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MAKING STATE MERIT SCHOLARSHIP PROGRAMS MORE EQUITABLE AND LESS VULNERABLE

Aaron N. Taylor*

Since the 1993 arrival of Georgia's Helping Outstanding Pupils Educationally (HOPE) Program, merit scholarships have become popular tools for states seeking to maximize human capital within their borders. However, research has concluded both that the bulk of merit scholarships goes to students with the least financial need and the popularity of these programs has led to a de-emphasis on need-based scholarship funding in some states. These trends are even more worrisome when these programs are funded by lottery revenue, as is the case with HOPE. Lotteries are inherently regressive because the people who play (and pay related taxes) tend to be poor and less educated. Therefore, when lottery revenue is distributed in the form of scholarships to higher-income recipients, this regressivity is exacerbated. This article presents two policy proposals for reducing socioeconomic and racial disparities in state merit scholarship awarding while also alleviating the fiscal pressures that tend to beset lottery-funded programs. The first proposal is to implement a need-based scholarship program with an early engagement component. The second proposal is to award merit scholarships using a "merit-aware" index.

INTRODUCTION

Since the 1993 arrival of Georgia's pioneering Helping Outstanding Pupils Educationally Program—colloquially, though incompletely, known as the HOPE Scholarship¹—merit scholarships have become popular tools for states seeking to maximize human capital within their borders. The goals and purposes of these programs often relate to encouraging students to engage and excel academically, keeping those deemed most talented from leaving the state, and encouraging higher education participation and attainment.² As many as 30 other states have

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¹ The HOPE Program is actually comprised of two scholarships, of which the HOPE Scholarship is one, along with the Zell Miller Scholarship. The Program also includes two grants—the HOPE Grant and the HOPE GED Grant. The scholarships are merit-based, taking into account grades and/or standardized test scores. Neither grades nor test scores are considered for initial grant eligibility. See, e.g., GACollege411, Georgia's HOPE Program, https://secure.gacollege411.org/Financial_Aid_Planning/HOPE_Program/default.aspx.

² TENNESSEE HIGHER EDUCATION COMMISSION, A COMPARISON OF STATES' LOTTERY SCHOLARSHIP PROGRAMS 5 (2012), <http://thec.ppr.tn.gov/THECSIS/Lottery/pdfs/SpecialReports/A%20Comparison%20of%20States'%20Lottery%20Scholarship%20Programs%20120717.pdf>.

instituted such programs since 1993,³ with eight of them, like HOPE, funded by state lottery revenue.⁴

For much of the 1990s, lottery revenue outpaced costs borne by these programs; but in the last decade as tuition rates have risen and more students have become eligible for the awards, the programs have encountered solvency issues.⁵ As a result, states have tightened eligibility criteria and placed other limitations on the awards.⁶ But even before states implemented these cost-saving measures, disparities between those most likely to receive the awards and those least likely were being observed. Research has concluded both that the bulk of merit scholarships goes to students with the least financial need⁷ and the popularity of these programs has led to a de-emphasis on need-based scholarship funding in some states.⁸ The fundamental nature of lotteries makes these trends even more worrisome. Lotteries are inherently regressive because the people who play (and pay related taxes) tend to be poor and less educated.⁹ Therefore, when lottery revenue is distributed in the form of scholarships to higher-income recipients, this regressivity is exacerbated.¹⁰

³ Christopher Cornwell & David B. Mustard, *Georgia's HOPE Scholarship and Minority and Low-Income Students: Program Effects and Proposed Reforms*, in STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 79 (Donald E. Heller & Patricia Marin eds., 2004), available at <http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf>.

⁴ States with lottery-funded merit scholarship programs are: Arkansas, Florida, Georgia, Kentucky, New Mexico, South Carolina, West Virginia, and Tennessee. TENNESSEE HIGHER EDUCATION COMMISSION, *supra* note 2, at 5.

⁵ See, e.g., Kathy Lohr, *Georgia's HOPE Scholarship Dwindles Amid Cutbacks*, NPR, Apr. 5, 2011, <http://www.npr.org/2011/04/05/135146704/georgias-hope-scholarship-dwindles-amid-cutbacks>. See, also, e.g., Brittany Shammass, *Bright Futures Scholarship Cuts Squeezing College Students as Tuition Increases*, NAPLESNEWS.COM, Jul. 10, 2012, <http://www.naplesnews.com/news/2012/jul/10/bright-futures-scholarship-cuts-squeezing-as/>.

⁶ See, e.g., Cornwell & Mustard, *supra* note 3 at 90 (explaining reforms undertaken by Georgia in order to stem HOPE Scholarship shortfalls). See, also, e.g., COLIN A. KNAPP, AN EVALUATION OF FLORIDA'S BRIGHT FUTURES SCHOLARSHIPS IN A FISCALLY CONSTRAINED ERA 7 (2012), http://www.jamesmadison.org/wp-content/uploads/Backgrounder_BrtFuturesSchlrshpEval_KnappFeb12.pdf (explaining reforms undertaken by Florida in order to stem Bright Futures Scholarship shortfalls).

⁷ CHRISTOPHER CORNWELL & DAVID B. MUSTARD, THE DISTRIBUTIONAL IMPACTS OF LOTTERY FUNDED AID: EVIDENCE FROM GEORGIA'S HOPE SCHOLARSHIP 13 (2001), <http://www.terry.uga.edu/hope/hope.lottery.pdf> ("The distribution of [scholarships] based on merit appears to provide funding disproportionately to relatively wealth counties with higher concentrations of whites, thus exacerbating the regressivity in lottery play.").

⁸ Donald E. Heller, *State Merit Scholarship Programs: An Overview*, in STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 15 (Donald E. Heller & Patricia Marin eds., 2004), available at <http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf>.

⁹ CORNWELL & MUSTARD, *supra* note 7, at 2.

¹⁰ *Id.* at 3. See, also, J. RODY BORG & MARY O. BORG, THE REVERSE ROBIN HOOD EFFECT: THE DISTRIBUTION OF NET BENEFITS FROM THE FLORIDA BRIGHT FUTURES SCHOLARSHIP 3 (2007), <http://stoppredatorygambling.org/wp-content/uploads/2012/12/The-Reverse-Robin-Hood-Effect-The-Distribution-of-Net-Benefits-From-the-Florida-Bright-Futures-Scholarship.pdf> (characterizing this trend as a "reverse Robin Hood effect").

Socioeconomic and racial disparities in the awarding of state-funded merit scholarships are restricting higher education access and choice among low-income students and those of color. Demographic trends, however, including the rise of college-age people of color, require that education access and choice be broadened and attainment be increased.¹¹ A critical component of increasing attainment is leveraging financial aid in effective and efficient ways. As demand for lottery scholarships further outstrips revenue, states must consider new ways to ensure the viability of the programs through increasingly efficient uses of these funds.

This article presents two policy proposals for reducing socioeconomic and racial disparities in state merit scholarship awarding while also alleviating the fiscal pressures that tend to beset the lottery-funded programs. The first proposal is to implement a need-based scholarship program with an early engagement component. The second proposal is to award merit scholarships using a “merit-aware” index.

Part I of this article provides a history of student aid, including the seemingly alternating prominence of the need-based and merit-based forms. Part II explains the problems associated with state merit aid programs, using Georgia’s HOPE and Florida’s Bright Futures, the two largest lottery scholarship programs, to illustrate salient issues. In Part III, the policy proposals are presented.

I: HISTORY OF STUDENT AID

The history of student aid is almost as old as American higher education itself. It began in 1643 with a gift of 100 pounds made to Harvard College by a wealthy English philanthropist, Ann Radcliffe.¹² This gift, “America’s first scholarship,” was intended to support “the yearly maintenance of a poor scholer (sp).”¹³ Radcliffe had three principle motives for funding the scholarship. In addition to helping a needy student, she desired to support her fellow countrymen who had settled the Massachusetts colony and promote Christian-based enlightenment, a guiding principle of Harvard’s founding.¹⁴

The gift, however, fell victim to realities that bear strong resemblances to contemporary pressures on scholarship funding. For starters, the initial award was made to the son of Thomas Weld. Weld, the head of a parish in Roxbury, was also Harvard’s chief fundraiser and the man who secured the gift from

¹¹ PETER SMITH, *THE QUIET CRISIS: HOW HIGHER EDUCATION IS FAILING AMERICA* 78 (2004)

¹² RUPERT WILKINSON, *AIDING STUDENTS, BUYING STUDENTS: FINANCIAL AID IN AMERICA* 2 (2005).

¹³ *Id.*

¹⁴ *Id.* at 4. *See, also id.* at 2 (asserting that the desire to “build a Godly civilization in the wilderness” was a factor motivating Radcliffe’s support of Harvard).

Radcliffe.¹⁵ And while he was no rich man by Radcliffe's standards, he likely possessed above-average wealth.¹⁶ So the ostensibly need-based award was actually awarded based on "personal patronage [and] extended family loyalties."¹⁷ In addition, by 1713, the scholarship had been merged with general funds and appropriated for purposes unrelated to student aid.¹⁸ For many years, the gift arguably served none of Radcliffe's principle motives. It took a "fit of honest guilt" on Harvard's part for the scholarship to be reinstated in 1893.¹⁹

Student aid, in general, encompasses loans, work-study, and of course, scholarships and grants.²⁰ This policy history focuses primarily on scholarships and grants. These forms of aid are most typically divided into two classifications: need-based and merit-based. Though the first scholarship was need-based, America has a long historical relationship with merit scholarships as well. Indeed many scholarship programs have required, either by directive or in practice, recipients to possess qualities that conform to both notions, merit and financial need.²¹

A. *Motives and Markets*

Any history of student aid in America must explore the interplay between the motives behind the scholarships and the markets that influence their funding. The early Colonial period saw a relatively robust targeting of aid to needy students at some colleges. Through much of the 17th century, the bulk of scholarships at Harvard went to needy students.²² The college sought to use aid as a means of "recruiting poor and promising students to become enlightened leaders against 'barbarism, ignorance, and irreligion.'"²³ By the late 1600s, a third of Harvard students came from what would now be considered working-class backgrounds.²⁴ Similarly, during this time, about half of students at Dartmouth attended at no cost, in return for future missionary work.²⁵

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ While Radcliffe expressed a desire to endow a need-based award, kinship ties and religious loyalties were important to her as well. Therefore, awarding a scholarship to the son of a clergyman made sense to her. *See, id.*

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *See, e.g.,* WILLIAM R. DOYLE, A NEW PARTNERSHIP: RESHAPING THE FEDERAL AND STATE COMMITMENT TO NEED-BASED AID (2013), http://www.sheeo.org/sites/default/files/publications/4_CED_A_New_Partnership_Financial_Aid_Report.pdf (providing a comprehensive overview of the student aid system).

