237–38 (stating that the racism and discrimination suffered up to that point could not be erased through enactment of the Civil Rights Act alone). “To translate newly won rights into a better life would require time, national patience, a willingness by minorities to pursue the educational and training opportunities now open to them, and, most of all, constant vigilance by those charged with enforcing the law to ensure that these opportunities are maintained.” *Id.* at 238.

enough to assure equality in the workplace and institutions of higher learning.⁵³ In order to help minorities overcome decades of discrimination, affirmative action measures would need to be put in place in hiring, recruitment, and promotion.⁵⁴ By the 1970s, however, Americans were divided on affirmative action. Proponents argued preferred treatment was necessary to overcome decades of discrimination, while opponents posited that Whites should not be penalized for the actions of society through preferential programs.⁵⁵ As financial aid benefits shifted from minorities and low-income to high-income individuals through MISAA and other measures, the debate simultaneously and unavoidably went to the Supreme Court.

In *Regents of the University of California v. Bakke*,⁵⁶ the Court examined the legality of affirmative action programs in medical school admission programs.⁵⁷ The medical school of the University of California at Davis utilized two admissions programs to comprise an entering class of one hundred students.⁵⁸ The full admissions program extended offers of admission based on an applicant's file and Medical College Admissions

53. Backgrounder on the Court Judgment of the *Regents of the University of California v. Bakke* Case, <http://exchanges.state.gov/EDUCATION/ENGTEACHING/PUBS/AmLnC/br41.htm> (last visited Mar. 21, 2008) (illustrating President Johnson's commitment to make the provisions of the Civil Rights Act work in practice). In September 1965, through executive order, Johnson required federal contractors to take affirmative action measures to promote racial balance. *Id.* Subsequently, and also through executive order, Johnson added women to the groups protected by previous anti-discrimination orders. *Id.*

54. *Id.*

55. *Id.* (demonstrating the divisiveness of the affirmative action issue by the 1970s).

Therefore, to overcome the results of this past discrimination, colleges and employers ought to give some sort of preferred treatment to minorities, either by actively seeking minority applicants or by setting up a quota of jobs or school spaces reserved for women and minorities. Only by making this effort to bring minorities into the mainstream, goes the argument, can the effects of decades of discrimination finally be erased. . . . Opponents do not deny that there has been discrimination in the past, but argue that the white male who must lose his chance at entrance to a particular college or job is being penalized unfairly. *Id.*

56. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

57. *Id.* at 269–70 (“This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups.”).

58. *Id.* at 265 (describing the admissions process for the medical school). “The Medical School of the University of California at Davis . . . had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program.” *Id.*

Test (MCAT) score.⁵⁹ A second, special admissions program based admission on whether candidates expressed a desire to be considered “economically and/or educationally disadvantaged” and part of a “minority group.”⁶⁰ If an applicant belonged to a minority group deemed “disadvantaged,” the rating employed was similar to that of the general admissions committee; however, “special candidates . . . did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process.”⁶¹ Over a four-year period, the special program admitted sixty-three students, while forty-four were admitted under the general program.⁶² Though many disadvantaged white students applied under the special admissions program, none were admitted.⁶³ The Court held that “the special admissions program [was] unlawful” because the university failed to prove it still would have denied Bakke admission if the special admissions program did not exist.⁶⁴ However, the Court also concluded the school could consider race, among other factors, in passing applications.⁶⁵ It is important to note that the Court split its decision in *Bakke*. Four members held affirmative action permissible under the Fourteenth Amendment, while four others held that any consideration of race violated the Civil Rights Act of 1964.⁶⁶

59. *Id.* (describing the special admissions process for the medical school). The full admission and special admission committees were separate, with the special admissions committee comprised mostly of minorities. *Id.*

60. *Id.* (“The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as ‘economically and/or educationally disadvantaged’ applicants and members of a ‘minority group.’”).

61. *Bakke*, 438 U.S. at 265 (comparing the number of minorities to Whites admitted to the medical school under special admission).

If an applicant of a minority group was found to be “disadvantaged,” he would be rated in a manner to the one employed by the general admissions committee. Special candidates however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. *Id.*

62. *Id.* at 265–66.

63. *Id.* at 266 (“No disadvantaged Whites were admitted under the special program, though many applied.”).

64. *Id.* at 267–71 (emphasizing that classifications for race and ethnicity are inherently suspect and require the utmost judicial scrutiny). In other words, the university’s burden was to prove that something in Bakke’s application, aside from his race (White) and socioeconomic status (he did not request “disadvantaged” consideration) prevented his admission. *Id.*

65. *Id.* at 267 (explaining when race is justified in admissions decisions). “While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions . . . under some circumstances, petitioner’s special admissions program . . . is unnecessary to the achievement of this compelling goal.” *Id.*

66. Backgrounder on the Court Judgment of the *Regents of the University of California v. Bakke* Case, <http://exchanges.state.gov/EDUCATION/ENGTEACHING/PUBS/AmLnC/br41.htm> (last visited Mar. 21, 2008) (“The Court split, with four members assert-

The Court's holding in *Bakke* accomplished two things. First, it explained the role of affirmative action in areas of higher education. However, the opinion also solidified confusion regarding the role of affirmative action in areas other than admissions. For instance, whether race can be a factor in assessing financial aid remains uncertain. Second, the decision paved the way for society to adopt some form of affirmative action plan and continue the debate on affirmative action's scope.⁶⁷

C. *From Need-Based to Merit-Based Aid: An Evolution*

One year after the Court's decision in *Bakke*, Congress passed Public Law 96-88, creating the U.S. Department of Education.⁶⁸ Originated by President Andrew Johnson in 1867, the first Department of Education collected information and statistics on the country's schools.⁶⁹ Local schools, fearing too much federal control, called for its abolition, successfully demoting the Department of Education to the Office of Education after only one year.⁷⁰ Congress restricted the agency from engaging in certain activities. These activities may be summarized into four major categories: (1) establish policies relating to federal financial aid for education, administer distribution of those funds, and monitor their use; (2) collect data and oversee research on America's schools and disseminate this information to educators and the general public; (3) identify the major issues and problems in education and focus national attention on them; and (4) enforce federal statutes prohibiting discrimination in programs and activities receiving federal funds and ensures equal access to education for every individual.⁷¹

With comprehensive merit-aid programs on the rise, the Department of Education is falling short of its responsibility to ensure equal access to education. The powers delegated by Congress to the Department of Education do little to equalize access to higher education. The sentiments and progressive educational agendas endeavored by the Roosevelt, Ken-

ing that affirmative action plans involving racial classification were permissible under the Fourteenth Amendment, and four others claiming that any racial considerations violated the 1964 Civil Rights Act.”).

67. *Id.* (“The decision did not really answer the questions raised by affirmative action, but paved the way for the Court and the society to adopt some affirmative action plans, and to begin the debate over just how far to go in this difficult area.”).

68. Ed.gov, An Overview of the U.S. Department of Education (June 2002), <http://www.ed.gov/print/about/overview/focus/what.html> (last visited Mar. 21, 2008) (explaining, briefly, how the Department of Education was created and its congressional purposes).

69. *Id.* (discussing the Department of Education's primary goal).

70. *Id.* (“However, many people feared the Department would exercise too much control over local schools and called for its abolition. Thus, the new Department was demoted to an Office of Education in 1868.”).

71. *See* 20 U.S.C. § 3402 (2000).

nedy, and Lyndon B. Johnson administrations are now reminiscent ideals. The revelation that “the Great Society is dead and the war on poverty is ended”⁷² reflects the state of financial aid programs, particularly regarding the use of merit rather than need-based aid.

Historically, states, universities, and the federal government utilized a means test to determine the financial need of undergraduate students and their families.⁷³ The “needs analysis” formula “took into account family income, assets, and other characteristics to determine the amount that a student and [their] family could afford to contribute to postsecondary education.”⁷⁴ The federal need analysis formula was first used to award the Pell Grant, formerly known as the Basic Educational Opportunity Grant in 1972.⁷⁵ As part of the reauthorization of Title IV of the Higher Education Act, the Pell Grant is the largest federal student aid program.⁷⁶ The grant provides an opportunity for low-income students to fund postsecondary education; however, it is not without its drawbacks. The program maintains a separate need determination test, which calculates a student’s and their family’s “expected family contribution (EFC) to the total cost of attending a postsecondary institution.”⁷⁷ Critics contend this formula

72. Interview by Donald A. Ritchie with Steward E. McClure, Chief Clerk, Senate Committee on Labor, Education, and Public Welfare (Jan. 28, 1983), *available at* <http://senate.gov/artandhistory/history/resources/pdf/McClure4.pdf> (“God knows, we’re having a war against the poor rather than [o]n behalf of them.”).

73. Donald E. Heller, *The Changing Nature of Financial Aid*, ACADEME, 2004, at 36, <http://www.aaup.org/AAUP/pubsres/academe/2004/JA/Feat/hell.htm> (introducing how financial aid awards were determined). “The rationale behind the use of ‘means testing’ or assessing a family’s ability to pay for college, is rooted in the ideals of the Higher Education Act of 1965.” *Id.*

74. *Id.* (“The difference between the cost of attending the institution of the student’s choice (including tuition, room, board, books, transportation, and other expenses) and the family’s contribution established the amount of financial aid for which the student would qualify.”).

75. SUSAN BOREN, *THE PELL GRANT PROGRAM: BACKGROUND AND ISSUES* 3 (1989), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1f/65/89.pdf (introducing background on the Pell Grant). The purpose of the grant is to aid low-income families in financing postsecondary education. *Id.* Pell Grants were initially designed to be a “foundation” for federal aid, from which other federal and non-federal loan and grant programs could be built upon to meet the total cost of higher education attendance. *Id.*

76. *Id.* at 6 (“It is administered by the department of Education’s Office of Student Financial Assistance.”).

77. *Id.* at 5 (detailing the formula that determines the amount of aid a student is awarded).

The final size of the Pell Grant award is determined by the expected family contribution or the student aid index, the total cost of attendance, the student’s enrollment status (i.e., full, half-time, less than half-time) and the type of academic calendar used, such as clock hours, semester hours, or quarter hours. *Id.* at 6.

is unfair to low-income students as it is intended to help by requiring high levels of student contribution.⁷⁸ Despite issues in its application, the intention that the Pell Grant benefit low-income students remains static.

In 1978, Congress passed MISAA, which spurred the doctrinal shift away from need-based aid. MISAA “expanded programs, eligibility, and benefits for students from middle and affluent family income backgrounds.”⁷⁹ Virtually every major initiative passed since MISAA benefits middle to affluent income students.⁸⁰ For example, federal aid is comprised largely of loans instead of grants. The Pell Grant formula extended income eligibility and “new scholarship programs benefit the most affluent.”⁸¹ States provide the largest governmental share of support for higher education, yet need-based aid programs constitute less than six percent of state appropriations.⁸² As part of its Research Report Series, American College Testing (ACT) reported:

Since 1983-84, states have increased their need-based grant appropriations to undergraduates by [fifty-three] percent and to non-need-based grants by [eighty-two] percent. These non-need-based grants are often awarded on the basis of academic talent or promise, and therefore go disproportionately to students from relatively affluent backgrounds.⁸³

In its report summary, ACT concluded that state support in higher education can be characterized as allocated to all students “without regard to each student’s need for the subsidy.”⁸⁴ States’ higher education subsidies are concentrated on affluent students who typically graduate from high school, attend, and stay in college longer than students from low-income backgrounds.⁸⁵

78. *Id.* at 3 (noting the concerns some financial aid officials have in using the expected family contribution formula to determine aid award).

