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Citations:

Bluebook 21st ed.

Joni Hersch, Affirmative Action and the Leadership Pipeline, 96 TUL. L. REV. 1 (2021).

ALWD 7th ed.

Joni Hersch, Affirmative Action and the Leadership Pipeline, 96 Tul. L. Rev. 1 (2021).

APA 7th ed.

Hersch, J. (2021). Affirmative action and the leadership pipeline. Tulane Law Review, 96(1), 1-58.

Chicago 17th ed.

Joni Hersch, "Affirmative Action and the Leadership Pipeline," Tulane Law Review 96, no. 1 (November 2021): 1-58

McGill Guide 9th ed.

Joni Hersch, "Affirmative Action and the Leadership Pipeline" (2021) 96:1 Tul L Rev 1.

AGLC 4th ed.

Joni Hersch, 'Affirmative Action and the Leadership Pipeline' (2021) 96(1) Tulane Law Review 1

MLA 9th ed.

Hersch, Joni. "Affirmative Action and the Leadership Pipeline." Tulane Law Review, vol. 96, no. 1, November 2021, pp. 1-58. HeinOnline.

OSCOLA 4th ed.

Joni Hersch, 'Affirmative Action and the Leadership Pipeline' (2021) 96 Tul L Rev 1

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TULANE LAW REVIEW

VOL. 96

NOVEMBER 2021

NO. 1

Affirmative Action and the Leadership Pipeline

Joni Hersch*

Recent events have brought heightened attention to racial injustice in the United States, which includes among its legacies a dearth of Black people in influential positions that shape society. But at the same time that the United States has turned its attention to diversity in leadership positions, the already narrow pipeline for those from underrepresented groups is likely to narrow even further in the near future. Specifically, the pipeline to influential positions in society typically flows from an elite education. Race-conscious affirmative action in higher education admissions is currently permitted in order for universities to meet their compelling interest in pursuing the educational benefits of a diverse student body. But the legality of affirmative action, which plays a prominent role in creating a diverse student body at elite educational institutions, is under attack, with the lawsuit Students for Fair Admissions v. Harvard expected to soon reach the United States Supreme Court—a Court that is not expected to be supportive of affirmative action—at which time race-conscious affirmative action may be banned nationally.

In this Article, I develop and provide an empirical basis for an expanded understanding of the educational benefits provided by affirmative action: namely, of fostering a pipeline of future societal leaders and professionals. A simple benefit-cost analysis indicates that full consideration of the benefits stemming from the compelling interest of diversity in education would imply fewer, not more, restrictions on consideration of race in admissions.

Using data on nearly 500,000 college graduates, I demonstrate that the likelihood of earning a professional or graduate degree—an outcome that is closely linked to employment in influential positions—drops off dramatically in the universities attended by the majority of college graduates, as compared with elite universities that use affirmative action. Further, race is a relatively unimportant predictor of professional or graduate degree attainment among graduates of similarly elite schools. Curtailing race-conscious affirmative action would thereby exclude many students from underrepresented minority groups who would successfully earn professional and graduate degrees—and later, enter into influential positions that shape society.

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As a consequence of the current lack of diversity in leadership, communities of color are left not only with limited power to advance their own interests, but a short supply of professionals to serve their communities with essential legal and medical services, and a restricted network through which those from underrepresented groups can advance their individual success and that of others in their community. Should affirmative action fall, the enrollment of underrepresented minorities in elite institutions will decline, further exacerbating the underrepresentation of minorities in positions of influence. The already existing lack of diversity in leadership roles impairs our nation's efforts to reckon with its history of racial injustice.

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I. INTRODUCTION

Following a talk by Supreme Court Justice Antonin Scalia at American University Washington College of Law in 2009, a student in the audience asked what she had to do to become “‘outrageously successful’ without ‘connections and elite degrees.’” Justice Scalia initially responded by saying “[j]ust work hard and be very good.” This sounds like good advice for anyone. But Justice Scalia continued to explain that his questioner had a very low chance of securing one of the biggest plums possible for a young lawyer seeking outrageous success: a Supreme Court clerkship. Ranked forty-fifth at that time by *U.S. News and World Report*, Washington College of Law simply wasn’t a strong enough law school to warrant his consideration for a clerkship. As he put it:

By and large, I’m going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can’t make a sow’s ear out of a silk purse. If they come in the best and the brightest, they’re probably going to leave the best and the brightest, O.K.?¹

The predominance of white male graduates from a small number of elite law schools among Supreme Court justices and their clerks is

1. Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES (May 11, 2009), <https://www.nytimes.com/2009/05/12/us/12bar.html>.