²¹ WILKINSON, *supra* note 12, at 15 ("Scholarships aimed at needy students have usually been scarce enough to require impressive qualities of one kind or another to get them.").

²² *Id.* at 67.

²³ *Id.*

²⁴ *Id.* (describing how student aid "helped Harvard expand its social reach").

²⁵ Dartmouth was founded as "a bi-racial (Indian-white) institution for training Indian missionaries as well as generally combating the 'ignorance and irreligion' of...New Hampshire" *Id.*

Harvard and Dartmouth saw the broadening of access to education as conferring societal benefits. In addition to curing perceived scourges such as irreligion, there was a sense at these institutions that broad access (among white protestant males) also promoted a “pragmatic sense of justice.”²⁶ But the market forced these relatively altruistic principles to the background. Burgeoning faculty ranks and student enrollments prompted both Harvard and Dartmouth to limit their financial commitment to need-based student aid and focus more on recruiting affluent, full-paying students who could underwrite institutional expansion.²⁷

The period between the American Revolution and the Civil War saw a vast increase in the number of colleges, particularly westward into the new territories. This expansion proceeded “without restraint” from the late 18th century through the mid-19th century.²⁸ Fueled mainly by religious denominations, the expansion led to a proliferation and democratization of education that was celebrated by some and vilified by others.²⁹ The proliferation of institutions created a market for low-tuition, high-aid pricing policies.³⁰

This market was also influenced by a popular anti-elitism that had taken hold. Principles of access to higher education gained popular footing, while “hereditary privilege and ‘aristocratic’ exclusiveness were discredited.”³¹ Schools were seen as the settings in which common leaders for the new republic would be trained.³² Student aid symbolized the newly evolved ideology, and, thus, many colleges of this time saw student aid as a tool of survival, both financial and political. Some colleges used low-cost tuition policies as a means of promoting themselves as providers of social mobility.³³ Williams College, for example, began to leverage “charitable aid” to the benefit of “the very poorest student,” in providing a path into the ministry.³⁴ But like in other places, the market eventually rendered the appeal of full-payers irresistible to Williams. Falling enrollments, due to the institution’s inability to keep pace with rising costs and rising student need, prompted Williams to change the socioeconomic make-up of its student body.

²⁶ *Id.* at 69 (asserting that these colleges “wanted to select and support ‘deserving’ poor students so they could be more ‘useful’ to society”).

²⁷ *Id.* at 67. The pressure to enroll more full-pay students continues today. In a recent survey, over one-third of college and university admissions directors stated that they had recently undertaken increased efforts to recruit students who could pay full price. Among public doctoral universities, the proportion was more than half. INSIDE HIGHER ED, THE 2011 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY ADMISSIONS DIRECTORS 7 (2011), http://www.insidehighered.com/sites/default/server_files/files/9-20finaladmissionsreport.pdf.

²⁸ CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 117 (2006).

²⁹ *Id.* at 116 (discussing the different historical opinions of the “overbuilding” of colleges after the Civil War).

³⁰ WILKINSON, *supra* note 12, at 70 (“To survive, the colleges had to charge low prices and provide ‘charity’ aid and easy credit.”). Kenyon College in Ohio was started based on this premise. Its founder promoted the college’s “unheralded cheapness.” *Id.* at 80.

³¹ *Id.* at 70.

³² *Id.* (“The new republic was often seen to require an educated citizenry and a good supply of leaders, provided by schools and colleges open to rising talent.”)

³³ LUCAS, *supra* note 28, at 123.

³⁴ WILKINSON, *supra* note 12, at 71.

The College is said to have gone from being populated by “half-bumpkin, half-scholar figures” to being comprised of “fashionably dressed young men” from “families of high standing.”³⁵

1. Enter the public institutions

As the nation’s first institutions of higher education, private colleges dictated early trends in student aid (and higher education in general). However, in the late 19th century, the federal government pushed public higher education onto the scene in a major way. The Morrill Act of 1862 provided for the establishment of public agricultural and mechanical arts colleges.³⁶ The Act is described as “a landmark in higher education,” and is cited as the federal government’s first major attempt at expanding higher education.³⁷ The Act, and its 1890 extension to the former Confederate states, spurred the founding or increased prominence of some of the country’s very best universities.³⁸ Flagship public universities, such as the University of Florida, Louisiana State University, and Texas A&M, and many historically black universities, such as Florida A&M and North Carolina A&T, are land-grant institutions.³⁹ And while land-grant institutions are overwhelmingly public, Cornell University, a private institution and member of the Ivy League, also has a land-grant designation.⁴⁰

The Morrill Acts funded some student aid as well, including state-parceled scholarships.⁴¹ Some states also used leverage gained from the Acts to make other student aid arrangements with institutions. For example, New York induced Cornell to award a full-tuition scholarship to a student from each Assembly district in return for land grant funds.⁴² By the late 19th century, more than 40% of Cornell students attended on full-tuition scholarships, including all of its agriculture students.⁴³

³⁵ *Id.*

³⁶ Through the Morrill Acts, the federal government granted each eligible state 30,000 acres of land per member of Congress. Initial eligibility hinged principally on whether or not a state had seceded from the Union; beyond that, states were free to dispose of the land grants in virtually any manner they pleased, and then use the proceeds for agricultural and mechanical arts education. *See, e.g.,* Martin Trow, *Federalism in American Higher Education*, in *HIGHER LEARNING IN AMERICA* (Arthur Levine ed., 1993).

³⁷ *Id.* at 57.

³⁸ *See, e.g.,* Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government and Higher Education*, in *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES* 152 (Philip G. Altbach, Robert O. Berdahl, & Patricia Gumpert eds., 1999).

³⁹ APLU Members, <http://www.aplu.org/page.aspx?pid=249> (providing a list of land-grant institutions) (last visited March 30, 2013).

⁴⁰ *Id.*

⁴¹ The most common form of Morrill Acts student aid was work on the college farm. These arrangements made sense, given the Acts’ mandated focus on agriculture and mechanical arts. WILKINSON, *supra* note 12, at 80.

⁴² *Id.*

⁴³ *Id.*

Historically, student aid had been funded mainly by charities and philanthropists supporting the extant private colleges; however, the end of the Civil War and the passage of the Morrill Acts engendered a “new era” in which public institutions, receiving public money for student aid, grew in prominence.⁴⁴ Of course, given their sources, these funds came with political griping. In North Carolina, accusations of elitism and exclusion in the awarding of need-based scholarships were levied.⁴⁵ These attacks were often inspired by larger anti-intellectual suspicions that couched public colleges and universities as “citadels of privilege” and “godless institutions.”⁴⁶ For many reasons, cultural and political, the view that public student aid should be directed at the needy remained a popular espousement, even if in practice, elitism and affluent lineage (which has often masqueraded as merit) were the primary selection criteria.

B. The Rise of Merit Scholarships

The late nineteenth century saw institutions place a greater emphasis on merit scholarships. Merit awards, of course, were not new, but “until the late 1860s they were seldom clearly designated as such in college literature.”⁴⁷ This shift aligned with a larger cultural shift that saw ideals of individualism and social Darwinism take hold within the American psyche.⁴⁸ In fact, the shift away from need-based aid could be characterized as a broad rejection. Arthur T. Hadley, president of Yale during the period, called need-based scholarships “demoralizing” and argued that such aid was insulting to the recipients.⁴⁹ He also questioned the legitimacy of some students’ professed neediness.⁵⁰ By the early twentieth century, need-based scholarships had become “handouts,”⁵¹ and handouts were un-American.

Merit scholarships were also viewed by institutions as means of improving academic standing and prestige.⁵² This was a view promoted by Andrew White, Cornell’s first president, as he believed that merit scholarships would attract “a most valuable class” made up of individuals who would eventually ascend to “high positions.”⁵³ In 1895, Dartmouth incorporated merit criteria into its need-based scholarships by tying the value of the aid to academic performance and

⁴⁴ MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION* 107 (1998).

⁴⁵ WILKINSON, *supra* note 12, at 81.

⁴⁶ *Id.*

⁴⁷ *Id.* at 99.

⁴⁸ *Id.* at 97 (“[Social Darwinism’s] main adherents believed that too much provision for social welfare...threatened nature’s ‘selection of the fittest,’ shoring up the unfit rather than rewarding the fit and vigorous through competitive struggle.”).

⁴⁹ *Id.* at 98.

⁵⁰ In lieu of need-based aid, Hadley promoted ideas that would later become very familiar means of financing higher education: low-interest loans and student employment. *Id.*

⁵¹ *Id.* at 99.

⁵² *Id.* at 102 (“Merits were not just a way of buying good students but of signaling, to other students and the world at large, that the college stood for academic excellence.”).