79. THOMAS G. MORTENSON, *THE REALLOCATION OF FINANCIAL AID FROM POOR TO MIDDLE INCOME AND AFFLUENT STUDENTS 1978 TO 1990*, at 5 (1990) (summarizing the major changes in education legislation affecting financial aid).

80. *Id.*

81. *Id.* (detailing how financial aid programs have benefited affluent students since the enactment of MISAA).

82. *Id.* at 6 (“States remain the largest reservoir of middle income and affluent student financial aid.”). Tuition and fees from students cover approximately one-fifth of the educational expenditures for colleges and universities, but are allocated to students without regard to financial need. *Id.*

83. *Id.* at 31.

84. THOMAS G. MORTENSON, *THE REALLOCATION OF FINANCIAL AID FROM POOR TO MIDDLE INCOME AND AFFLUENT STUDENTS 1978 TO 1990*, at 31 (1990) (summarizing the report’s findings that financial aid is benefiting affluent students more so than low-income students).

85. *Id.*

The development of financial aid programs and racial and socioeconomic equality in higher education are not mutually exclusive. No measure or initiative involving education escaped debate, passage, or veto without race or socioeconomic status at its core. The controversy over merit-based scholarships is no different as colleges and universities “are beginning to act less like nonprofit educational institutions and more like market players, using financial aid as a way of attracting talented students away from competitors rather than as a method of helping those who need it most.”⁸⁶

III. LEGAL ANALYSIS

A. *The Merit Scholarship Train: Why States are Hopping Aboard*

Succeed academically in Georgia, and the reward is great. Since its establishment in 1993, the HOPE Scholarship program rewards high school seniors graduating with a cumulative grade point average of 3.0 by paying their tuition and fees in full to an in-state university.⁸⁷ Also seeking to reward its students’ meritorious performance several states followed suit, establishing broad state-funded merit scholarship programs, including Florida, Louisiana, and Kentucky.⁸⁸ This section will examine merit aid popularity in the states, identify the goals of state merit programs, as well as analyze the presence of a shift from need-based to merit aid.

The Southern Regional Education Board identified a number of factors attributing to the increased popularity of state merit-aid programs, including “[i]ncreases in college costs[,] [r]eductions in the share of public

86. RICHARD D. KAHLENBERG, LEFT BEHIND: UNEQUAL OPPORTUNITY IN HIGHER EDUCATION 6 (2004), available at http://www.bc.edu/bc_org/avp/soe/cihe/ihec/policy/leftbehindrc.pdf (commenting on financial aid being used to buy talent rather than provide access). “While low-income students are less likely to enroll in college, those who do manage to do so are less likely to graduate than their middle-class peers.” *Id.* at 7.

87. GSFC: Student Eligibility for HOPE Scholarship, http://www.gsfc.org/hope/dsp_hopoes.cfm (last visited Mar. 21, 2008) (providing eligibility criteria for the HOPE scholarship).

88. JOSEPH D. CREECH, STATE-FUNDED MERIT SCHOLARSHIP PROGRAMS: WHY ARE THEY POPULAR? CAN THEY INCREASE PARTICIPATION IN HIGHER EDUCATION?, 2–3 (1998), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/3b/75.pdf (listing a sample of states which have implemented state-funded merit scholarships).

Since then, several SREB states have passed legislation to begin state-funded merit scholarships. Those programs include Florida’s Bright Futures Scholarships (1997); Louisiana’s Tuition Opportunity Program for Students (1997); Kentucky’s Educational Excellence Scholarships (1998); Maryland’s Science and Technology Scholarship Program (1998); South Carolina’s Palmetto Scholarships (1996) and Legislative Incentives for Future Excellence Scholarships (1998). *Id.*

college revenues from state appropriations[,] [c]hanges in the type and sources of financial aid[,] [and] [c]oncerns about improving preparation for college and college graduation rates.”⁸⁹ While these factors point to the legislative reasons a state may implement merit aid programs, there are also ideological reasons. States embody certain political characteristics that influence their adoption of policies, including merit-based aid programs,⁹⁰ which are then split into three facets that affect the adoption of merit-based programs: liberalism, partisan control, “and the presence of a policy entrepreneur.”⁹¹

Liberalism, or political ideology in this framework, typically centers on a liberal-conservative split, where liberals appreciate government interventions designed to ensure equity and conservatives prefer market-based mechanisms that furnish incentives for expedient behavior.⁹² The rationale for need-based aid, which is to assure equity and fairness,⁹³ posits the liberal ideology, whereas the rationale for merit-based aid, which is to promote high academic achievement,⁹⁴ posits the conservative ideology. In effect, merit scholarships could be viewed as a move away from a liberal-equity program, which need-based aid depends upon, to a conservative market-based incentive program.⁹⁵

89. *Id.* at 4–5 (establishing the factors that influence enactment of state-funded merit programs).

90. William R. Doyle, *Adoption of Merit-Based Student Grant Programs: An Event History Analysis*, 28 *EDUC. EVALUATION & POL’Y ANALYSIS* 259, 267 (2006) (outlining the political characteristics states find to be important in adopting policies).

91. *Id.* (“I look at three aspects of state governments that may be important to the process of adopting a merit aid program: the liberalism of state government, partisan control of state government, and the presence of a policy entrepreneur in the state government.”).

92. *Id.* (“In addition to ideology, simple partisan control may be an important factor States with different parties may indeed be more likely to adopt certain policies, based primarily not on ideological considerations, but instead on the basis of strategic electoral advantage.”).

93. David Longanecker, *Is Merit-Based Aid Really Trumping Need-Based Student Aid?*, *CHANGE*, 2002, at 33–34 (“Institutions want high achievers to attend because such students increase their standards and prestige. States want high achievers . . . because they believe these students are likely to stay after graduation, thus creating a higher caliber workforce.”).

94. *Id.* (“Two quite different rationales have driven the growing public policy infatuation with merit-based student assistance: an interest in promoting high academic achievement and an interest in attracting the best and the brightest, both of which are legitimate interests for policymakers.”).

95. William R. Doyle, *Adoption of Merit-Based Student Grant Programs: An Event History Analysis*, 28 *EDUC. EVALUATION & POL’Y ANALYSIS* 259, 267 (2006) (explaining how the adoption of these programs may be related to conservative ideology).

In addition to ideology, partisan control of state legislatures impacts the adoption of merit programs.⁹⁶ Democratic-controlled states are traditionally more strongly associated with support of sweeping public bureaucracies and labor groups, whereas Republican-controlled states support school voucher initiatives and other programs designed to break up government-supported interest groups.⁹⁷ Based on the partisan differences, two hypotheses can be drawn regarding each party's view of non-need-based assistance programs: (1) that liberal state governments are less likely to enact a merit aid program; and (2) that conservative state governments are more likely to enact a merit program.⁹⁸ Testing these hypotheses requires an examination of the influence of political ideology and party on government policy, particularly merit-based aid.

As of 2004, fourteen states used state-funded merit scholarship programs.⁹⁹ Interestingly, the voting trend of those states since 1972 shows that most of those states elected the Republican candidate in at least five of the last eight presidential elections.¹⁰⁰ Research on the influence of political parties on state legislatures demonstrates that in order to compete for electoral advantage and bring in new voters, parties package their new and existing issue platforming.¹⁰¹ This in turn, "provides a political connection among issues, which works its way into our general ideological way of looking at politics."¹⁰² In other words, society packages issues so individuals can identify their political views with one party or the other. This forms the general political ideology, which society carries

96. *Id.* (stating that simple partisan control is an important factor in adopting merit based programs).

97. *Id.* ("Democrats have traditionally been more strongly associated with direct support of large public bureaucracies and associated labor groups, which in turn have provided strong support for Democratic candidates. Republicans, on the other hand, have been supporters of vouchers and other types of programs designed in part to break up the vested power of government-supported interest groups.").

98. *Id.*

99. See D.E. HELLER & P. MARIN, STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY, at table 1-1 (2004) (listing state merit scholarship program information including the funding source, award criteria, and award amount).

100. National Atlas Maps, <http://nationalatlas.gov/printable/images/pdf/elections/elect12.pdf> (last visited Mar. 21, 2008) (showing presidential election results by state and political party from 1972-1984).

101. Gerald C. Wright & Brian F. Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 AM. POL. SCI. REV. 367, 377 (2002) ("Our analysis provides strong evidence that the parties, in vying for electoral advantage, adopt positions on new issues to bring in new voters and, thus, package these with their existing issue stands.").

102. *Id.* (concluding that without the existence of political parties, there would less likely be any obvious connections between the party and the various issues). "Where the parties are not active in the legislature . . . the clear structure found in partisan legislatures disappears." *Id.* However, "[t]hese findings suggest that nonpartisan elections effectively break the policy linkage between citizens and their representatives in the statehouse." *Id.*

through both state and federal politics. Regardless of whether it is a presidential or state election issue, liberal or conservative ideology remains the same. By providing a clearer understanding of how societal members develop political ideology, the research helps demonstrate that the second hypothesis is accurate. Conservative ideology states are, in fact, more likely to adopt a merit assistance program in promotion of high academic achievement.

Whether policy entrepreneurs are present to push the merit agenda forward helps determine if a state will offer this form of assistance. Although difficult to identify in merit-aid programs,¹⁰³ policy entrepreneurs are in a key position to get these programs enacted “and indeed several [governors] have made such programs a centerpiece of their campaigns.”¹⁰⁴ It stands to reason, then, that with governors acting as policy entrepreneurs, they are likely to adopt a merit scholarship program within the first year of office.¹⁰⁵

The adoption of merit programs does not rest merely on political party affiliation or ideological views. Proponents of merit-based aid and the states that enact the programs rest their decision to adopt these programs on something more fundamental – their interest in a better-educated citizenry to contribute to society.¹⁰⁶

103. William R. Doyle, *Adoption of Merit-Based Student Grant Programs: An Event History Analysis*, 28 *EDUC. EVALUATION AND POL'Y ANALYSIS* 259, 267 (2006) (comparing policy entrepreneurs in other policy areas as easy to identify compared to those in merit-aid programs). Researchers conducted a state-by-state survey to determine whether “policy entrepreneurs were active in the area of school choice” and found that of the twenty-six states that had entrepreneurs, the likelihood of school choice passing was raised. *Id.*

104. *Id.* (explaining how most experts, who are familiar with state merit scholarships, recall the pivotal role Governor Zell Miller played in the enactment of the Georgia HOPE program).

105. *Id.* (“The time period immediately after taking office [is] a critical ‘policy window’ when policy reforms are more likely to occur.”). See also Gerald C. Wright & Brian F. Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 *AM. POL. SCI. REV.* 367, 377 (2002) (citing DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 27 (2d ed. 2004)) (theorizing that political entrepreneurs adapted institutional rules in order to facilitate their goal of reelection).

106. David Longanecker, *Is Merit-Based Aid Really Trumping Need-Based Student Aid?*, *CHANGE*, 2002, at 34 (“The interest in promoting high academic achievement is almost a return to the original concept of ‘scholarship.’”). “[S]tates make this investment because they believe that these students, as graduates, will stay put and contribute to their economy.” *Id.* at 35.

B. *A Closer Look at Merit Programs from the States*

1. The Business of Merit-Aid Programs

Proponents of merit-aid programs argue there should be more merit-aid programs because existing programs do not provide students considerable incentives to achieve more in high school.¹⁰⁷ This may be due to the success of merit programs in states that have them. Dozens of states and the federal government have merit-based aid programs in place and the evidence demonstrates that the programs increase performance and achievement in high schools. But what is it about merit programs compared to other forms of financial assistance that make them so desirable and allegedly successful? Following an overview of federal merit-based assistance, this section will discuss specific state-funded programs and evaluate their criteria for success in promoting access and enrollment of minorities and the poor.