⁵³ *Id.* at 100.

requiring recipients to maintain high grades in order to remain eligible for the aid.⁵⁴ Chicago and Swarthmore also notably used merit scholarships as a way to improve their academic standing.⁵⁵ Even Oberlin, one of the staunchest early advocates of need-based aid, established a merit scholarship program in the late 1920s.⁵⁶

Institutions were not the only entities establishing merit aid programs during this period. The states and the federal government followed the trend as well. However, public sector programs were not as unabashedly merit-based as their institutional counterparts. In 1864, the state of New Jersey funded a merit scholarship program at Rutgers, and in 1914, the state of New York established its Regents scholarship program.⁵⁷ These scholarships were awarded based on competitive examination, but they were not totally divorced from traditional access goals.⁵⁸ These programs were precursors to contemporary state merit programs.

In 1944, the federal government revolutionized federal aid with the passage of the GI Bill. Described as “one of the best things that ever happened to American higher education,”⁵⁹ the GI Bill provided direct aid to students, not based on need, but service⁶⁰—arguably a conception of merit. The Soviet’s launching of Sputnik spurred the passing of the National Defense Education Act in 1958.⁶¹ The Act established the first federal subsidized loan program, with the goal of encouraging higher education participation in order to prevent the Soviets from gaining an advantage in science and technology.⁶² Benefits written into the Act were merit-based, and attempts by the Eisenhower administration to include need-based provisions were met with fierce opposition.⁶³ But need-based aid was set to return to prominence, and like the previous shifts, this renewed emphasis would be the result of a shift in popular thinking.

C. The “Re-rise” of Need Based Scholarships

⁵⁴ *Id.*

⁵⁵ *Id.* at 101.

⁵⁶ *Id.* at 102.

⁵⁷ *Id.* at 100.

⁵⁸ *Id.* (“The early state awards were meant not so much to compete against other colleges for good students as to get anyone of ability to go to college at all, especially among college-suspicious farmers.”).

⁵⁹ Trow, *supra* note 36, at 58.

⁶⁰ IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 118 (2005) (explaining that all veterans who served 90 days or more without a dishonorable discharge were eligible to receive benefits).

⁶¹ *See, e.g.*, SANDRA R. BAUM, FINANCIAL AID TO LOW-INCOME COLLEGE STUDENTS: ITS HISTORY AND PROSPECTS 7 (1987).

http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED377265&ERICExtSearch_SearchType_0=no&accno=ED377265.

⁶² *Id.*

⁶³ *Id.* at 8.

One of the most significant and enduring developments in the history of student aid was the founding of the College Scholarship Service (CSS) in 1954.⁶⁴ The CSS was a cooperative of institutions seeking a uniform method of determining financial need.⁶⁵ The forces underlying the founding of the CSS included a desire to squelch bidding wars for students.⁶⁶ An additional motivation, however, was “an emerging professional and liberal ethos” among admissions officers at the elite schools of the time.⁶⁷ Member institutions collectively expressed a desire to use student aid to improve society. The views of John Munro, Harvard’s first director of student aid and a founder of the CSS, typified the “liberal sentiment”⁶⁸ that formed the philosophical basis of the CSS. Munro was a scholarship student himself both in boarding school and later at Harvard, and he is said to have possessed “an antiestablishment streak [and] a deep desire to nurture ability among the disadvantaged.”⁶⁹

In some ways, CSS was highly influential on higher education generally; in other ways, not so much. Methods of means-testing developed by CSS influence how federal need-based student aid is awarded today;⁷⁰ however, CSS was largely ineffective at slowing the rise in the use of merit aid by institutions.⁷¹ While many elite colleges today adhere to the principles advocated by CSS, the use of merit aid has endured at most selective institutions.

In the 1960s, however, the fight for civil rights and the War on Poverty gripped the nation. During this decade, the perils of inequality were highlighted for all to see, and curing those inequities became a target of national focus. This restive climate served as an impetus behind a new federal emphasis on access.⁷² Where the Morrill Acts broadened higher education access mainly by encouraging states to invest in higher education infrastructure, the Higher Education Act of 1965 broadened access by encouraging investments in students.⁷³ Among other things, the Act funded Educational Opportunity Grants, which were targeted at students with “exceptional financial need.”⁷⁴

⁶⁴ See, e.g., MCPHERSON & SCHAPIRO, *supra* note 44, at 6.

⁶⁵ *Id.*

⁶⁶ WILKINSON, *supra* note 12, at 121 (asserting that the CSS sought to create a “shame culture” among member schools around the awarding of merit scholarships and bidding wars for students). See, also, *id.* at 123 (identifying “price and cost control” as another motivation behind the founding of the CSS).

⁶⁷ *Id.* at 121.

⁶⁸ *Id.* at 123.

⁶⁹ *Id.* at 122.

⁷⁰ MCPHERSON & SCHAPIRO, *supra* note 44, at 9.

⁷¹ *Id.* at 109 (“Despite the influence of CSS, the awarding of scholarship aid based solely on the basis of merit continued to be a part of the American scene.”).

⁷² See, e.g., BAUM, *supra* note 61.

⁷³ See, e.g., Lawrence E. Gladioux & Jacqueline E. King, *The Federal Government and Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 162 (Philip G. Altbach, Robert O. Berdahl, & Patricia Gumpert eds., 1999) (arguing that the Act represented the first sign of a federal commitment to access in higher education).

⁷⁴ WILKINSON, *supra* note 12, at 222.

During the 1970s, the federal government supported a seemingly ever-growing list of aid programs. Most prominently, the period saw the advent of Basic Educational Opportunity Grants, which later became known as Pell Grants,⁷⁵ which remains the hallmark need-based aid program.⁷⁶ These grants were instituted as part of the Education Act of 1972. Federal support of need-based aid peaked in the 1970s; but the 1980s and the Reagan era would cease the expansion.⁷⁷

D. The Reassertion of the Market

The 1980s were characterized by rising tuition and falling student aid. Moreover, the decade saw a continued expansion in the numbers of 18-24 year olds enrolled in higher education.⁷⁸ This expansion was a response to the widening earning differentials between college graduates and those with only high school diplomas.⁷⁹ Also during the 1980s, student loans became the centerpiece of the federal student aid equation,⁸⁰ and public institutions saw significant cutbacks in state higher education appropriations.⁸¹ The discretionary nature of higher education funding made it an easy target of cuts once health care costs and other entitlements began to strain state budgets.⁸² The market reasserted itself in the 1980s, and need-based aid paid the proverbial price.

1. The Golden Age of the Merits

If there is one characterization that could capture the essence of student aid funding in the 1990s, it would be the “The Golden Age of the Merits.” The decade inherited many trends from its predecessor. College enrollments continued to rise.⁸³ Increasing tuition costs furthered weakened the value of Pell Grants.⁸⁴ Also, federal student lending continued to grow.⁸⁵ The 1990s also saw for the first time in about three decades the affordability concerns of middle- and upper-income students take precedence over access issues. In 1997, higher

⁷⁵ *Id.* at 224.

⁷⁶ During the 2010-2011 school year, thirty billion dollars were distributed among nine million recipients. U.S. DEP’T OF EDUC., 2009-2010 FEDERAL PELL GRANT PROGRAM END-OF-YEAR REPORT 1 (2011), <http://www2.ed.gov/finaid/prof/resources/data/pell-2009-10/pell-eoy-09-10.pdf>.

⁷⁷ BAUM, *supra* note 61 at 11.

⁷⁸ THOMAS J. KANE, THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE 139 (1999).

⁷⁹ *Id.* (“As the payoffs to postsecondary education rose, students and families responded.”)

⁸⁰ BAUM, *supra* note 61 at 41.

⁸¹ *See, e.g.*, KANE, *supra* note 78 at 59.

⁸² *Id.* at 69 (“The states with the largest increases in [Medicaid spending per capita] were among those with the largest increases in public four-year tuition.”).

⁸³ *See, e.g., id.* at 139.

⁸⁴ *See, e.g.*, COLLEGE BOARD, TRENDS IN STUDENT AID 17 (2006)

http://www.collegeboard.com/prod_downloads/press/cost06/trends_aid_06.pdf

⁸⁵ *See, e.g.*, KANE, *supra* note 78 at 67.

education tax credits and other financial incentives were codified.⁸⁶ The cost of the new tax expenditures was about the same as the Pell Grant program, with virtually all the relief going to middle- and upper-class families.⁸⁷ This “redistribution” of aid away from low-income students served ends that were neither equitable nor efficient in promoting college enrollment.⁸⁸

The strategic use of merit aid as a “defensive strategy” against competitive, zero-sum enrollment management pressures has been an enduring theme for institutions since at least the early 1970s.⁸⁹ One researcher asserted, “merit aid is often the only prudent response to a more competitive environment (or market) of college applicants.”⁹⁰ The 1990s saw “spectacular” increases in merit aid.⁹¹ These increases were most prevalent among less prestigious doctorate-granting and research private universities, liberal arts colleges, and the most selective research and doctorate-granting public universities.⁹² These classes of institutions are highly susceptible to market pressures. Only the most selective private universities have been spared from the merit aid arms race.⁹³

2. State Merit Aid

Probably the most profound student aid development of the 1990s is the advent of state merit aid programs. While state merit aid can trace its roots back more than a century, the modern movement is on a scope much larger and more deliberate than previously seen. Broad-based state merit aid, which can be funded through a variety of sources, including lottery revenue,⁹⁴ arrived in 1993, and there has been an incremental, but steady, diffusion across state borders ever since.⁹⁵ Quite simply, Georgia’s HOPE Program fundamentally changed the nature of higher education student aid and finance.⁹⁶ There are three most commonly cited

⁸⁶ *Id.* at 43

⁸⁷ *Id.*

⁸⁸ MCPHERSON & SCHAPIRO, *supra* note 44, at 41.