Historically, financial aid subsidies administered to students went directly from the state or federal government to universities.¹⁰⁸ Because the universities decided which students were sufficiently meritorious to attend their respective school, the universities traditionally controlled financial aid access.¹⁰⁹ Now, marking a significant change in the distribution of financial aid, state legislatures are in the business of awarding merit scholarships directly to students, which only increases program popularity.¹¹⁰ By making merit-aid available directly to students, states are providing broader accessibility to those funds, effectively cutting out the university middle-man.

The specific eligibility requirements and procedures for each state's merit-aid program differ, but commonalities exist in their objectives.¹¹¹ Some of these objectives include: (1) high performance in high school, (2) strong academic record, (3) attendance to an in-state institution, and (4)

107. Michael S. McPherson & Morton Owen Schapiro, *The Blurring Line Between Merit and Need in Financial Aid*, CHANGE, 2002, at 42 (discussing the issues raised in policy discussions in the states regarding expanding the use of merit scholarships).

108. MATT THOMPSON, THE HOPE SCHOLARSHIP AND THE LAW OF UNINTENDED CONSEQUENCES 4 (2005), available at <http://www.educationlawconsortium.org/forum/2005/papers/thompson.pdf>.

109. *Id.*

110. *Id.* (explaining that merit aid's popularity is attributed to the political advantage it enjoys over other forms of aid). Merit programs are politically advantageous because low tuition creates a high profile. *Id.* It is the understanding of parents, who are voters, that the tuition they pay is kept low by tuition-waiver scholarships their children receive. *Id.*

111. *Id.*

targeted assistance to middle-class families.¹¹² Each of these objectives contributes to merit program success by speaking to every parent's desire for their child to achieve educational excellence in high school and through college.

2. Federal Merit Assistance

In July 2007, the United States Senate reauthorized the Robert C. Byrd National Honors Scholarship, extending it for an additional five years because "our society must fully recognize and reward the hard work . . . required to achieve excellence in the classroom[,] that is why the Byrd Scholarships were created."¹¹³ Named for its creator, U.S. Sen. Robert Byrd of West Virginia, the Byrd Scholarship was the first national merit scholarship program.¹¹⁴ Under the program, the Department of Education allots grant money to the states to fund the scholarships;¹¹⁵ however, there are no provisions in the federal statute regarding income caps, grade point average, or college admission test scores for scholarship eligibility.¹¹⁶ Rather, each state education agency establishes its own selection procedures through consultation with school boards and

112. *Id.* (citing JOSEPH CREECH, STATE-FUNDED MERIT SCHOLARSHIP PROGRAMS: WHY ARE THEY POPULAR? CAN THEY INCREASE PARTICIPATION IN HIGHER EDUCATION? 4-5 (1998)).

113. Kali Geldis, *Senate Reauthorizes Byrd Scholarships*, HERALD-DISPATCH.COM, <http://wvhepcdoc.wvnet.edu/news/07222007clips.pdf> (last visited Mar. 21, 2008) (quoting U.S. Sen. Robert Byrd's press release on the reauthorization of the Byrd scholarship). These scholarships, totaling \$216,000 to West Virginia students in 2006, award \$6000 to high school graduates who demonstrated academic excellence. *Id.*

114. TG RESEARCH & ANALYTICAL SERV., OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 38 (2005), available at http://www.tgslc.org/pdf/HEA_History.pdf (describing the evolution of the Higher Education Act). "In 1985, Byrd created the first national, merit-based scholarship program, which was later renamed for him. The Robert C. Byrd Honors Scholarship Program was established to recognize outstanding high school seniors and help them obtain a postsecondary education." *Id.*

115. Higher Education Act of 1965, 20 U.S.C. § 1070d-33 (2000) ("The Secretary is authorized . . . to make grants to States to enable the States to award scholarships to individuals who have demonstrated outstanding academic achievement and who show a promise of continued academic achievement.").

116. *See id.* § 1070d-36 (stating that the only federal eligibility requirements are that the student "shall be a graduate of a public or private secondary school or have the equivalent of a certificate of graduation as recognized by the State in which the student resides and must have been admitted for enrollment in an institution of higher education," and also stating that "[e]ach student awarded a scholarship under this subpart must demonstrate outstanding academic achievement and show promise of continued academic achievement.").

administrators, teachers, parents and guidance counselors.¹¹⁷ The scholarships are completely need-blind and are rewarded regardless of student financial need or economic background.¹¹⁸

In addition to implementing the Byrd Scholarship, Congress approved measures to alleviate the crunch on middle-income families trying to fund a college education. Under the Tax Relief Act of 1997, Congress provided higher education tax incentives by creating the HOPE Scholarship and Lifetime Learning tax credits.¹¹⁹ The purpose of these middle-class tax cuts was to promote expanded educational opportunity.¹²⁰ Providing assistance to middle-income families in the form of higher education tax cuts could arguably be equivalent to the assistance middle-income families are already receiving through merit scholarships. In other words, critics of merit-aid could argue middle-class families are already being helped through the adoption of state merit-aid programs and providing them with tax cuts to fund higher education is gratuitous. However, according to David Longanecker, a proponent of merit-based aid, at the time the legislation passed, the choice was to either give a tax cut to wealthy individuals and companies or to educational benefit.¹²¹ Since it was not a choice between increasing Pell Grants or tuition tax credits, President Bill Clinton believed that it was more sensible to invest in middle-class families who invest in higher education, thereby enhancing their worth to the country, instead of throwing tax credits to affluent people

117. *Id.* § 1070d-37 (“The State educational agency is authorized to establish the criteria for the selection of scholars. . . . In carrying out its responsibilities . . . the State educational agency shall consult with school administrators, school boards, teachers, counselors, and parents.”).

118. See Information for Financial Aid Professionals, http://ifap.ed.gov/sfahandbooks/doc0186_bodyoftext.htm (last visited Mar. 21, 2008) (detailing the criteria for receipt of the Byrd scholarship). “The SEA selects scholars solely on the basis of demonstrated outstanding academic achievement and promise of continued achievement.” *Id.*

119. U.S. Dep’t of Educ., The HOPE Scholarship and Lifetime Learning Credits, <http://www.ed.gov/offices/OPE/PPI/HOPE/index.html> (last visited Mar. 21, 2008) (providing information on the creation of the HOPE tax credit). This was the biggest investment in education that the federal government had made since the G.I. Bill in 1944. *Id.*

120. *Id.* (outlining the specific provisions of the HOPE Scholarship and Lifetime Learning Credits). Under HOPE, college students in their first two years are eligible for a credit equal to 100% of the initial \$1,000 of tuition and mandatory fees as well as fifty percent of the subsequent \$1000. *Id.* The Lifetime Learning Credit provides for students attending college beyond the first two years, a twenty percent credit for their first \$5000 in tuition and mandatory fees and, after 2002, for the initial \$10,000 thereafter. *Id.*

121. David Longanecker, *Is Merit-Based Aid Really Trumping Need-Based Student Aid?*, CHANGE, 2002, at 35–37 (“When the federal tuition tax credit was passed, it was part of an effort to cut taxes. There was no stomach at that time for increasing direct program expenditures.”).

who did not need help.¹²² While federal involvement in meritorious aid is essentially limited to these two assistance programs, state-funded programs are far more comprehensive.

3. Georgia HOPE

A discussion of state merit-aid programs must begin with “the gold standard for judging all state aid programs,” the Georgia HOPE Scholarship Program.¹²³ In 1993, then-governor Zell Miller spearheaded the effort to create a lottery-funded state education merit-aid program that provided scholarship money directly to students.¹²⁴ HOPE had three basic goals: “to increase college enrollment, to retain the best and brightest in-state for college, and to promote academic achievement.”¹²⁵ To be eligible for a HOPE scholarship, high school seniors must earn a “B” average in high school and attend an accredited university within the state of Georgia.¹²⁶ The scholarship pays all tuition and mandatory fees and provides a book allowance.¹²⁷ For the first two years, the Georgia legislature imposed an income cap that limited who was eligible to receive the scholarship, but by the third year of the program, lawmakers eliminated the income cap.¹²⁸ The HOPE program’s basic premise and relatively simple implementation have made it a model for other states, evidenced by a review of other state merit-aid programs. One of the most pressing issues

122. *Id.* at 37 (“The reality is that the constituencies and forces for need-based aid often differ from those that support merit-based aid, and trade-offs between the two often simply don’t exist.”).

123. MATT THOMPSON, THE HOPE SCHOLARSHIP AND THE LAW OF UNINTENDED CONSEQUENCES 2 (2005), available at <http://www.educationlawconsortium.org/forum/2005/papers/thompson.pdf> (commenting on the amount of interest and literature the HOPE program has generated).

124. *Id.* at 4–6 (illustrating that Georgia lawmakers recognized the mistakes of other merit programs and implemented HOPE differently). “Learning from the fungibility mistakes of other states, the then-governor Zell Miller and the Georgia legislature intentionally chose not to allow practices with these new lottery-created state education funds.” *Id.*

125. *Id.* at 5 (detailing that HOPE’s goals relate to the objectives of other states’ merit-aid programs). “These common objectives include: a) merit-based aid encourages students to perform well in high school, b) the aid program requires students to maintain strong collegiate academic standing, c) students must attend in-state institutions, and d) middle-class families are the target for the aid.” *Id.* at 4.

126. *Id.* at 5 (“The only requirements for performing well is defined as earning a “B” average in high school and attending an accredited institution in the state of Georgia.”).

127. Christopher Cornwell et al., *The Enrollment Effects of Merit-Based Financial Aid: Evidence from Georgia’s HOPE Scholarship*, 24 J. LABOR ECON. 761 (2003).

128. MATT THOMPSON, THE HOPE SCHOLARSHIP AND THE LAW OF UNINTENDED CONSEQUENCES 5 n.1 (2005), available at <http://www.educationlawconsortium.org/forum/2005/papers/thompson.pdf> (“In the first two years of the program, there was an income cap on those who could receive the scholarship. By the third year, the state legislature eliminated the cap.”).

facing states is not only whether merit-aid programs achieve the goals they set forth, but also how conscientious those goals are of the under-represented student.

Experts conducted a research study evaluating whether Georgia achieved its goals through HOPE. Georgia's first goal in enacting HOPE was to increase enrollment in college by providing financial support through HOPE, thereby encouraging students to attend college.¹²⁹ Research shows the scholarship increased total freshman enrollment by 5.9%.¹³⁰ The second goal was to retain the brightest students in the state. A major factor for students contemplating where to attend college is their number of options.¹³¹ Students are more likely to attend college outside of the state if they believe there is not a quality institution located within their home state; therefore, solid in-state opportunities, coupled with tuition waiver programs like HOPE, are now a more attractive option for students who otherwise would have sought out-of-state institutions.¹³² The last goal was to promote academic achievement amongst high school students. According to a study by Christopher Cornwell and David Mustard, there was a seventeen percent increase in the number of high school seniors satisfying the HOPE eligibility requirements.¹³³ One can reasonably infer from these statistics that the increase in HOPE eligibility is also indicative of higher academic achievement.¹³⁴

129. *Id.* at 8 (“HOPE seeks to increase college enrollment. The intent is that the financial support provided by HOPE will drive students to make the decision to attend college.”).