⁸⁹ *Id.* at 120 (“Many institutions are apparently using merit aid...hoping to preserve enrollment levels and student quality in the face of declining applicant pools.”).

⁹⁰ KANE, *supra* note 78 at 80.

⁹¹ MCPHERSON & SCHAPIRO, *supra* note 44, at 60.

⁹² *Id.* at 118.

⁹³ *Id.* at 120 (explaining that the fierce competition for seats at these schools makes merit awards unnecessary and expensive).

⁹⁴ TENNESSEE HIGHER EDUCATION COMMISSION, *supra* note 2, at 5 (listing the other sources as including “tobacco settlement revenues, land leases and sales, turnpike revenues, [and] state general funds”).

⁹⁵ Besides Georgia, four states implemented lottery-funded scholarship programs in the 1990s and three in the 2000s. *Id.* at 8.

⁹⁶ TENNESSEE HIGHER EDUCATION COMMISSION, *supra* note 2, at 6 (“Evidence of Georgia’s influence can be seen in the way the programs are structured, the naming of programs, and the legislative discussions surrounding the founding of states’ programs.”). *See, also*, CARL VINSON INSTITUTE OF GOVERNMENT, HOPE SCHOLARSHIP: JOINT STUDY COMMISSION REPORT 2 (2009), <http://www.cviog.uga.edu/free-downloads/hope-joint-study-commission-report.pdf> [HEREINAFTER VINSON REPORT] (asserting that America’s Hope Program, the federal tax credit program passed in 1995, was modeled after Georgia’s HOPE Program).

motivating factors for enacting these programs: encouraging students to engage and excel academically, keeping those deemed most talented from leaving the state, and encouraging higher education participation and completion.⁹⁷ Given the popularity of the programs, there is undoubtedly a political motivation as well.⁹⁸

Since 1981, state merit aid from all sources has increased from a barely perceptible \$100,000⁹⁹ to \$1.8 billion in 2010¹⁰⁰—a stunning 18,000-fold increase. This increase accelerated after the enactment of Georgia’s HOPE.¹⁰¹ In that same period, need-based aid grew from \$900 million¹⁰² to \$6.3 billion¹⁰³—a relatively modest 7-fold increase. So while the overwhelming bulk of state aid remains need-based, the trend lines lean heavily in favor of merit-based aid. And it seems only a matter of time before merit aid becomes the predominant form of state assistance to students.

Many researchers have concluded that the rise of merit aid has led to a decreased emphasis on, and funding of, need-based aid. One study of 12 states with merit aid programs found that the amount spent on need-based aid accounted for less than a third of the more than \$1 billion dedicated to merit scholarships.¹⁰⁴ Florida provides an apt illustration: in 1998, the first year of its merit-based Bright Futures Scholarship Program, need-based aid accounted for 35% of all state aid awarded.¹⁰⁵ By 2011, that proportion had fallen to 24%. And while need-based funding grew less than four-fold during the period, Bright Futures funding grew more than six-fold.¹⁰⁶ Other researchers, however, have challenged the idea that increases in merit scholarship funding have universally led to need-based funding decreases, arguing that while this theory may hold true in states where funding of need-based scholarships has traditionally been a priority, the conclusion does not

⁹⁷ *Id.* at 5.

⁹⁸ *See, e.g.*, BORG & BORG, *supra* note 10, at 12 (explaining the political appeal of Florida’s Bright Futures Scholarship Program).

⁹⁹ DONALD E. HELLER, INSTITUTIONAL AND STATE MERIT AID: IMPLICATIONS FOR STUDENTS 3 (2008), <http://www.usc.edu/programs/cerpp/docs/HellerPaper.pdf>.

¹⁰⁰ LESLEY MCBAIN, STATE NEED-BASED AND MERIT-BASED GRANT AID: STRUCTURAL INTERSECTIONS AND RECENT TRENDS 4 (2011), <http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/State%20Need-Based%20and%20Merit-Based%20Grant%20Aid.pdf>.

¹⁰¹ HELLER, *supra* note 99, at 4 (displaying graph plotting increases).

¹⁰² *Id.* at 3.

¹⁰³ MCBAIN, *supra* note 100, at 4.

¹⁰⁴ Heller, *supra* note 8, at 15 (calculating that the 12 states spent \$1.175 billion on merit aid and \$349 million on need-based in 2003).

¹⁰⁵ Calculations by author. FLORIDA DEP’T OF EDUC., ANNUAL REPORT TO THE COMMISSIONER 1997-98 V (1998), <http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport97-98.pdf>.

¹⁰⁶ In 1997, \$69,566,969 was awarded through Bright Futures, compared to \$423,269,545 in 2011. In the same period, need-based funding grew from \$38,109,539 to \$136,498,665. *Compare id.*, (listing 1998 data), with FLORIDA DEP’T OF EDUC., ANNUAL REPORT TO THE COMMISSIONER 2010-11 1 (2011), <http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport10-11.pdf> (listing 2011 data) [HEREINAFTER ANNUAL REPORT 2011].

hold in states like Georgia, where large-scale funding of the sort never existed and is politically untenable.¹⁰⁷

II: THE PROBLEMS

Socioeconomic and racial disparities in the awarding of state merit scholarships are restricting higher education access and choice among low-income students and those of color. Demographic trends, however, including the rise of college-age people of color, require that higher education access and choice be broadened and attainment be increased. It has been estimated that blacks and Hispanics will account for more than 80% of the rise in college-age youth.¹⁰⁸ Equalizing the higher education attainment rates of those groups to those of white students would result in \$225 billion in added national wealth each year.¹⁰⁹ A critical component of increasing attainment is leveraging financial aid in effective and efficient ways.

While state merit aid has been found to increase college participation in some states, the bulk of this aid goes to students with the least financial need and those who would have likely attended college anyway.¹¹⁰ This trend gets to the heart of the programs' inefficiency. Public money is most efficiently used when incentivizing socially beneficial behavior that likely would not have otherwise occurred.¹¹¹ So an expenditure that subsidizes college attendance for individuals who would have attended anyway is less efficient than the subsidization of an individual at risk of not attending. In addition, the inequity in distribution has prompted many researchers to conclude convincingly that these programs widen inequities in college access and choice—amounting to further educational, economic, and social stratification and a squandering of human capital. These effects are further exacerbated in states that fund merit scholarships with lottery revenue. The inherently regressive nature of lotteries creates more of an imperative to ensure that scholarship funds are distributed in an equitable manner. Unfortunately, as states tighten merit scholarship eligibility requirements to account for budget shortfalls, poorer students are at even greater risk of being left out of the windfall.

¹⁰⁷ Cornwell & Mustard, *supra* note 3, at 87. See, also, WILLIAM R. DOYLE, DOES MERIT BASED AID “CROWD OUT” NEED BASED AID? 21 (2008), http://www.vanderbilt.edu/lpo/doyle/merit_need.pdf (stating, albeit cautiously, that no “statistically significant impact of merit-based aid on need-based aid” had been found in the study). See, also, KANE, *supra* note 78, at 84 (arguing that because students are contributors to the educational process, low-income students benefit from the presence of high-achieving merit aid recipients, thus blunting any negative effects on the availability of need-based aid).

¹⁰⁸ SMITH, *supra* note 11, at 78 (“The populations that do prosper in our schools constitute the majority in the American future.”).

¹⁰⁹ *Id.* at 82 (characterizing the benefits in “human terms” as “incalculable”).

¹¹⁰ Patricia L. Farrell, *Who are the Students Receiving Merit Scholarships?*, in STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 69 (Donald E. Heller & Patricia Marin eds., 2004), available at <http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf>.

¹¹¹ See, e.g., KANE, *supra* note 78 at 19 (“A dollar in federal subsidy that does not lead to a change in behavior leaves the nation no better prepared than before.”).

A. Disparities in Awarding

For the past thirty years, the national agenda in higher education has been defined by goals of ‘access’ and ‘choice’, access labeling the goal of ensuring that no American is denied the opportunity to attend some kind of postsecondary institution by reason of inability to pay and choice labeling the goal of giving students a reasonable menu of alternative colleges from which they can pick the one that best fits their needs.¹¹²

In spite of this agenda, statistics relating to educational access and choice illustrate a common trend: disparities along social strata and as a result, racial lines. Regarding access, while 77% of high school graduates from the highest income quartile enroll in a four-year college by the age of 26, only 39% of those from the lowest quartile do.¹¹³ Among those who enrolled in college, 72% of the wealthiest students graduated by the age of 26, compared to only 40% of the poorest.¹¹⁴ These trends led to an overall graduation rate (including those who did not enroll in college) of 52% for the wealthiest cohort and a woeful 11% for the poorest.¹¹⁵ There is no wonder that almost 80% of all college graduates come from the top-half of the income strata, while only 1% comes from the bottom decile.¹¹⁶

Economic trends in the U.S. give these socioeconomic attainment trends a racial element. The median net worth of white households is 20 times greater than the median net worth of black households and 18 times greater than the median Hispanic household.¹¹⁷ Given the role that wealth plays in educational attainment,¹¹⁸ these disparities contribute to higher college participation and attainment rates among whites compared to blacks and Hispanics.¹¹⁹

¹¹² Alan B. Krueger, Jesse Rothstein & Sarah Turner, *Was Justice O’Connor Right? Race and Highly Selective College Admissions in 25 Years*, in COLLEGE ACCESS: OPPORTUNITY OR PRIVILEGE 2 (Michael S. McPherson and Morton Owen Schapiro eds. 2008).

¹¹³ WILLIAM G. BOWEN, MATTHEW M. CHINGOS, MICHAEL S. MCPHERSON, *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA’S PUBLIC UNIVERSITIES* 23 (2009). The overall enrollment rate was 58%. *Id.* at 21.

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.*

¹¹⁶ Robert Haverman & Kathryn Wilson, *Access, Matriculation, and Graduation*, in ECONOMIC INEQUALITY AND HIGHER EDUCATION 26 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007).

¹¹⁷ The median for white households was \$113,149; the median for black households was \$5,677 and \$6,325 for Hispanic households. PAUL TAYLOR ET AL., PEW RESEARCH CENTER, *WEALTH GAPS TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS* 13 (2011), available at http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

¹¹⁸ See, e.g., Aaron N. Taylor, *Reimagining Merit as Achievement* 14 (unpublished draft article), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231516 (providing comprehensive overview of the effects of wealth in educational achievement and attainment).

¹¹⁹ BOWEN ET AL., *supra* note 113 at 30. Parental education also contributes to graduation rate disparities, with children who have at least one parent who graduated from college more likely to graduate from college themselves than the children of two parents who did not graduate. *Id.* at 24.

Regarding choice, rising tuition rates and the falling value of need-based aid have weakened the ability of “lower-income students to gain access to institutions other than community colleges.”¹²⁰ As a result, while almost half of the richest students attend a four-year university, only 13.5% of the poorest students do.¹²¹ Thus, like higher education access, choice of institution seems to be diminishing among low-income students.

The tuition and student aid trends contribute to the related phenomenon of “undermatching.” Undermatching occurs when a student selects a less selective college than he was qualified to attend.¹²² Students attending less selective schools tend to graduate at lower rates, and take longer to do so, than “observationally equivalent” students attending more selective schools.¹²³ This trend reflects the fact that selective, well-endowed schools tend to offer “richer instructional, extracurricular, and other resources” as well as more generous institutional aid.¹²⁴ So undermatching can lower a student’s chances of graduating. Family income has been found to correlate with undermatching. A study of North Carolina high school seniors found that 59% of students in the bottom income quartile undermatched, compared to 27% of students in the top quartile.¹²⁵ Financial considerations influence college choice, and given the risks presented by undermatching, they impact attainment rates too.

The “national agenda” cited earlier now eschews equity and focuses on narrow conceptions of merit. This shift is most apparent in the way state merit scholarships are often awarded. For example, the most generous awards through Florida’s Bright Futures require students to have a minimum 3.5 GPA and an ACT score of at least 28,¹²⁶ a 91st percentile score.¹²⁷ Access to advanced coursework, such as the International Baccalaureate Curriculum, provides advantages and alternative pathways to eligibility on an unequal basis.¹²⁸ These are the mechanisms through which socioeconomic gaps in higher education participation are widened. As one group of researchers noted, “the shift of

¹²⁰ MCPHERSON & SCHAPIRO, *supra* note 44, at 47. *See, also, id.* at 49 (“Low-income students are increasingly rare at four-year colleges and universities.”).

¹²¹ *Id.* at 45.

¹²² BOWEN ET AL., *supra* note 113 at 100.

¹²³ *Id.*

¹²⁴ CAROLINE M. HOXBY & CHRISTOPHER AVERY, THE MISSING “ONE-OFFS”: THE HIDDEN SUPPLY OF HIGH-ACHIEVING, LOW INCOME STUDENTS 1 (2012), *available at* http://www.brookings.edu/~media/Projects/BPEA/Spring%202013/2013a_hoxby.pdf.

¹²⁵ Parental education was also correlated, with 64% of students with no college education between their parents undermatching, compared to 41% among students with at least one college educated parent and 31% among students with at least one graduated school educated parent. *Id.* at 103.

¹²⁶ Florida Student Scholarship and Grant Programs, Florida Academic Scholars, <http://www.floridastudentfinancialaid.org/SSFAD/bf/fasrequire.htm> (last visited April 3, 2013) [HEREINAFTER Florida Academic Scholars].

¹²⁷ ACT, Inc., National Ranks for Test Scores and Composite Score, <http://www.actstudent.org/scores/norms1.html> (last visited April 3, 2013).

¹²⁸ Florida Academic Scholars, *supra* note 126.

financial aid policy toward merit-based programs...has been especially detrimental to students at the bottom of the income distribution.”¹²⁹

Many advocates of merit aid have argued that differences in academic preparation are to blame for higher education disparities. This argument is plausible, as socioeconomic and racial differences in academic preparation have been widely documented.¹³⁰ Poor teacher quality, high teacher turnover, and decrepit facilities have all been identified as culprits behind the subpar college preparation of many students of color and the poor.¹³¹ One researcher asserted that “differences in college attendance by family income reflect longer-term differences in high- and low-income families’ investments in educational attainment.”¹³² Fundamentally, inadequate academic preparation is a problem endemic to poor students and those of color.¹³³

Based on the literature, however, differences in academic preparation are only partly to blame. Many researchers have challenged the idea that lack of academic preparation was the primary cause of socioeconomic college participation and attainment disparities. One researcher concluded that millions of academically prepared, low income students were being denied educational opportunities due to financial difficulty.¹³⁴ Another study concluded, “[l]ow-income high school graduates in the top academic quartile attended college only at the same rate as high-income high school graduates in the bottom quartile of achievement.”¹³⁵ Focusing on selective colleges only, another study estimated that while there were 2.5 high-achieving/high-income high school seniors to every one high-achieving/low-income senior in the overall population, the proportion balloons to 15-to-one within selective college application pools.¹³⁶ The implication of these findings is that socioeconomic factors, including ability to pay, remain powerful

¹²⁹ Bridget Terry Long & Erin Riley, *Financial Aid: A Broken Bridge to College Access*, 77 HARVARD EDUC. REV. 45 (2007), available at <http://www.hepg.org/document/19/> (last visited March 29, 2013).

¹³⁰ See, e.g., Michal Kurlaender & Stella M. Flores, *The Racial Transformation of Higher Education*, in HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE 26 (Gary Orfield, Patricia Marin & Catherin L. Horn eds., 2005) (citing “the unequal preparation many African American and Latino students receive in their K-12 schooling” in explaining disparities).

¹³¹ Michael Kirst, *Secondary and Postsecondary Linkages*, in ECONOMIC INEQUALITY AND HIGHER EDUCATION 47 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007).

¹³² KANE, *supra* note 78, at 98.

¹³³ See, e.g., Long & Riley, *supra* note 129, at 41.

¹³⁴ Edward P. St. John, *The Impact of Financial Aid Guarantees on Enrollment and Persistence: Evidence from Research on Indiana’s Twenty-First Century Scholars and Washington State Achievers Programs*, in STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 125 (Donald E. Heller & Patricia Marin eds., 2004), available at <http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf>.

¹³⁵ Long & Riley, *supra* note 129, at 40.

¹³⁶ This study did not argue that lack of student aid led to these disparities; in fact the authors highlight the fact that for many of low-income students could attend a selective school for less than the cost of a non-selective school. HOXBY & AVERY, *supra* note 124 at 6.

influencers upon college participation, choice, and therefore attainment, even when academic preparation is not an issue.

The failure of student aid to keep pace with rising education costs has further restricted the access of low-income students to higher education, even at public institutions.¹³⁷ The buying power of Pell Grants has diminished to its lowest levels ever, with the maximum grant only covering about 64% of average in-state tuition and fees at four-year institutions and only 31% of the average cost of attendance.¹³⁸ At private schools, the maximum grant covers only 19% of tuition and fees just 14% of cost of attendance.¹³⁹ Not only does ability to pay, and perceptions thereof, heavily influence enrollment decisions among poor students, poor families are more likely to overreact to tuition increases. This inclination is evidenced by lower proportional enrollment among low-income students, even though the value of higher education, in terms of future earnings, outpaces increases in tuition.¹⁴⁰ These trends prompt many researchers to argue rightly that our national imperative should be to increase higher education access and attainment among the people who need it most by reducing costs of attendance.¹⁴¹ A state merit scholarship program premised on equity, rather than narrow notions of merit, could be a highly effective means of broadening access and choice. The prevailing frameworks, however, restrict pathways in manners that are inequitable and threaten the very viability of the scholarship programs.

B. Viability Issues

In its first year, the Georgia Lottery grossed more than a billion dollars, breaking the national record.¹⁴² This left \$360 million for its HOPE Program, a more than adequate amount given the program's limited early scope and expenses.¹⁴³ This favorable economic climate prompted Georgia lawmakers to expand eligibility over the next few years, including lifting the income cap from \$66,000 to \$100,000 in 1994, and doing away with it completely in 1995.¹⁴⁴ In three years, participation in the program had tripled, thanks to expanded eligibility and

¹³⁷ MCPHERSON & SCHAPIRO, *supra* note 44, at 14.

¹³⁸ Twenty years ago, the maximum Pell grant covered 103% and 41% of average tuition and fees and cost of attendance respectively at public four year institutions. The College Board, Maximum Pell Grant as Percentage of Tuition and Fees and Total Charges over Time (2013), <http://trends.collegeboard.org/student-aid/figures-tables/fed-aid-maximum-pell-grant-percentage-total-charges-over-time>.

¹³⁹ Twenty years ago, the maximum Pell grant covered 23% and 16% of average tuition and fees and cost of attendance respectively at private four year institutions. *Id.*

¹⁴⁰ KANE, *supra* note 78 at 10.

¹⁴¹ MCPHERSON & SCHAPIRO, *supra* note 44, at 14 (“There is persuasive evidence that reducing the price lower-income students must pay significantly influences their decisions about attending college.”).

¹⁴² VINSON REPORT, *supra* note 96 at 4.