130. Christopher Cornwell et al., *The Enrollment Effects of Merit-Based Financial Aid: Evidence from Georgia's HOPE Scholarship*, 24 J. LABOR ECON. 761 (2003) (reporting the results of research on HOPE's impact on total college enrollment). The enrollment effect was concentrated mostly in four-year schools with the greater percentage of that being private universities. *Id.* Statistically, HOPE raised enrollment in four-year public schools by nine percent and thirteen percent in four-year private schools. *Id.*

131. MATT THOMPSON, *THE HOPE SCHOLARSHIP AND THE LAW OF UNINTENDED CONSEQUENCES* 8 (2005), available at <http://www.educationlawconsortium.org/forum/2005/papers/thompson.pdf> (“The role of choice has one of the most dramatic effects on whether a student remains in state for their baccalaureate degree.”).

132. *Id.* at 4 (explaining the role choice has in a student's decision to attend college in state). High-achieving students believe that they now have reasonable alternatives in Georgia rather than pursuing out-of-state universities. *Id.*

133. Christopher Cornwell & David B. Mustard, *Race and the Effects of Georgia's HOPE Scholarship, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS* 57, 60 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilrightsproject.ucla.edu/research/meritaid/6Cornwellch4.pdf> (“Between 1993 and 1999, the number of HOPE-eligible high-school graduates rose over [fifty] percent, from 29,840 to 45,149, and the proportion of high-school graduates satisfying the merit requirements increased from [forty-eight] percent to almost [sixty-five] percent.”).

134. MATT THOMPSON, *THE HOPE SCHOLARSHIP AND THE LAW OF UNINTENDED CONSEQUENCES* 4 (2005), available at <http://www.educationlawconsortium.org/forum/2005/>

Determining the success of the Georgia HOPE program depends upon whether success is being measured by the state's achievement of its established scholarship goals or the pursuance of a public interest such as equal access, opportunity, or increased graduation and enrollment of minorities and the poor. Without a doubt, Georgia achieved the goals the state set forth for the scholarship. But critics question whom the goals truly benefit. This is a reasonable question because if HOPE's success were measured by the furtherance of the public interest of underrepresented students, then Georgia, like virtually every other state with a merit-aid program, fell short.

One of the principal criticisms of merit scholarships is that their increased funding far surpasses that of need-based aid, slowly replacing it.¹³⁵ Longanecker argues that critics of merit programs should be asking what happened to the funding for students in need, instead of what happened to funding for the need-based programs, because numerous needy students qualify for merit scholarships.¹³⁶ According to Longanecker, Georgia exchanged a modest need-based program, which allotted only \$3 million in funding, for the HOPE program, which generated \$277 million in scholarships in 2001.¹³⁷ Needy students may stay underrepresented in HOPE, but the \$45 million increase in funding going to students with established financial need makes it difficult for critics to argue that those students have been harmed by the program's implementation.¹³⁸

While critics of HOPE would not likely consider the program's statistical increases to be substantial, there were increases, nonetheless; therefore, if measured only by the achievement of its state-established goals, HOPE is an example of a successful state-funded merit program.

papers/thompson.pdf (concluding that HOPE achieved its goal of promoting academic achievement).

135. David Longanecker, *Is Merit-Based Aid Really Trumping Need-Based Student Aid?*, CHANGE, 2002, at 33 (“[D]espite a substantial new focus on merit-based aid in a few states, in the aggregate the increases in merit-based support have not been as precipitous as current discussions reflect, nor has support for on form of state aid resulted, on average, in reductions for the other.”).

136. *Id.* (“The big issue, really, is not what has happened to funding for need-based programs, but rather what has happened to funding for needy students. Many needy students qualify for merit-based scholarships.”).

137. *Id.* (“One example: Georgia, which dropped a very modest \$3 million need-based program in exchange for its infamous merit-based Helping Outstanding Pupils Educationally (HOPE) program (which provided \$277 million in Fiscal Year 2001), greatly advantaged needy students in doing so.”).

138. *Id.* (“Today, students with assessed financial need in Georgia receive . . . 15 times what they were receiving from the old need-based program.”).

4. Following Georgia's Lead: Michigan Nevada and Tennessee

Taking a cue from Georgia, both Michigan and Nevada adopted broad state merit-aid programs in 1999, and Tennessee followed in 2003. The goals for the Michigan Educational Achievement Program (MEAP),¹³⁹ the Nevada Millennium Scholarship Program,¹⁴⁰ and the Tennessee Education Lottery Scholarship (TELS)¹⁴¹ are essentially the same as Georgia HOPE. The differences lay in the methodologies used to implement each program, including eligibility criteria, award amounts, and length of time students continue to receive scholarship funds after entrance into college.

The Michigan program is distinguished from the Georgia HOPE program in two significant ways. First, unlike HOPE, the MEAP scholarship lasts for one year and covers approximately half of the average tuition and fees to a public four-year university.¹⁴² Second, eligibility is based on a state-sponsored test rather than grade point average.¹⁴³ While, MEAP also does not have an income cap, the state does prohibit university financial aid officers from taking the merit scholarship into consideration when need-based awards are assessed.¹⁴⁴ The rest of MEAP's operation essentially models HOPE, with minor differences. Success of the Michigan merit award is evident. Prior to the scholarship's enactment, only seventy-five percent of the state's high school juniors took the MEAP exams.¹⁴⁵ After the program took effect, exam participation immediately

139. John H. Bishop, *Money and Motivation*, 4 EDUC. NEXT 63, 64 (2004) (indicating that Michigan policymakers wanted to promote academic achievement). Michigan rejected minimum-competency exams so that the state's high school tests reflected more challenging learning goals. *Id.*

140. Robert Ackerman et al., *A State-Supported, Merit-Based Scholarship Program That Works*, 35 J. STUDENT FIN. AID 21, 24 (2005) (stating that the objective of the program was to raise participation rates in higher education and to retain students in the state).

141. ERIK NESS & BRIAN NOLAND, TARGETED MERIT AID: TENNESSEE EDUCATION LOTTERY SCHOLARSHIPS 8 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/c5/b7.pdf (explaining that TELS was originally conceived as a replication of HOPE and although Tennessee eventually implemented it differently, the basic goals remained similar).

142. John H. Bishop, *Money and Motivation*, 4 EDUC. NEXT 63, 67 (2004) (describing what financial benefits MEAP offers students).

143. *Id.* at 64 (distinguishing the test Michigan uses to determine eligibility for the MEAP award). Michigan does not rely primarily on the SAT or ACT exams. *Id.* Rather, "[w]hat makes the Michigan program so powerful is that the scholarships are based on students' performance on an external exam that reflects the state's recommended curriculum." *Id.*

144. *Id.* ("[S]tudents who earned the [MEAP] scholarship would not have their need-based aid reduced, as is common.")

145. *Id.* at 67 (discussing the positive increase in participants after the MEAP program was implemented).

jumped ten percentage points and continued to climb.¹⁴⁶ Not only did state test participation rates increase, but also average scores on both the SAT and ACT exams also rose.¹⁴⁷ Most notably, while nationwide graduation rates declined in the 1990s, Michigan's graduation rate grew from seventy-eight percent in 1991 to eighty-three percent in 2001.¹⁴⁸ Although it altered the HOPE model to address its own governmental objectives, the data shows that Michigan, like Georgia, achieved its educational goals through the use of a merit scholarship program.

The Millennium Scholarship Program in Nevada is modeled more closely after Georgia HOPE than the MEAP program. Eligibility is based upon grade point average and there is no income cap on the award.¹⁴⁹ The significant difference from HOPE is that Millennium recipients can receive scholarship funds a maximum of eight years after high school graduation.¹⁵⁰ Following a study of high school student performance before and after Millennium's implementation, Nevada, like Georgia and Michigan, witnessed marked growth in college participation rates, going from just over thirty-seven percent to almost forty-five percent within only two years of the program taking effect.¹⁵¹ Of particular interest to the Nevada Millennium policy rationale was the increase of in-state college enrollment.¹⁵² In 1992, the in-state to out-of-state percentage was 145%, but in 2002, three years after the merit scholarship program took effect the ratio rose to an astounding 311%.¹⁵³ Nevada's statistics exhibit the Millennium Scholarship Program's attainment of the state's goals, thereby making it a success.

The Tennessee Education Lottery Scholarship program is a new model for merit-based financial aid called targeted merit aid since it "incorporates aspects of both *merit* and *need* [and] cannot accurately be described

146. *Id.* (observing that exam participation rates reached 99.7% for the senior class of 2002).

147. John H. Bishop, *Money and Motivation*, 4 EDUC. NEXT 63, 67 (2004) (illustrating MEAP's success in that average ACT scores were constant in Michigan, despite falling elsewhere in the nation). SAT scores rose to five points, faster than the rest of the country. *Id.*

148. *Id.* at 64 (attributing the increased graduation rate to the implementation of the MEAP award).

149. Robert Ackerman, Martha Young, & Rodney Young, *A State-Supported, Merit-Based Scholarship Program That Works*, 35 J. STUDENT FIN. AID 21, 24 (2005) (describing award eligibility).

150. *Id.*

151. *Id.* at 26 (noting growth in college participation rates).

152. *Id.* at 24.

153. *Id.* at 27 (attributing the growth or in-state college enrollment to the Millennium program).

as either.”¹⁵⁴ Using HOPE’s basic tenets as a framework, the Tennessee legislature formulated TELS for a broader base of students. Policymakers intended the program’s criteria to include students with the most financial need, so after consideration of a multitude of merit aid program iterations, the Education Lottery Scholarship offers three different ways students can earn the scholarship.¹⁵⁵ Base scholarships of \$3000 are awarded to students with a 3.0 grade point average or an ACT score of 19.¹⁵⁶ Supplemental awards are available one of two ways: if a student maintains a 3.75 grade point average and a score of 29 on the ACT, or if a student lives with a total family income below \$36,000 and meet the program’s base criteria.¹⁵⁷ There is also an Access award which is equal to one-half of the base scholarship with a need supplement of \$2000 for students graduating with a grade point average of 2.75 and ACT score of 18.¹⁵⁸

Because TELS also targets needy students, its success also focuses on the impact of the program on minorities and the poor. Research shows that compared to Louisiana, which has a greater overall proportion of African-Americans, the number of eligible scholarship recipients in Tennessee more than doubled.¹⁵⁹ The research demonstrates that the TELS also was successful in achieving its established objectives for the program, even though its methodology differs drastically from every other state-funded merit-aid program. This success raises the question of whether

154. ERIK NESS & BRIAN NOLAND, TARGETED MERIT AID: TENNESSEE EDUCATION LOTTERY SCHOLARSHIPS 12 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/c5/b7.pdf (highlighting the uniqueness of this program because it does not fit under the traditional classifications of merit or need aid).

155. *Id.* at 7–8 (“[N]ational and state education leaders from higher education provided information and advice . . . [which] often disaggregated to allow elected officials to consider how students in their districts would fare under various scenarios.”).

156. *Id.* at 8 (detailing the three ways students can earn a TELS award to be more inclusive of minorities and the poor). Originally, Tennessee lawmakers did not consider the 3.0 GPA and a score of 19 on the ACT as base criteria. *Id.* Rather, it was initially written as an “and” provision. *Id.* However, “it appears that this change was initially based on legislators’ concerns that too few low-income and African-American students would qualify.” *Id.* Because income gaps were also rejected, the only way to assuage the disparate impact experienced in other states was to broaden eligibility. *Id.*

157. *Id.* (describing the second level of TELS awards).

158. *Id.* (describing the third level of TELS awards).

159. ERIK NESS & BRIAN NOLAND, TARGETED MERIT AID: TENNESSEE EDUCATION LOTTERY SCHOLARSHIPS 11 (2004), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/c5/b7.pdf (comparing the success of TELS for African-American students with that of another state with a higher percentage of African-American students).

the TELS program could and should replace Georgia HOPE as the model for future merit-aid programs.

C. *Evaluating the Success of Merit Scholarship Programs Outside the United States*

Due to certain issues facing the nation's higher education system, including discrimination, socioeconomic disparity, and inequality of access, it is difficult to qualify and quantify the success of merit programs in the United States. To measure the overall success of merit-based aid, perhaps it is helpful to evaluate a merit scholarship program outside of the United States.

Researchers studied a merit program in Kenya, which awarded scholarships to girls who performed well in public school.¹⁶⁰ Not only did test scores significantly improve, but other beneficial effects were felt; the test scores of students not eligible for the scholarship also improved as did attendance for students and teachers.¹⁶¹ The research also compared the cost-effectiveness of a variety of school intervention programs that had recently been studied in Kenya – merit scholarships, teacher incentives, textbook provision, flip-chart program, de-worming, and child sponsor-

160. See Michael Kremer et al., *Incentives to Learn: Merit Scholarships That Pay Kids to Do Well*, 4 EDUC. NEXT 57, 58 (2005), available at http://media.hoover.org/documents/ednext20052_57.pdf (introducing the research study). “We collected evidence from a program in Kenya, in which girls in public schools who performed well were offered merit scholarships that covered the cost of the fees charged by public schools at the time.” *Id.*

161. See *id.* at 61–63 (evaluating the scholarship program's effect on test scores and attendance).

We looked at the combined sample in both districts for children in grade 6 in 2001, finding that the scholarship program raised test scores significantly, by 0.12 standard deviations on average, in 2001 and 2002. Surprisingly, there was no statistically significant difference in the effect of the program on girls and its effect on boys, indicating that the program also indirectly benefited students who were not eligible for the scholarships. *Id.* at 61.

Not only did test scores, but attendance rates did too. In one district, student attendance rose as much as five percent for both girls and boys, while teacher attendance rose 6.5%. *Id.* at 62.

The study links teacher attendance to the rise in test scores by students who had no hope for receiving an award and states, “[t]his finding provides a plausible explanation for the positive ancillary benefits experienced by boys in Busia program schools, namely greater effort directed to the class as a whole.” *Id.*

ship.¹⁶² The conclusion was that merit scholarships were a highly cost-effective option to improve both attendance and test scores.¹⁶³

Merit scholarship programs have historically been utilized throughout the world and now external evidence from Kenya provides support for a more widespread use of state merit programs in the United States.¹⁶⁴ The Kenyan program suggests that awards based on merit can induce added effort to increase test scores as well as encourage ineligible students to work harder.¹⁶⁵ Boosting study efforts amongst students improves the overall learning environment of the classroom,¹⁶⁶ so “states that desire to focus students’ attentions would be wise to consider merit-based scholarship programs . . . [for] they have the potential for wide-ranging benefits.”¹⁶⁷

162. *See id.* at 57 (comparing the cost-effectiveness of merit scholarships with that of other intervention programs that were being used in Kenya at the time).

Finally, when we compared the cost-effectiveness of six primary school interventions that had recently been evaluated in the Kenyan study area—the merit scholarship program that is the focus of this paper, a teacher incentive program, a textbook provision program, a flip-chart program, a deworming program, and a child sponsorship program that provided a range of education resources, including free uniforms—we found that cash incentives were a highly cost-effective way to improve both test scores and attendance. *Id.* at 62–63.

163. *Id.* at 62–63 (concluding the program an overall cost-effective success for school performance improvement). Although more advantaged students benefited from the Kenya program, groups of girls who had little chance of actually winning the award academically improved enough to make it a cost-effective benefit to them as well. *Id.* “Still, groups with little chance at winning an award, including girls with low initial test scores, gained enough academically from the merit scholarship program to make it cost-effective for them, too.” *Id.* at 64.

164. *Id.* (explaining that the research found the Kenya program to be successful). The girls who participated in the girls scholarship program were chosen randomly, enabling the researchers to reliably gauge the program’s effect through comparison of the students’ test scores during 2001 and 2002 with those of students in schools that did not use the program. *Id.*

The important lesson from Kenya, though, is that while most education research focuses on the effect of material inputs such as class size or of school organization on student outcomes, this work suggests that the most important input in the education production function may very well be the study effort on the part of the child—effort that may be significantly enhanced by the promise of material rewards. *Id.* at 64.

165. Michael Kremer et al., *Incentives to Learn: Merit Scholarships That Pay Kids to Do Well*, 4 *EDUC. NEXT* 57, 58 (2005), available at http://media.hoover.org/documents/ednext20052_57.pdf (“Moreover, the program had salutary spillover effects: test scores of students who were not eligible for—or had no hope of earning—the award also improved[.]”).

166. *Id.* at 63 (“[The study] suggests that boosting study effort among students improves the learning environment in the classroom.”).

167. John H. Bishop, *Money and Motivation*, 4 *EDUC. NEXT* 63, 67 (2004) (discussing the benefits of merit-based scholarship programs like MEAP).

D. *Race and Scholarship: A Case Analysis*

While merit scholarships are not race-based, critics of them argue that such programs discriminate against minorities and the poor, primarily because awards are being disproportionately awarded to more White affluent students than minority or poorer students.¹⁶⁸ Some proponents of merit-aid programs recognize this legitimate concern.¹⁶⁹ The United States Fourth Circuit Court of Appeals examined the validity of race-based scholarships in *Podberesky v. Kirwan*.¹⁷⁰

In *Podberesky*, a Hispanic student brought suit against the University of Maryland, challenging the school's Banneker Program, a scholarship awarded exclusively to African-American students.¹⁷¹ The issue before the Court was whether the university could maintain a scholarship program that was available only to African-American students.¹⁷²

The University of Maryland established the Banneker scholarship to remedy past discrimination by the school against African-Americans.¹⁷³ The school claimed the existence of four present effects of past discrimination to justify the program: (1) the university's poor reputation in the Black community; (2) under-representation of African Americans amongst the student population; (3) low retention and graduation rates of African American students; and (4) a perceived hostile atmosphere on

168. Donald E. Heller, *The Changing Nature of Financial Aid*, 2004, at 36, available at <http://www.aaup.org/AAUP/pubsres/academe/2004/JA/Feat/hell.htm> ("Merit scholarships, whether provided by states or institutions, are awarded disproportionately to students from groups that already have the highest college participation rates in the nation—white, Asian American, and upper-income students.").

169. David Longanecker, *Is Merit-Based Aid Really Trumping Need-Based Student Aid?*, CHANGE, 2002, at 35 (stating that need-based aid increased at a faster rate than both inflation and enrollment combined). However, Longanecker adds:

This is not to suggest that needy students should not have received even more assistance, particularly given the reductions in inflation-adjusted funding for needy students that occurred in the 1980s and early 1990s. A strong case can be made for returning to the principles that guided the early years of federal and state financial aid policy. *Id.*

170. *Id.* ("The issue in this case is whether the University of Maryland at College Park may maintain a separate merit scholarship program that it voluntarily established for which only African American Students are eligible.").

171. *Podberesky v. Kirwan*, 38 F.3d 147, 152 (4th Cir. 1994) ("Podbersky is Hispanic; he was therefore ineligible for consideration under the Banneker Program, although he met the academic and all other requirements for consideration.").

172. *Id.*

173. Burt M. Fealing, *Race-Based Scholarships-Podberesky v. Kirwan*, 12 HARV. BLACKLETTER L.J. 177, 179 (1995) (establishing the purpose of the Banneker program).

the university campus toward Black students.¹⁷⁴ The Fourth Circuit previously determined whether certain race-conscious remedial measures could be sustained under the Constitution by establishing a two-part analysis.¹⁷⁵ First, the proponent of the remedy “must demonstrate a ‘strong basis in evidence for its conclusion that remedial action [is] necessary’ and second, ‘the remedial measure must be narrowly tailored to meet the remedial goal.’”¹⁷⁶ Accordingly, the Court determined that to implement a justifiable remedial program proponents must, at a minimum, show that the present effect was not only caused by past discrimination, but also that it was sufficiently immense to rationalize the program.¹⁷⁷ Regarding justification of the remedial goal, the Fourth Circuit did not engage in full analysis of that issue;¹⁷⁸ however, the Court held that the Banneker Scholarship Program was more outright racial balancing rather than a narrowly tailored remedy program, reasoning that “while the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.”¹⁷⁹ The past discriminations the University of Maryland cited to justify the Banneker Program were, according to the Court, products of societal discrimination which race-conscious remedies cannot be based upon.¹⁸⁰ In essence, programs such

174. *Podberesky*, 38 F.3d at 154–55 (citing *Md. Troopers Ass’n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) discussing the perpetuation of race-consciousness through the use of race as a reparational device designed to overcome race-consciousness).

175. *Id.* at 153 (citing *Md. Troopers Ass’n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) explaining how the two-step analysis implements the constitutional premise that race is “an impermissible arbiter of human fortunes.”).

176. *Id.* (citing *Md. Troopers Ass’n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) elaborating on the rationale behind each of the two criteria the court may use in determining whether race conscious measures are constitutional).

177. *Id.* at 154 (explaining why the district court’s holding was incorrect). The district court stated that the Banneker scholarship would be justified if the university found strong evidence, which supported any of the proffered effects. *Id.* The Court reasoned neither the university’s poor reputation amongst the African-American community nor the racially hostile climate on campus, standing alone, were justification for the Banneker program. *Id.*

178. *Id.* at 153–54 (reasoning that without searching judicial inquiry into the justifications for these type of race-based measures, there was no way to determine their classification). Whether such race-based measures are classified as “benign” or “remedial” or are motivated by illegitimate opinions of racial inferiority or racial politics is difficult to determine without going into an overall examination of these types of programs. *Id.*

179. *Podberesky*, 38 F.3d at 152 (“While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes.”).

180. *Id.* at 55. The Court analyzed the district court’s ruling, concluding that it could no longer be sustained because by assuming that every predominately white university

as the Banneker Scholarship are insufficient to justify race-conscious remedies because, due to the enormity of societal discrimination, there is no way for them to be narrowly tailored.

While merit-aid programs are not race-based scholarships implemented to benefit White students, opponents of merit-based aid stress that this is the outcome. Merit-based aid programs undeniably cause racial disparity in America's colleges and universities and call for a solution.

E. *Survival of the Fittest: The Social Darwinist Approach to Financial Aid*

Beliefs that America should be a country of individualists provide fertile ground for social Darwinist ideas.¹⁸¹ Most Social Darwinists adhere to the idea that too many provisions for social welfare threaten the natural selection of the fittest, giving a boost to the unfit instead of rewarding the fit through competitive struggle.¹⁸² In 1899, Yale president Arthur T. Hadley connected the social Darwinist concerns to financial aid as well as other college policies, saying that dominance by the wealthy at the expense of the poor jeopardized traditional college life.¹⁸³ More than a century later, Hadley's concerns are realized, evidenced by the popularity of merit scholarships and how they affect college access and enrollment for minorities and those of lower socioeconomic status.

discriminated in the past, at that point, they are confronting societal discrimination. *Id.* “[M]ere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.” *Id.* at 154. “There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland.” *Id.* at 155.