¹⁴³ In its first year, the number of HOPE participants was 42,807 and the cost was \$21.4 million. *Id.*

¹⁴⁴ Other major changes included funding four years of study, rather than the initial two. *Id.* at 5.

expanded awareness.¹⁴⁵ After a relative lull in expansion between 1997 and 2000,¹⁴⁶ the program began to grow anew,¹⁴⁷ prompting Georgia lawmakers to respond in 2004 by tightening eligibility criteria, freezing the award for student fees, and setting new fiscal “triggers” for cutting the program’s book awards.¹⁴⁸ The re-imposition of an income cap, a seemingly obvious response to the fiscal realities, was discussed but not implemented.¹⁴⁹ The aftermath of the 2004 reforms saw some decreases in the number of recipients; but by 2011, the recipients had increased another 15%, to a record high of 256,400.¹⁵⁰ That year, expenditures reached a record high as well—\$747 million.¹⁵¹ And all the while, lottery deposits had plateaued,¹⁵² and tuition at the state’s public universities increased significantly, more than doubling at the University of Georgia between 2005 and 2011.¹⁵³

In response to this explosive growth, HOPE underwent another major round of reforms in 2011. The minimum GPA to receive a HOPE scholarship or grant was raised from 2.0 to 3.0, as was the minimum GPA to maintain it.¹⁵⁴ In addition, the Hope Scholarship no longer covered full tuition at public institutions, but rather about 90%.¹⁵⁵ Full-scholarship awards were reserved for recipients of the newly created Zell Miller Scholar Program,¹⁵⁶ which requires a minimum GPA of 3.7 and either an SAT score around the 80th percentile¹⁵⁷ or an ACT score in the 83rd percentile.¹⁵⁸ Book and fee allowances also were eliminated, and remedial courses were no longer covered by program funds.¹⁵⁹

¹⁴⁵ The number of participants was 123,000 in the 1996. *Id.*

¹⁴⁶ *Id.* at 7 (estimating yearly growth of 3-6% per year during this period).

¹⁴⁷ *Id.* at 8 (“From FY 2000 to 2001, HOPE expenditures rose from \$209 million to \$277 million, an increase of nearly one-third in a single year.”). *See, also, id.* (blaming the elimination of the Pell grant offset for much of the increase in expenditures).

¹⁴⁸ Heller, *supra* note 8, at 17.

¹⁴⁹ *Id.*

¹⁵⁰ Georgia Student Finance Comm’n, Students Earning Georgia’s HOPE Scholarships and Grants (2013), http://www.gsfc.org/gsfnew/SandG_facts.cfm?sec=3 [HEREINAFTER HOPE Scholarships and Grants].

¹⁵¹ *Id.*

¹⁵² GEORGIA STUDENT FINANCE COMM’N, AN OVERVIEW OF LOTTERY REVENUES, EXPENDITURES, AND HOPE 63 (2010), http://www.gsfc.org/main/publishing/pdf/common/presentation_draft_for_aug2v2.pdf (showing flat trend line from 2008 onward) [HEREINAFTER LOTTERY REVENUES 2010].

¹⁵³ *Id.* at 56 (increasing from \$1,684 in 2005 to \$3,535 in 2011).

¹⁵⁴ GEORGIA STUDENT FINANCE COMM’N, STATE PROGRAM UPDATES SUMMARY (2013), http://www.gsfc.org/MAIN/publishing/pdf/2011/state_programs_updates_summary.pdf [HEREINAFTER PROGRAM UPDATES]

¹⁵⁵ Univ. System of Ga., How HOPE Changes Will Affect USG Students, http://www.usg.edu/student_affairs/students/how_hope_changes_will_affect_usg_students.

¹⁵⁶ PROGRAM UPDATES, *supra* note 154.

¹⁵⁷ Eightieth percentile is a rough estimate. The way the SAT is scored makes it difficult to identify a percentile rank for scores combined across two or more sections. THE COLLEGE BOARD, SAT PERCENTILE RANKS (2012), <http://media.collegeboard.com/digitalServices/pdf/research/SAT-Percentile-Ranks-2012.pdf>.

¹⁵⁸ ACT, Inc., *supra* note 127.

¹⁵⁹ PROGRAM UPDATES, *supra* note 154.

Since the implementation of the 2011 reforms, the number of HOPE recipients has declined more than 30%, and the total dollar amount of the awards has declined almost 46%.¹⁶⁰ There is no doubt that reforms were needed to shore up projected budget shortfalls.¹⁶¹ But low-income students bore the brunt of this sacrifice.¹⁶² Today, the Georgia Lottery is experiencing modest growth,¹⁶³ and, optimistically, there is talk of easing some of the most deleterious 2011 reforms,¹⁶⁴ albeit not enough. The latest round of reforms have been successful at easing some of the immediate threats to HOPE's fiscal viability, but given that the pain of the reforms is being felt disproportionately by the poor, the program has been rendered less equitable and less efficient.

Florida's Bright Futures Scholarship Program¹⁶⁵ is facing similar viability issues. Created in 1997 as "the umbrella program for all state funded scholarships based on academic achievement in high school,"¹⁶⁶ there have always been concerns about the program's fiscal viability.¹⁶⁷ Unlike Georgia, Florida's lottery had existed more than a decade before the establishment of its lottery scholarship,¹⁶⁸ and there were already signs that lottery revenue had plateaued.¹⁶⁹ In 1998, the

¹⁶⁰ In 2011, 256,400 recipients received a total of \$747.7 million. In 2013, those numbers declined to 178,108 and \$406.5 million respectively. HOPE Scholarships and Grants, *supra* note 150.

¹⁶¹ LOTTERY REVENUES 2010, *supra* note 152, at 68 (projecting 2012 expenditures as \$1.2 billion, but deposits as less than \$884 million).

¹⁶² For example, enrollment in technical schools fell much more dramatically than in the university system. Dave Williams, *Bill Easing HOPE Grant Standard Clears Georgia House*, ATLANTA BUSINESS CHRONICLE (Mar. 7, 2013), <http://www.bizjournals.com/atlanta/news/2013/03/07/bill-easing-hope-grant-standard-clears.html>.

¹⁶³ Maggie Lee, *Gov. Deal to Propose HOPE Changes*, THE TELEGRAPH (Jan. 16, 2013), <http://www.macon.com/2013/01/16/2319047/gov-deal-to-propose-hope-changes.html> ("In the third quarter of calendar year 2012, the lottery transferred about \$221 million to pre-K, college and university programs, some \$16 million more than the same time in 2011."). *See, also*, GEORGIA STUDENT FINANCE COMM'N, AN OVERVIEW OF LOTTERY REVENUES, EXPENDITURES, AND HOPE 16 (2012), http://www.gsfc.org/MAIN/publishing/pdf/2012/020312_HOPE_presentation.pdf (projecting an increase in lottery deposits of almost \$7 million, about 1%, between 2012 and 2013) [HEREINAFTER LOTTERY REVENUES 2012].

¹⁶⁴ *See, e.g.*, Governor Nathan Deal, Office of the Governor, Deal Backs Effort to Expand Access to Tech Schools (2013), <http://gov.georgia.gov/press-releases/2013-02-07/deal-backs-effort-expand-access-tech-schools>.

¹⁶⁵ Bright Futures is comprised of three separate merit-based aid programs: the Florida Academic Scholars Award, the Florida Medallion Scholars Award, and the Florida Gold Seal Vocational Scholars Award. *See, e.g.*, ANNUAL REPORT 2011, *supra* note 106, at 24.

¹⁶⁶ POSTSECONDARY EDUCATION PLANNING COMM'N, FLORIDA'S BRIGHT FUTURES SCHOLARSHIP PROGRAM: A BASELINE EVALUATION 5 (1999), <http://www.cepri.state.fl.us/pdf/bffin.pdf> [HEREINAFTER BRIGHT FUTURES EVALUATION].

¹⁶⁷ *Id.* at 6 ("The program's cost might eventually become prohibitive.").

¹⁶⁸ Florida voters approved a constitutional amendment authorizing a lottery in 1986, eleven years before the creation of Bright Futures. *See, e.g.*, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, JUSTIFICATION REVIEW: SALE OF LOTTERY PRODUCTS PROGRAM i (2002), <http://www.oppaga.state.fl.us/reports/pdf/0211rpt.pdf>.

¹⁶⁹ BRIGHT FUTURES EVALUATION, *supra* note 166, at 6 (explaining that lottery revenues had been stagnant for years and were projected to remain stagnant).

first year Bright Futures awards were made, 42,319 students received \$69,566,969 in scholarship funds.¹⁷⁰ By 2009, the number of recipients had increased almost five-fold to 202,469, and the amount awarded had ballooned six-fold to \$429,012,109.¹⁷¹ During this period, Bright Futures's share of deposits to the lottery trust fund more than tripled, from 9% to 29%.¹⁷² This unsustainable growth prompted Florida lawmakers to enact a series of reforms over the next few years. In 2009, Bright Futures tuition payouts were tied to an amount set by the Legislature, thereby decoupling payouts from tuition increases.¹⁷³ In 2010, phased-in increases in the minimum ACT and SAT scores were enacted, and the window of time in which a high school graduate could apply for Bright Futures funding was decreased from seven years to five years.¹⁷⁴ In 2011, ACT and SAT minimums were increased again.¹⁷⁵ In 2012, the application window was restricted again, with high school graduates now required to accept their first Bright Futures award within two years (down from three) of graduating or lose all future eligibility.¹⁷⁶

Like Georgia's HOPE, Bright Futures was in need of reform. But once again, the painful aspects of reform will fall disproportionately on low-income students. Increases in minimum test scores (as much as 28 percentiles on the ACT)¹⁷⁷ will prevent a disproportionate number of low-income students from qualifying for the program's most lucrative scholarships. Restricting the application window will disproportionately disadvantage low-income students, who often enroll in college later as non-traditional students and take longer to finish.¹⁷⁸ And while decoupling Bright Futures payouts from tuition was a logical response to runaway tuition increases,¹⁷⁹ this reform saddles students with any increases above the stipulated rate, and low-income students, who are more price sensitive and more likely to overreact to price increases, will experience the most hardship. Once

¹⁷⁰ FLORIDA DEP'T OF EDUC., ANNUAL REPORT TO THE COMMISSIONER 2009-10 33 (2010), <http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport09-10.pdf> (providing an itemization of recipient and disbursement data from 1997 until 2010).