181. RUPERT WILKINSON, *AIDING STUDENTS, BUYING STUDENTS: FINANCIAL AID IN AMERICA* 97 (2005) (providing historical background on how America turned to social Darwinism). Over time, particularly after the immigration wave in the 1880s, urban poverty caused widespread concern and the question began to arise of how to preserve self-reliance and individual creativity in a dense social structure. *Id.*

182. *Id.* at 97–98 (“The challenge for those social Darwinists who wanted to preserve a humane and democratic society was how to organize individual effort and achievement – replicating the struggle for survival in a state of nature – in a way that extended social opportunity without diminishing individual initiative.”).

183. *Id.* (illustrating Yale President Hadley's concerns about wealth and dominance in the higher education system). In his inaugural address speech, Hadley expressed concern that wealthy students becoming too dominant would make poorer students feel repressed and college life would lose its “traditional spirit of democracy and loyalty.” *Id.* Hadley's solution was to place rich and poor on an equal footing by creating a community in which everyone lived together and all worked on a demanding common course curriculum. *Id.* As part of his solution, Hadley called for low-interest and interest-free loans to be widely available, with outright scholarships reserved as a prize for truly distinguished work. *Id.* at 98–99.

Reflective of the social Darwinism theory is the policy rationale which calls for the implementation of state-funded merit scholarship programs in order to promote the best and brightest students to our nation's colleges and universities. Applying social Darwinism, students with high grade point averages or test scores who are awarded merit scholarships, in essence, are deemed "the fittest," while those who do not receive such aid are assumed to be incapable of survival in an institution of higher learning. This notion flows from serious public misperceptions about education, ability, and low-income students.¹⁸⁴ Americans are relatively unconcerned about financial aid and college access because nearly half of them think most low-income students are unqualified to attend college.¹⁸⁵ Such a misperception is demonstrative of the fact that many Americans are comfortable with social Darwinism in the higher education system and see little need to change it; however, opponents of merit aid raise various issues that say otherwise, and given the statistics, their concerns are valid.

F. *Cost is Slamming the Door on Access*

Donald Heller, commenting on his study of merit-based financial aid programs expresses critics' concerns as "not saying [that] there should [not] be merit scholarships . . . but maybe people will ask themselves 'do we really want to give these scholarships to kids from families making \$100,000 to \$500,000 a year?'"¹⁸⁶ Understanding the impact of non-need-based aid is especially important considering the challenges facing post-secondary education in the near future.¹⁸⁷ According to researchers, in the next twelve years, colleges are likely to see increased enrollment of

184. Haley Chitty, Higher Education Policy and Practice Disconnect, <http://www.nasfaa.org/publications/2006/gncan041206.html> (last visited Mar. 21, 2008) (stating that higher education policy is not given priority by politicians because there are many misperceptions among the general public about college access for low-income students).

185. *Id.* (citing study conducted by Marty McGough of Widmeyer Communications). The study showed that for most Americans, higher education access for poor students was a high priority, but that various misperceptions made them relatively unworried about the issue. *Id.* Americans are misperceiving the current financial aid situation by believing: (1) that the federal Pell grant covers approximately half of attendance costs at a four-year public university; (2) that funding for need-based rather than merit-based scholarships are increasing; and (3) that the average debt of a college graduate is about \$10,000. *Id.*

186. Mark Clayton, *Merit Scholarships: Robin Hood in Reverse?*, CHRISTIAN SCI. MONITOR, Aug. 27, 2002, available at <http://www.csmonitor.com/2002/0827/p21s01-lehl.htm> (quoting Donald Heller and commenting on a report he published evaluating merit scholarship programs). "What this report shows is that public money is not being spent on those who need it – but on those who don't . . . it's almost like Robin Hood in reverse." *Id.*

187. Donald E. Heller, *State Merit Scholarship Programs: An Introduction*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT SCHOLARSHIPS 17, 20 (Donald E. Heller & Patricia Marin eds., 2002). ("Academic merit—measured in many

1.6 million undergraduates.¹⁸⁸ The income and racial profiles of this influx of entering undergraduates indicates that their need for grant and scholarship aid will grow faster than enrollment, placing even more pressure on already strained financial aid resources.¹⁸⁹

Also contributing to the strain of financial aid resources is the soaring cost of college tuition.¹⁹⁰ During the 2006-2007 school year, college tuition and fees amounted to twenty-four percent of median family income.¹⁹¹ Some leaders in higher education are not ignorant to the growing crisis in college tuition costs and what it means for minority and low-income students, recognizing that “[i]ncreasing disparity based on parental position has never been anyone’s definition of the American dream.”¹⁹² Supporting this ideal, Harvard University initiated a program in which parents whose income is less than \$40,000 per year are not expected to contribute toward the cost of attendance for their children.¹⁹³

The Harvard initiative is an encouraging sign that some universities are taking affirmative steps to broaden equality of access in the wake of the merit scholarship boom. It is the hope of need-aid supporters that initiatives which “create eligibility standards that promote equitable access to an increasingly large share of student financial aid expenditures”¹⁹⁴ will

different forms—has replaced financial need as the primary determinant for the awarding of scholarships in most of the new state grant programs developed over the past decade.”).

188. *Id.* (“Research conducted by Anthony P. Carnevale and Richard Fry (in press) shows that higher education is likely to face an increase in enrollments of 1.6 million undergraduates in the next dozen years.”).

189. *Id.* (“In addition, the income and racial profile of this influx of students indicates that the need for grants and scholarships to help pay for college will grow faster than the growth in enrollment, putting even more demands on financial aid resources.”).

190. Bridget Terry Long & Erin Riley, *Financial Aid: A Broken Bridge to College Access?*, 77 HARV. EDUC. REV. 39, 40 (2007) (discussing the various barriers to college access). The three major categories of college barriers are cost, academic preparation, and the complexity of the admissions and financial aid processes. *Id.* at 40–41.

191. *Id.* at 40 (stating that the average tuition and fees for a public four-year university was \$5836, with totals averaging \$12,796).

192. Lawrence H. Summers, President, Harvard University, Remarks at the American Council on Education 86th Annual Meeting: Higher Education and the American Dream (Feb. 29, 2004) (“Going back to the beginning of the Republic, and Jefferson’s view that virtue and talent were sown as liberally among the poor as the rich, the contribution of education and especially higher education to equality of opportunity has been a central concern.”).

193. *Id.* (describing the initiatives implemented at Harvard University to address access and equality). “In addition, Harvard will reduce the contributions expected of families with incomes between \$40,000 and \$60,000 [.]” *Id.*

194. DONALD E. HELLER & CHRISTOPHER J. RASMUSSEN, DO MERIT SCHOLARSHIPS PROMOTE COLLEGE ACCESS? EVIDENCE FROM TWO STATES 22 (2001), available at http://www.personal.psu.edu/deh29/papers/ashe_merit01.pdf (encouraging states to consider the criteria used to award merit scholarships and to create standards that would broaden ac-

become the trend. But what is driving those universities that are looking for states to expand merit scholarship programs? As in every other market-based venture, it is the cost to compete.

1. University Focus is on Competition, Not Access

Around the time need-based aid began to shift to merit is about when financial aid began its capitalism journey. Where financial aid was once thought of as providing benefits for students and society alike, there is now “a collective public policy attitude that views higher education as more of a private benefit than a public good.”¹⁹⁵ This attitude manifests itself into policy that expects larger individual contributions to education costs since it is individuals who will be accruing the benefits.¹⁹⁶ Universities echo this attitude, engaging in a practice called tuition discounting.

Tuition discounting, also called price discrimination, is “charging different students different prices for the same educational opportunities.”¹⁹⁷ Tuition discounting increases the likelihood certain students will choose to enroll. Until now, tuition discounting was more common in the private sector, but its use is up in public institutions.¹⁹⁸ Discounts in tuition are

cess). “While merit scholarship programs have broad political support and possess wide popular appeal, policymakers need to be aware of the distortional impact of such programs and the concomitant negative implications for the expansion of equality of educational opportunity.” *Id.*

195. Haley Chitty, Higher Education Policy and Practice Disconnect, <http://www.nasfaa.org/publications/2006/gncan041206.html> (last visited Mar. 21, 2008) (quoting William Kirwan, Chancellor of the University System of Maryland). William Kirwan also stated, “High-ability, low income students attend college at the same rate as low-ability, high-income students.” *Id.*

196. *Id.* (emphasizing that higher education policy has become misguided in recent years). According to Jamie Merisotis, the founding president of the Institute for Higher Education Policy, recent policy on higher education such as federal funding of postsecondary education, the debate over the Higher Education Act reauthorization, and the president’s latest budget demonstrate policymakers’ perception that a college education benefits individuals; therefore, those individuals should bear the brunt of the cost. *Id.* “Whatever the rhetoric may be, the reality is that we have lost the debate about the public good that higher education contributes to our society.” *Id.*

197. SANDY BAUM & LUCIE LAPOVSKY, TUITION DISCOUNTING: NOT JUST A PRIVATE COLLEGE PRACTICE 1 (2006), available at http://www.collegeboard.com/prod_downloads/press/tuition-discounting.pdf (defining tuition discounting as the billing of different rates for different students on identical educational opportunities).

198. *Id.* (“The practice of tuition discounting or price discrimination—charging different students different prices for the same educational opportunities—is a long-standing feature of private higher education institutions,” and later illustrating that “[o]ver the decade beginning in 1994-95, the discount rate increased by about [six] percentage points in two-year public institutions [and] [three] percentage points in four-year public colleges and universities”).

frequently provided to students with inadequate financial resources,¹⁹⁹ but with the expansion of merit-based aid programs, the controversy surrounding price discrimination now focuses on how institutions strategically use grant aid to compete with other institutions.²⁰⁰ This “financial aid ‘leveraging’ may be used to alter the profiles of students attending the institution—usually to improve the perceived academic profile of the institution, to increase net revenues, or simply to fill empty seats.”²⁰¹ Financial aid leveraging in the form of merit scholarships attracts certain types of students, thereby improving an institution’s profile in the university ranking system. Rankings of colleges and universities in magazines and newspapers are important marketing devices for institutions,²⁰² frivolously encouraging competition in higher education rather than working to expand and improve access.

Colleges place tremendous significance upon the recruitment of the best and brightest students, particularly with the highly influential rankings systems in magazines such as *U.S. News & World Report*, which rate

199. *Id.* at (“Discounts to published tuition and fee rates are most often provided to students whose financial resources are inadequate to allow them to enroll without some form of assistance[.]”).