¹⁷¹ *Id.*

¹⁷² Calculations by author. FLORIDA DEP'T OF EDUC., 2012-13 EDUCATION APPROPRIATIONS 12 (2012), <http://www.fldoe.org/fefp/pdf/Lotbook.pdf>.

¹⁷³ KNAPP, *supra* note 6, at 10. *See, also*, Florida Student Scholarship and Grant Programs, Florida Legislative Session 2012 Updates and Legislative History (2012), <http://www.floridastudentfinancialaid.org/SSFAD/bf/newsrenew.htm> (providing full list of reforms) (last visited Apr. 5, 2013).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ The ACT minimum score for the Florida Medallion Scholars award will increase from 21 (55th percentile) in 2012 to 26 (83rd percentile) in 2014. *See*, ACT, Inc., *supra* note 127 (providing ACT score percentiles).

¹⁷⁸ *See, e.g.*, BOWEN ET AL., *supra* note 113 at 71 (presenting data showing positive relationship between family income and time-to-degree).

¹⁷⁹ Research has shown that institutions respond to increases in aid eligibility with tuition and/or fee increases. *See, e.g.*, Michael J. Rizzo, *State Preferences for Higher Education Spending: A Panel Data Analysis, 1977-2001*, in WHAT'S HAPPENING TO PUBLIC HIGHER EDUCATION? 7 (Ronald G. Ehrenberg ed., 2006).

again, an income cap was not among the latest reforms (and never has been a part of Bright Futures); but with recent data showing that 32% of Bright Futures recipients come from families with incomes of \$100,001 and above, a cap could have been the most consequential reform of all.¹⁸⁰

Other states with lottery scholarships have had to wrestle with many of the same issues as Georgia and Florida. In Tennessee, a cost-saving 2011 reform which cut the number of credit-hours covered by its HOPE Scholarship will cause 3,000 students to unexpectedly lose scholarships for which they were eligible when they initially enrolled in college.¹⁸¹ New Mexico's lottery scholarship is facing a projected 2014 shortfall of \$5 million.¹⁸² And Arkansas lawmakers recently cut the maximum four-year college awards through its lottery scholarship from \$18,000 to \$14,000.¹⁸³ This is the second cut to Arkansas's lottery scholarship since its enactment in 2010.¹⁸⁴

III: POLICY PROPOSALS

The following are two policy proposals that would be effective at targeting state merit scholarship funds in the most efficient and equitable ways:

- Implement a need-based scholarship program with an early engagement component.
- Use a “merit-aware” index to award state merit-based scholarships.

The overarching goals of each proposal are to use available public funds, including lottery funds, to help close disparities in higher education participation and attainment, while ensuring the fiscal viability of the programs. The first proposal is need-based; the second is merit-based. Each proposal is intended to be an alternative to the other (and all others). However, components of either could conceivably be incorporated into the other. The proposals are offered as general frameworks; as such, not every detail is presented.

¹⁸⁰ A plurality of Bright Futures awardees—40%—came from families with income of \$50,000 or less. FLORIDA DEP'T OF EDUC., HIGHER EDUCATION APPROPRIATIONS: FAFSA FINANCIAL AID DATA OVERVIEW 6 (2012), <http://www.fldoe.org/fejp/pdf/Lotbook.pdf>. A more useful statistic would be the percentage of actual funding going to students in each income bracket. It is likely that the most lucrative awards disproportionately go to the wealthiest students.

¹⁸¹ The Associated Press, *HOPE Scholarship Funding Running Out for Some*, THE DAILY HERALD, Jan. 8, 2013, <http://columbiadailyherald.com/sections/news/state/hope-scholarship-funding-running-out-some.html> (explaining that the maximum hours were cut from 150 to 120).

¹⁸² STATE OF NEW MEXICO: REPORT OF THE LEGISLATIVE FINANCE COMM. TO THE FIFTY FIRST LEGISLATURE: FIRST SESSION 27 (2013), <http://www.nmlegis.gov/lcs/lfc/lfcdocs%5Cbudget%5C2014RecommendVoll.pdf>

¹⁸³ Two-year college awards were cut from a maximum of \$4,500 to \$4,000. Andrew DeMillo, *Arkansas Lawmakers Approve Lottery Scholarship Changes*, ARK. BUSINESS, Feb. 25, 2013, <http://www.arkansasbusiness.com/article/91044/arkansas-lawmakers-approve-lottery-scholarship-changes?page=all>.

¹⁸⁴ *Id.*

A: Need-Based Scholarship Program with Early Engagement Component

This proposal is modeled after Indiana's Twenty-first Century Scholars Program, the state's need-based aid program which was founded in 1990 with a goal of raising "the educational aspirations and attainment of low and moderate income Hoosier families."¹⁸⁵ Twenty-first Century is only open to students who qualify for free or reduced lunch, and like its merit-based counterparts, Twenty-first Century seeks to maximize human capital.¹⁸⁶ Indiana's focus, however, is less on rewarding narrow notions of merit and more on incentivizing socially beneficial behavior that may not have otherwise occurred. Implicit in Twenty-first Century are two keen acknowledgements: 1) that public funds are most beneficial when used to broaden opportunity, not solidify existing inequities, and 2) early guarantees of financial aid increase college participation and attainment among low-income students.¹⁸⁷

1. Structure

The proposed program would pay up to 150 credit-hours towards an academic (undergraduate or graduate), vocational, or technical program at a public college or university in the state.¹⁸⁸ Recipients would be free to use their eligibility in any way they wish, whether to pursue one degree or to earn multiple degrees.¹⁸⁹ Continued eligibility would require remaining in good academic standing at their higher education institutions. The program would be aimed at students from low- and moderate-income families, with an income cap set at no higher than the median level for the state.

¹⁸⁵ IND. COMM'N FOR HIGHER EDUC., INDIANA'S TWENTY-FIRST CENTURY SCHOLARS PROGRAM: YEARS OF IMPACT 1 (2012), http://www.in.gov/che/files/21st_Century_Scholar_Report.pdf [HEREINAFTER YEARS OF IMPACT].

¹⁸⁶ The program has six principle objectives: 1) reduce the number of high school dropouts, 2) "increase the number of students prepared to enter the workforce," 3) increase college participation, 4) reduce the financial burden of college; 5) "decrease drug and alcohol abuse," and 6) "improve the overall quality of life for many Indiana residents." *Id.*

¹⁸⁷ In terms of participation, Twenty-first Century Scholars are more likely to graduate high school, more likely to earn a college prep (Core 40) diploma, and more likely to enroll in college. In terms of attainment, Scholars lag behind all students in college completion, but exceed completion rates among other low-income college students. And when broken down by race, black and Hispanic Scholars exceed their peers (low-income and not) in college completion. *See, also*, Edward P. St. John & Choong-Guen Chung, *Merit and Equity: Rethinking Award Criteria in the Michigan Merit Scholarship Program*, in PUBLIC FUNDING OF HIGHER EDUCATION: CHANGING CONTEXTS AND NEW RATIONALES 129 (Edward P. St. John & Michael D. Parsons eds., 2005) (explaining the success of Twenty-first Century using a specific framework called a Balanced Access Model).

¹⁸⁸ Recipients could use their tuition benefits at private, non-profit and for-profit, schools, with the amount set at the median cost of a similar program at an area public school.

¹⁸⁹ Budgetary practicality might require a maximum timeframe in which to use the eligibility, maybe three years after high school graduation to take first award and seven years to exhaust eligibility.

For initial eligibility, the only academic criteria would be adherence to a curriculum of core courses and a cumulative high school GPA at the minimum passing level.¹⁹⁰ But in order to incentivize socially beneficial behavior, all participants would be required to sign a pledge of good citizenship. The pledge, made in middle school, would require participants to remain crime- and drug-free and, when appropriate, submit timely applications for college admission and federal financial aid.¹⁹¹

The program would also feature a college planning and engagement component. This component would be premised on the goal of educating the family about the child's potential higher education options and the necessary steps to pursuing those options. Lack of information about the admissions and financial aid processes contribute to socioeconomic disparities in higher education participation and attainment rates.¹⁹² Through the program, participants would be provided with information and support in navigating these processes, as well as information tying higher education to the job market. In its best form, this assistance would be akin to the student having her own admissions counselor, a benefit low-income students are rarely afforded.

2. Potential Criticisms

This proposal is not without potential criticisms. An argument could be made that states would lose human capital because strong students may be induced to attend college out of state because of better scholarship offers. But a strong argument could be made that the benefits of increasing higher education participation and attainment would outweigh the burdens of losing some of the perceived “best and brightest.”¹⁹³ But at least one study has concluded that the benefits of keeping these students in-state are “much too small to justify using economic development as a rationale for merit-based student aid programs.”¹⁹⁴ Relatedly, there seems to be some question of the effectiveness of merit scholarships in keeping these

¹⁹⁰ Mandatory curricula are a common component of state merit scholarship programs. *See, e.g.*, Florida Student Scholarship and Grant Programs, Academic Requirements for Initial Eligibility, <http://www.floridastudentfinancialaid.org/SSFAD/bf/acadrequire.htm> (last visited April 7, 2013). *But, see*, YEARS OF IMPACT, *supra* note 185 at 2 (explaining that Indiana does not require, but encourages, Twenty-first Century participants to adhere to the state's Core 40 curriculum).

¹⁹¹ Indiana requires that students apply to college and for financial aid during their senior year in high school. There is merit to this approach. *Id.* at 1.