200. *See id.* (“The controversy about tuition discounting centers primarily on the strategic use of institutional grant aid of the purpose of competition with other institutions.”). According to evidence by the National Postsecondary Student Aid Study, lower-priced private universities are distributing a disproportionate amount of institutional aid to middle and upper-income students. *Id.*

201. *Id.* (demonstrating how universities discount tuition to aid students who could afford to attend without assistance). The merit-based aid might be awarded to a student with financial need, but often, it is instead given to students who are able to pay, but are simply unwilling to pay the full published tuition price to attend a specific university. *Id.* *See also* KATI HAYCOCK, PROMISE ABANDONED: HOW POLICY CHOICES AND INSTITUTIONAL PRACTICES RESTRICT COLLEGE OPPORTUNITIES 7 (2006) (emphasizing how institutions significantly reduce tuition including for wealthy students whose families could afford the full price of attendance). Schools will engage in this financial leveraging in order to increase the likelihood that they will meet other goals, primarily recruiting high-achievers to raise national ranking points. *Id.*

202. Marguerite Clark, *The Impact of Higher Education Rankings on Student Access, Choice, and Opportunity*, in COLLEGE AND UNIVERSITY RANKING SYSTEMS: GLOBAL PERSPECTIVES AND AMERICAN CHALLENGES 35 (Inst. for Higher Educ. Policy ed., 2007), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/9d/af.pdf (discussing the impact of university rankings on higher education). Over the past twenty years, as higher education rankings emerged around the world, they have increasingly played an important role as not only informational tools for prospective students, but also marketing devices for colleges and universities. *Id.* “The growing demand for rankings is fueled by several trends in higher education, including increasing participation rates, higher costs, and the view of students as consumers who expect value for money.” *Id.*

universities on a variety of factors.²⁰³ “However, the fact that colleges emphasize *recruiting* smart students much more than *developing* smart students has important consequences.”²⁰⁴ The consequences regarding access vary, but tend to be especially negative for minority and low-income students.²⁰⁵ “Access can be defined as ‘the process of enabling entry to higher education.’”²⁰⁶ From this definition, there may be an examination of access in relation to university policies and procedures, which directly affects admission for traditionally underrepresented students.²⁰⁷ The rankings effect on institutional policy and behavior is evidenced in the stratification of the higher education system by income and race where minority and low-income students are concentrated in lower-priced, less selective institutions.²⁰⁸ Commercial rankings are exacerbating the stratification of postsecondary education by creating incentives for colleges and universities to recruit students that will be assets for the schools in terms of enhancing or maintaining their place in the rankings.²⁰⁹ Some universities enhance their ranking by actually excluding in-

203. Randy Moore, *Do Colleges Identify or Develop Intelligence?*, 28 J. DEVELOPMENTAL EDUC. 28, 28 (2004), available at <http://www.salisbury.edu/campusgov/facsenate/06-07/docs/sat%20docs/Do%20Colleges%20Identify%20or%20Develop%20intelligence.pdf> (pointing out that university rankings are based upon a variety of factors that range from endowment and alumni contribution to library holdings). The authoritative influence of the “rankings issues” of magazines like *U.S. News & World Report* is evident from the fact that the issues are the magazine’s best-sellers, usually selling twice the number of copies of a regular issue. *Id.*

204. *Id.* (examining how university ranking systems affect entry and enrollment).

205. Marguerite Clark, *The Impact of Higher Education Rankings on Student Access, Choice, and Opportunity*, in COLLEGE AND UNIVERSITY RANKING SYSTEMS: GLOBAL PERSPECTIVES AND AMERICAN CHALLENGES 35, 36 (Inst. for Higher Educ. Policy ed., 2007), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/9d/af.pdf (evaluating the impact of higher education rankings in the United States compared to that of other countries in the world).

206. *Id.* (quoting L. Harvey, *Analytic Quality Glossary*, QUALITY RES. INT’L, 2004, <http://www.qualityresearchinternational.com/glossary/access.htm>).

207. *Id.* (asserting that because the ranking systems affect institutional behavior, the ranking systems therefore affect the ability of underrepresented students to obtain access to the higher ranking schools).

208. *Id.* at 37 (concluding that university ranking systems reinforce the effects of aggressive competition in higher education). “This stratification has been exacerbated in recent years by a relative decline in state expenditures for higher education, increased tuition costs for individual students, and demise of race-based affirmative action in several states.” *Id.* “At least some of these adverse outcomes are related to the student selectivity indicators used in rankings, and highlight the need for rankings that reward schools for how well they have educated students as opposed to how selective they have been in recruiting them.” *Id.*

209. *Id.* (showing how ranking system contributes to the stratification of minorities and the poor). Stratification worsened with a relative decline in state appropriations for higher education, higher tuition costs for students, and the diminishment of race-based

formation regarding affirmative action admission policies or other racial diversity programs.²¹⁰ Universities resorting to abhorrent practices such as these to compete signify a tragic breakdown in our higher education system. College, a place to learn to think critically and speak effectively is being diminished by competition for the best rankings and test scores. The incentives offered by universities seem directly correlated to the selectivity indicators utilized by commercial rankings which include test scores and high school rank.²¹¹ To improve performance on these indicators and receive higher ranking points, schools strategically implement early admissions, invest in student consumption benefits, and offer larger sums of merit aid.²¹²

Strategizing to recruit certain types of students over others in the name of competition and rank dangerously swings the equality pendulum in the direction of discrimination. Engaging in these activities only reinforces “the effects of broader market-based and competitive forces in higher education.”²¹³ Quantifying university excellence by resources, academic reputation, and SAT scores alone rather than giving credit for activities such as campus diversity, recruitment and graduation of minority students, and recruitment of minority faculty grossly “ignore[s] the societal

affirmative action programs in several states. *Id.* See also Randy Moore, *Do Colleges Identify or Develop Intelligence?*, 28 J. DEVELOPMENTAL EDUC. 28, 29 (2004), available at <http://www.salisbury.edu/campusgov/facsenate/06-07/docs/sat%20docs/Do%20Colleges%20Identify%20or%20Develop%20intelligence.pdf> (supporting the argument that rankings cause stratification of minorities and the poor). Schools that stress SAT scores but not diversity usually rank higher in *U.S. News & World Report* than “schools that are strongly committed to affirmative action programs and racial diversity.” *Id.*

210. Randy Moore, *Do Colleges Identify or Develop Intelligence?*, 28 J. DEVELOPMENTAL EDUC. 28, 29 (2004), available at <http://www.salisbury.edu/campusgov/facsenate/06-07/docs/sat%20docs/Do%20Colleges%20Identify%20or%20Develop%20intelligence.pdf> (“Access to top-tier colleges and universities [are] skewed by race[,] . . . ethnicity and . . . socioeconomic status.”). “African Americans and Hispanics constitute only 6% of the freshman class of the 146 most selective 4-year colleges, yet they constitute 15% and 13% respectively of all 18-year-olds attending college.” *Id.* Only three percent of the student population at the more selective schools are from families in the lowest socioeconomic percentile. *Id.*

211. Marguerite Clark, *The Impact of Higher Education Rankings on Student Access, Choice, and Opportunity*, in COLLEGE AND UNIVERSITY RANKING SYSTEMS: GLOBAL PERSPECTIVES AND AMERICAN CHALLENGES 35, 37, (2007), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/9d/af.pdf.

212. *Id.* (illustrating the activities universities engage in to raise their ranking). Awarding merit-based aid to reduce the cost of attendance allows colleges and universities to purchase talent that will improve their profiles for commercial rankings. *Id.*

213. *Id.* at 36.

purposes of education.”²¹⁴ Promoting access to higher education may be more appropriate than rewarding achievement.²¹⁵

Institutions wishing to climb in the rankings define excellence not by the knowledge and skills students attain while attending college, but rather by what they already know when they arrive.²¹⁶ So long as universities continue to identify instead of develop intelligence, postsecondary education will continue to provide advantages to students who already have them, while keeping other students in their economic place.²¹⁷

2. Who is Getting the Reward? A Look at the Racial Disparities of Merit-Aid

a. Re-examing Michigan MEAP

A critical re-examination of the MEAP program supports critics' contentions that the program is benefiting White, affluent students. Despite wide support for Michigan's adoption of a state curriculum test for MEAP eligibility over the use of an SAT or ACT alone, “[a] second body of research [which] . . . examines the relationship between students' socioeconomic characteristics and the results of standardized tests”²¹⁸ raises

214. Randy Moore, *Do Colleges Identify or Develop Intelligence?*, 28 J. DEVELOPMENTAL EDUC. 28, 29 (2004), available at <http://www.salisbury.edu/campusgov/facsenate/06-07/docs/sat%20docs/Do%20Colleges%20Identify%20or%20Develop%20intelligence.pdf>.

For example, the ranking systems give no credit to a school for achieving a diverse campus, producing a family's first generation of college graduates, recruiting and graduating minority students, or recruiting and retaining minority faculty. Instead, such reports define excellence and rank the quality of colleges and universities largely by resources, SAT scores, and academic reputation. Emphasis on these factors “diverts attention from the many social, economic, cultural, and political factors that influence academic performance.” *Id.*

215. Kiana S. Lane, *The Dark Side of HOPE: Crowding Out Need-Based Financial Aid?*, 2 POL'Y MATTERS 17, 18 (2004) (“When a person's eligibility for such public largesse depends solely on the ability to be admitted to college, the subsidies are bound to benefit higher-income youth disproportionately because they are more likely to have the academic preparation in high school to succeed in college.”).

216. Randy Moore, *Do Colleges Identify or Develop Intelligence?*, 28 J. DEVELOPMENTAL EDUC. 28, 29 (2004), available at <http://www.salisbury.edu/campusgov/facsenate/06-07/docs/sat%20docs/Do%20Colleges%20Identify%20or%20Develop%20intelligence.pdf> (defining excellence in education by what students learn while attending college).

217. *Id.*

218. Donald E. Heller & Christopher J. Rasmussen, *Merit Scholarships and College Access: Evidence from Florida and Michigan, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS* 27, 30 (Donald E. Heller & Patricia Marin eds., 2001), available at <http://www.civilrightsproject.ucla.edu/research/meritaid/4MIFLHellerch2.pdf> (arguing the use of standardized tests to determine award eligibility discriminates against minority and poorer students). “Since these programs award scholarships based on test performance, differences in performance among varying groups of students help explain how the scholarships can have differential effects.” *Id.*

doubts as to what kind of equality bar it sets. Studies have found significant achievement gaps between White and Asian-American students and African-American and Hispanic students as well as between high and low socioeconomic status students.²¹⁹ Gaps in performance are noted consistently in various reports,²²⁰ supporting the contention that race and socioeconomic status can effect standardized test scores, thereby adversely affecting those students' chances for a MEAP award. With such a strong relationship between socioeconomic status and test performance, researchers expected substantial variations in the number of MEAP awards distributed.²²¹ That was the result. Hispanic and African-American students qualified for scholarships at considerably lower rates than their White or Asian-American counterparts,²²² meaning the numbers demonstrate the disparate outcome in Michigan.

Despite support for the MEAP exam and merit program, the disparate outcome for Michigan's minority and low-income students is undeniable. The research shows vastly larger numbers of merit scholarships being awarded to White students over minorities. Even though MEAP utilizes a test purported to be a fair means of award assessment, the link between race and socioeconomic status and poor test performance cannot be ignored. The glaring disparities present in Michigan must be addressed with a more balanced, conscientious system, which expands opportunity for underrepresented students.

b. Judging the "Gold Standard": How HOPE Really Stacks Up

Just as the viewed success of merit programs could not be discussed without an evaluation of Georgia HOPE, the same is true of the program's effect, or more correctly, non-effect on minority and low-income youth. Even the best gold tarnishes, and HOPE's is the unequal distribution of scholarships to minorities.

219. *Id.* at 27 (illustrating the effect of race and socioeconomic status on standardized tests). The gaps persist no matter what learning outcome is measured. *Id.*

220. *Id.* at 30 ("The gaps in test performance have been found consistently in reports from the National Assessment of Educational Progress (NAEP)[.]"). The NAEP is a federal program that has conducted national testing of students in different subjects since 1969. *Id.*

221. *Id.* (hypothesizing that with the research connecting socioeconomic status so closely to test performance that minority and low-income students would not perform as well on the MEAP exam, creating a disproportionate number of awards distributed to high school students).

222. *Id.* (providing results of the research findings on the 1999 distribution of merit scholarships in Michigan). Nearly 31,000 White students received scholarships compared to 1217 African-American students. *Id.* at 32. Hispanic students received 601 compared to 964 Asian-American students. *Id.* at 32.