¹⁹² KANE, *supra* note 78 at 13 (“Differential access to information about applying to college and about the rigors of college life is likely to lead some students to underinvest in their education.”). *See, also*, Christopher Avery & Thomas J. Kane, *Student Perceptions of College Opportunities: The Boston COACH Program*, in COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT 378 (Caroline M. Hoxby ed. 2004), available at <http://www.hks.harvard.edu/fs/cavery/Student%20Perceptions%20of%20College%20Opportunities.pdf> (proposing interventions, principally tied to providing information and support, to close socioeconomic college enrollment gaps).

¹⁹³ This argument would be rooted in the view that public funds are used most efficiently when incentivizing socially beneficial behavior that otherwise would not have happened. *See, e.g.*, KANE, *supra* note 78 at 19.

¹⁹⁴ *See*, Rizzo, *supra* note 179, at 8 (citing the study).

students in-state anyway. In Florida, a bill was recently introduced, and later withdrawn, that would have required recipients of Bright Futures funds to reimburse the state if they left.¹⁹⁵ The bill was motivated by a desire to cut program costs and assumedly was rooted in some angst regarding the effectiveness and efficiency of the program's incentives.

One of the strongest arguments in favor of merit aid is that strong students add quality to the academic experience and therefore confer benefits upon their peers.¹⁹⁶ Therefore, a cogent argument could be made that basing state aid on need rather than merit would diminish the quality of the academic experience. But to the extent that this argument is valid, it still seems that the potential costs associated with losing some strong students are outweighed by the benefits of broadening access.

A practical shortcoming of the proposal would be political. Need-based aid is not as popular among voters as merit aid. Wealthier residents tend to vote and donate to political campaigns in higher proportions than poorer residents.¹⁹⁷ In short, they are able to influence the political process in ways that benefit their interests and in ways that poorer residents cannot. Therefore, in order to gain popular support for need-based aid, economic arguments would have to take precedence over those relating to ideals such as fairness.

B: Use a "Merit-Aware" Index to Award State Merit-Based Scholarships

This proposal is modeled after an admissions program developed by William Goggin¹⁹⁸ and is based on three premises:

- State merit scholarship programs should not be used to effectively punish children for being stuck in low-performing schools.¹⁹⁹

¹⁹⁵ H.R. 35, 2013 Leg. Reg. Sess. (Fla. 2013), available at http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=_h0035_.docx&DocumentType=Bill&BillNumber=0035&Session=2013

¹⁹⁶ KANE, *supra* note 78 at 84.

¹⁹⁷ See, e.g., U.S. Census Bureau, Census Bureau Reports Hispanic Voter Turnout Reaches Record High for Congressional Election (2011),

<http://www.census.gov/newsroom/releases/archives/voting/cb11-164.html> ("People living in families who earned \$100,000 or more were more than twice as likely to vote as those who lived with families earning less than \$20,000"). See also, e.g., HENRY E. BRADY, WHY DO RICH PEOPLE MAKE POLITICAL CONTRIBUTIONS? SOME SURPRISING RESULTS FROM A FORMAL MODEL 22 (2004),

http://www.russellsage.org/sites/all/files/u4/Brady_Why%20Do%20Rich%20People%20Make%20Political%20Contributions.pdf (presenting figure showing campaign contributions trending upward as income increases).

¹⁹⁸ William J. Goggin, *A "Merit-Aware" Model for College Admissions and Affirmative Action*, 83 POSTSECONDARY EDUC. OPPORTUNITY 3 (1999),

<http://www.postsecondary.org/last12/83599Goggin.pdf>.

¹⁹⁹ St. John & Choong-Guen Chung, *supra* note 187, at 126 (criticizing Michigan's Merit Scholarship Program for holding "low-income students accountable for attending low-quality schools rather than holding schools accountable and encouraging schools to improve").

- “Indicators of merit become indicators of achievement only when context is considered.”²⁰⁰
- “The extent to which a student’s achievement has exceeded what could reasonably have been expected given his or her academic background” is a reliable measure of chances of college success.²⁰¹

1. Structure

A merit-aware index considers an applicant’s admissions indicators in light of the applicant’s background. The goal of this approach is to measure an applicant’s level of actual achievement.²⁰² For example, a simple merit-aware index could determine achievement by subtracting the average ACT score at an applicant’s high school from the applicant’s own score:

- If Applicant A scores a 24 on the SAT and the average at his high school is 17, he would have an index score of 7.
- If Applicant B scores a 26 on the SAT and the average at her high school is 23, she would have an index score of 3.
- If Applicant C scores a 27 on the SAT and the average at her high school is 25, she would have an index score of 2.

Of the three applicants, Applicant A has the highest index score (7) and, therefore, would have the best chance of receiving a merit scholarship, even though he has the lowest ACT score. Given her low index score (2), Applicant C would have the worst chance of receiving a scholarship, even though she has the highest ACT score. In the context of admission, a simple merit-aware index has been shown to predict persistence about as well as admissions tests.²⁰³ Indexes could incorporate other criteria such as score percentiles, GPA, class rank, and even socioeconomic factors.²⁰⁴

A merit-aware index represents a practical approach to addressing the problems of inequities in the awarding of state merit scholarships. A threshold benefit would be that it would help reduce the extent to which ability to pay influences college participation and choice. And pursuant to the common motivations behind merit scholarships, a merit-aware index would incentivize academic achievement, possibly to an even greater extent given the relative nature that achievement would be measured. The index would still incentivize the “best and brightest” students to remain in-state, though the definition of best and brightest would be

²⁰⁰ Taylor, *supra* note 118 at 53.

²⁰¹ Goggin, *supra* note 198, at 4.

²⁰² Taylor, *supra* note 118 at 53.

²⁰³ Edward P. St. John, et al., *Merit-Aware Admissions in Public Universities*, THE NEA HIGHER EDUC. J. 39 (2005), http://www.nea.org/assets/img/PubThoughtAndAction/TAA_01Win_05.pdf. See, also, St. John & Choong-Guen Chung, *supra* note 187, at 131 (concluding that a merit-aware selection process would increase racial and ethnic diversity among state-funded merit scholarship recipients).

²⁰⁴ See, e.g., Taylor, *supra* note 118 at 54 (presenting an index-based Achievement Framework).

broadened. But no longer would children be punished for attending subpar schools—a decision over which they have no control.

The index could also enhance the quality of students within public high schools. It is possible that many parents would decide to enroll their children in “weaker” public schools rather than “stronger” private schools, in order to increase the chances of their children qualifying for a scholarship.²⁰⁵ Such behavior could benefit these schools, as the integration of strong students among weaker ones benefits the weaker students more than it hurts the stronger ones.²⁰⁶ Lastly, the index would also allow for relative fast (e.g. yearly) assessment and tweaking, and in its most effective form, would allow legislatures to adjust scholarship eligibility criteria based on available funds and ensure that the pool of eligible students represents the aims of the program.

2. Potential Criticisms

The index would require policymakers to reframe popularly-held conceptions of merit. State policymakers would have to convincingly promote a less common perception of merit—one that places standardized test scores, GPAs, and other factors in environmental contexts, rather than in a so-called objective “vacuum.” The index could also increase pressure on students to out-perform each other. This pressure would reflect the fact that students are competing against each other rather than pre-set criteria. The process of tweaking the index would invariably become a political exercise, increasing the chances that the program could pursue perverse interests. In addition, while the elements of a simple index could be easily grasped and calculated by parents, students and other stakeholders, a more complicated index would be potentially less transparent.

CONCLUSION

The history of student aid has seen a constant battle between the ideals that prompted Ann Radcliffe to make that first gift to Harvard and the realities that

²⁰⁵ A recent study concluded that Texas’s Top 10% Plan prompted families to move into neighborhoods with lower-performing schools in order to improve their children’s chances of gaining admission into the state’s flagship universities. KALENA E. CORTES & ANDREW I. FRIEDSON, RANKING UP BY MOVING OUT: THE EFFECT OF THE TEXAS TOP 10% PLAN ON PROPERTY VALUES 2 (2012), <http://users.nber.org/~cortesk/KCortes%20AFriedson%20PV%20and%20Top10.pdf>. Through the plan, students in the top 10% of their high school graduating classes gain automatic admission into any of the state’s public colleges and universities. The plan’s accounting of the school context renders it “merit-aware” in its philosophical approach. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d. 587, 612 (W.D. Tex. 2009) (providing overview of plan).

²⁰⁶ *See, e.g.*, MCPHERSON & SCHAPIRO, *supra* note 44, at 113 (discussing research that concludes “mixing weak and strong students raises the overall performance of the student population as the gains of the weak students exceed the losses of the strong students”). *See, also*, CORTES & FRIEDSON, *supra* note 205, at 20 (concluding that family relocations prompted by the Texas Top 10% plan led to a greater proportional increases in property value among homes in the bottom quintile).

have prompted institutions and governments to focus their priorities on less equitable aims. Today, the student aid trend is heavily tilted to merit aid. This approach, however, leads to socioeconomic and racial disparities in higher education participation and attainment. If the U.S. is to maintain and increase its world standing,²⁰⁷ it must integrate disadvantaged populations into higher education. In advocating for this integration, advocates of need-based aid must cloak their arguments in efficiency and market-based realism in order to counter the compelling, though short-sighted, arguments in favor of merit aid.

State merit scholarships increase inequity in college access and choice—amounting to further educational, economic, and social stratification and a squandering of human capital. These trends are exacerbated when the source of the funds is lottery revenue, which is inherently regressive. The proposals presented in this article would help alleviate these deleterious trends, while also helping cure the persistent fiscal vulnerabilities besetting the programs.

²⁰⁷ The White House: President Barack Obama, Higher Education, <http://www.whitehouse.gov/issues/education/higher-education> (“The President has also set a new goal...that by 2020, America would once again have the highest proportion of college graduates in the world.”)