Statistics show HOPE increased college attendance in Georgia overall, but it was not shared equally.²²³ Enrollment grew for families with incomes above \$50,000 by 11.4%.²²⁴ In contrast, students whose family incomes were below \$50,000 saw no effect at all on enrollment.²²⁵ What explains this drastic difference? Graduates with family incomes above \$50,000 who also met HOPE eligibility criteria automatically qualified for the scholarship by completing a simple, one-page form.²²⁶ Families with incomes less than \$50,000 applied for federal aid by completing “a complex, four-page form and waited several months to learn the size of their grant award[.]”²²⁷ Higher-income families began the HOPE application process with an advantage over poorer families – a simple one-page form. The very research which states low-income and minority students are less likely to graduate high school and even less likely to attend college also reveals that the lower-educated families are forced to navigate through four pages of complex government forms, while families with more education receive a one-page form. There is no evidence to show that assistance is offered to low-income families in filling out the federal aid forms, so the HOPE process, from the starting gate, places minorities and the

223. Susan Dynarski, *Race, Income, and the Impact of Merit Aid, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS* 75, 80 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilright-project.ucla.edu/research/meritaid/7Dynarskich5.pdf> (noting higher income students were more likely to increase their postsecondary schooling than students of low income). “As a result, in Georgia, higher-income youth increased their attendance relative to lower-income youth by 12.8 percentage points more than they did in the other southeastern states.” *Id.*

224. *Id.* (comparing rate of enrollment increases in Georgia compared to that of other Southern states). The results regarding income should be interpreted cautiously because family income is actually known for only a select part of the data. *Id.* This type of sample selection can produce biased estimates; however, that bias would have to have been “[i]mprobably large in order to negate the conclusion that HOPE has widened the income gap in college attendance in Georgia.” *Id.*

225. *Id.* (explaining why enrollment increased for higher-income families). “By contrast, the program appears to have had no effect at all on enrollments for Georgia youth from lower-income families.” *Id.*

226. *Id.* at 80–81 (comparing rate of enrollment increases in Georgia to that of other Southern states). “During the period under study, Georgia high school graduates with annual family incomes over \$50,000 who met the high school grade requirement automatically qualified for HOPE by filling out a simple one-page form.” *Id.*

227. *Id.* at 81 (explaining the starkly different processes high and low-income families had to use to apply for federal aid and HOPE).

Those with lower incomes, by contrast, applied for federal aid with a complex, four-page form and waited several months to learn the size of their grant award, which was then deducted from their HOPE scholarship. As a result, lower-income students received HOPE scholarships that were both smaller and more uncertain than those received by their better-off peers. *Id.*

poor at a disadvantage. Poorer students were also less likely to meet academic requirements to be eligible for a HOPE scholarship.²²⁸ The first year of HOPE, of high school seniors intending to go to college, 24.4% of high socioeconomic status had the requisite GPA of 3.5, compared to only ten percent of students from low socioeconomic status.²²⁹

Tied to low socioeconomic status, race also played a factor in the disproportionate distribution of HOPE scholarships. HOPE had more effect on Whites than Blacks because they tend to have higher incomes²³⁰ and higher grade point averages.²³¹ Some research found the disparity amongst Blacks is not just in meeting the eligibility requirements to get a HOPE scholarship. Black students at the University of Georgia were twice as likely as White students to lose their scholarship after their freshman year²³² resulting in an education the state may give them, the state may take away. This raises questions regarding support at the institutional level for students who may be entering college from lower performing schools. Minority students who met the grade requirement for a HOPE scholarship from a low-performing school are disadvantaged at the university level when competing with non-minority students who met the HOPE requirement from high-performing schools. That disadvantage should not prevent those students from succeeding at the university level. In general, colleges and universities provide resources for incoming freshman; however, a concentrated effort must be made for transitional assistance for students coming from low performing schools. Since the

228. Susan Dynarski, *Race, Income, and the Impact of Merit Aid*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS 75, 81 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilright-sproject.ucla.edu/research/meritaid/7Dynarskich5.pdf> (stating the discriminatory effect of the academic requirements of HOPE regarding income levels of youth). “[L]ow-income youth are less likely to meet the academic requirements of HOPE.” *Id.*

229. *Id.* (citing results from the National Center for Education Statistics). “Among high school seniors in 1993 who intended to go to college, 24.4[%] of those of high socioeconomic status (SES) had a grade point average of at least 3.5 while just [ten] percent of those from low SES families had grades that high.” *Id.*

230. *Id.* at 81–82 (stating that HOPE has significantly increased White college-youth schooling, while having little to no effect, even negative, on Black college-going youths).

231. *Id.* at 82 (showing that a considerably smaller proportion of Blacks met HOPE’s academic requirements).

232. *Id.* (citing Patrick Healy, *HOPE Scholarships Transform the University of Georgia*, CHRON. HIGHER EDUC. 32 (1997)). Indicating that Blacks are affected more negatively by HOPE’s college GPA requirements than whites. *Id.* Patrick Healy, *HOPE Scholarships Transform the University of Georgia*, CHRON. HIGHER EDUC. (1997), available at <http://chronicle.com/colloquy/97/inflation/background.htm>. “Roughly equal proportions of white and black students enter the university with the scholarship, but black freshmen are much more likely than their white classmates to lose it. About [fifty-five] percent of white freshmen carry HOPE into their sophomore year; about [twenty-seven] percent of black freshmen do.”

common goal of all of these merit-aid programs is college enrollment, and ultimately, graduation, there should not be any resources spared to ensure that opportunity for everyone. The goal is access and opportunity, not a guarantee of completion and these solutions increase those possibilities.

The findings regarding certain aspects of the HOPE program at first glance seem inconsistent as some studies “conclude that more Blacks enrolled at Georgia’s colleges after HOPE was introduced.”²³³ However, according to Dynarski, that conclusion is simply reconciled by her finding that HOPE has not impacted the attendance rate of Black students choosing to attend college in any state, not just within Georgia.²³⁴ In essence, the vast difference in the percentages still raises grave questions regarding the amount of support and resources being made available to poorer schools and districts as these numbers are representative of an affliction present not only in Georgia, but throughout the country’s school system.

IV. CONCLUSION

There is nothing inherently wrong with wanting to reward meritorious performance. The statistics from states that adopted merit aid programs

233. Susan Dynarski, *Race, Income, and the Impact of Merit Aid*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS 75, 82 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilrightsproject.ucla.edu/research/meritaid/7Dynarskich5.pdf> (citing Christopher Cornwell & David B. Mustard, *Race and the Effects of Georgia’s HOPE Scholarship*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS 59, 65 (Donald E. Heller & Patricia Marin eds., 2002)). “Between 1993 and 1997, HOPE raised the enrollment rates of blacks at four-year public and private by [twenty-one] percent and [sixteen] percent, respectively.” Christopher Cornwell & David B. Mustard, *Race and the Effects of Georgia’s HOPE Scholarship*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS 59, 65 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilrightsproject.ucla.edu/research/meritaid/6Cornwellch4.pdf>.

234. Susan Dynarski, *Race, Income, and the Impact of Merit Aid*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT AID SCHOLARSHIPS 75, 82 (Donald E. Heller & Patricia Marin eds., 2002), available at <http://www.civilrightsproject.ucla.edu/research/meritaid/7Dynarskich5.pdf> (explaining the difference between her research methodology and that of Cornwell and Mustard). Assume the only impact HOPE had on Black Georgia students was those who would not have gone to college otherwise out state instead chose to attend a Georgia university. *Id.* In that scenario, Cornwell and Mustard’s research indicates HOPE increased Black enrollments in Georgia, while the data from Dynarski’s research indicates no attendance increase of black students from Georgia. *Id.* In other words, Dynarski’s research measures whether Black students attended college in any state versus Cornwell and Mustard’s research measures how many Black attended college in Georgia. *Id.*

illustrate, undeniably, that merit scholarships succeeded in increasing high school graduation rates, raising standardized test scores, and improving college enrollment, but only for certain groups. Because the public policy purpose of merit aid programs do not specifically exclude any legally suspect groups and any high school graduate can qualify for merit scholarships, supporters claim it is difficult to argue state-funded merit scholarships discriminate against minorities and the poor; however, research showing more scholarships being rewarded to Caucasian and affluent students can hardly be dismissed. Moreover, it is disagreeable to assert that, “connecting [the] policy with the outcomes stated . . . are less important than establishing that policymakers may in fact be responding to a verifiable characteristic of their state in creating these programs.”²³⁵ Discrimination in practice is purely unacceptable. That the governing act is shrouded in policy language that does not lessen its discriminatory effect.

States and universities claim commitment to need-based aid, yet a significant portion of the larger merit rewards goes to targeted students, which is most likely creating a growing inequality in the financial aid system.²³⁶ Committing to need-based aid without something more is insufficient. The best way to broaden access while rewarding merit is to implement a hybrid-model merit program that utilizes targeted merit-aid to satisfy formulaic fairness, but that also takes into account subjective measures similar to those used in admissions. Using the targeted merit-aid program of Tennessee as a model, rather than Georgia HOPE, is a good start. By having a system with varied reward levels, the TELS program is not only available to more students, but is conscientious of the racial and socioeconomic disparities merit-aid purports. Because states offer merit scholarships in large part to retain students in-state and to build an enriched freshman class in their colleges and universities, a modified TELS program would achieve both goals while expanding access.

235. William R. Doyle, *Adoption of Merit-Based Student Grant Programs: An Event History Analysis*, 28 *EDUC. EVALUATION & POL'Y ANALYSIS* 266 (2006) (commenting on how the adoption of certain state policies should be viewed).

Several policy rationales for the adoption of merit aid programs have been suggested. These include improving low student achievement, reducing the number of students who leave the state to attend college elsewhere, increasing the number of college graduates in the state, and increasing the proportion of high school graduates who go on to college. Each of these, or some combination of the above, has been stated as the reason for creating these programs. *Id.*

236. YUKO MULUGETTA, POSSIBLE LONG TERM EFFECTS OF AWARDED MERIT AID 2, 4 (1999), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/db/e4.pdf (noting the long term consequences of current merit-aid programs).

Understandably, states will require a program that utilizes a formulaic approach for fairness, but it must also consider subjective measures similar to those used in admissions. For instance, a student who has exhibited community leadership, engaged in volunteer work, or held leadership positions in their schools are all attributes that would contribute to an enriched freshman class and university community. A student involved in his or her community through volunteerism and leadership promotes social awareness, in turn, heightening diversity. A hybrid merit system would not only provide states the formulaic approach attractive to policy-makers, but would also achieve the ultimate goals: broadening access and equalizing opportunity to our universities' doors.

This comment sought to determine whether state-funded merit scholarship programs discriminate against minorities and the poor. In finding that the implementation of these programs indeed discriminates, the solution presented is a viable alternative to current merit programs in that it promotes high achievement in the classroom and involvement in the community, which benefits government, institutions, and society. The pursuit of higher education requires great passion and strength of conviction to reap the rewards it supplies for so many. All that is required is a chance: the opportunity to step through university doors to learn what so many college students and graduates are privileged to already know. That it is “[here] the seeds [are] planted . . . that for the individual, education is the path to achievement and fulfillment; for the Nation, it is a path to a society that is not only free but civilized; and for the world, it is a path to peace – for it is education that places reason over force.”²³⁷

237. President Lyndon Baines Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), *available at* http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu_whca370-text.shtm (discussing how the Higher Education Act would make a college education attainable for families that could not afford it). The initiative provided for the establishment of scholarships, interest-free loans, and work-study programs to assist students in paying college tuition. *Id.*