easily observable and well documented.² But to reach the point of entry—that is, enrollment in one of the most competitive law schools—odds are that the student checked a number of very specific boxes along the way. One of these boxes could be labeled “elite undergraduate degree.”³ And, as substantial evidence documents, checking this box is vastly more common among those from privileged backgrounds.⁴

Furthermore, the opportunity to check the elite education box is not evenly distributed by race. The long history of racial injustice in the United States has all but assured that people who are identified as Black, Latinx, or Native American (referred to as underrepresented minorities, or URM) are disproportionately from less privileged backgrounds than those who are white. Unequal access to economic, political, and educational resources resulted in massive racial disparities in income and wealth that exist to this day.⁵ In recognition of historic racial injustice, executive orders in the 1960s mandated affirmative action to address racial injustice in hiring.⁶ Elite universities voluntarily adopted affirmative action policies,⁷ and to date all relevant Supreme Court decisions allow some consideration of race in higher

2. Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, N.Y. L.J. (Dec. 11, 2017), <https://www.bloomberglaw.com/document/X5LPFU1K000000?jsearch=gml45imjh#jcite> (noting that of the 487 clerks hired since 2005, 85% have been white; only twenty African American and nine Hispanic; women comprise about one-third; and half of the clerks hired were law graduates from Harvard or Yale).

3. This is not unique to the legal profession, and it is widely recognized that the path to professional success starts early. See, e.g., N. Gregory Mankiw, *Things Didn't Go as Planned*, N.Y. TIMES (Nov. 14, 2013), <https://www.nytimes.com/2013/11/17/books/review/alan-greenspan-map-and-the-territory.html> (noting that the path to becoming a star economist is to start by attending an elite college followed by finding a prominent mentor in graduate school).

4. Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility I* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017).

5. Federal Reserve data shows that typical Black households have less than 15% of the wealth of typical white households. Specifically, the median white family wealth is \$188,200 and the median Black family wealth is \$24,100 (12.8% of white wealth). Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/DZH5-P39W>].

6. Executive orders were issued by Presidents John F. Kennedy, Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961), Lyndon B. Johnson, Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), and Richard Nixon, Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969).

7. Lisa M. Stulberg & Anthony S. Chen, *The Origins of Race-conscious Affirmative Action in Undergraduate Admissions: A Comparative Analysis of Institutional Change in Higher Education*, 87 SOCIO. EDUC. 36, 43-47 (2013) (arguing that affirmative action policies at elite universities began due to the influence of “liberally minded administrators”).

education admissions in order for universities to meet their compelling interest in pursuing the educational benefits of a diverse student body.⁸

But the future of affirmative action is clearly at risk. The lawsuit *Students for Fair Admissions v. Harvard* alleges that Harvard's affirmative action policy for undergraduate admissions illegally discriminates against Asian American applicants.⁹ It is widely anticipated that affirmative action will reach the Supreme Court in the near future.¹⁰ It is also widely expected that the current Supreme Court will be unsympathetic to continued allowance of race-conscious affirmative action in undergraduate admissions.¹¹ The consequence of elimination of any consideration of race in higher education admissions

8. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (medical school admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (undergraduate admissions); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions); *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013) (undergraduate admissions); *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016) (undergraduate admissions).

9. See *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020). U.S. District Judge Allison Burroughs found in favor of Harvard. On November 12, 2020, the district court's finding for Harvard was upheld on appeal. 980 F.3d 157 (1st Cir. 2020).

10. The Students for Fair Admissions (SFFA) lawsuits against Harvard and other universities are spearheaded by Edward Blum with the intention of reaching the Supreme Court. See, e.g., Anemona Hartocollis, *The Affirmative Action Battle at Harvard Is Not Over*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/18/us/affirmative-action-harvard.html> (noting that the appellate decision brings "the case one step closer to the Supreme Court"); Scott Jaschik, *Appeals Court Backs Harvard on Affirmative Action*, INSIDE HIGHER EDUC. (Nov. 16, 2020, 4:35 AM), <https://www.insidehighered.com/admissions/article/2020/11/16/appeals-court-backs-harvard-affirmative-action> [<https://perma.cc/6YNU-QYGZ>] (explaining that Edward Blum believes the lawsuit will go to the Supreme Court). In February 2021, SFFA petitioned the Supreme Court to hear the case. See, e.g., Vivi E. Lu & Dekyi T. Tsotsong, *How SFFA is Trying to Convince SCOTUS to Hear Its Suit Against Harvard*, HARV. CRIMSON (Mar. 5, 2021), <https://www.thecrimson.com/article/2021/3/5/sffa-petitions-supreme-court/> [<https://perma.cc/Q9QC-YLEW>] (noting that SFFA petitioned the Court for a writ of certiorari). In June 2021, the Supreme Court asked the Biden administration for its views on this case. See, e.g., Brent Kendall & Melissa Korn, *Supreme Court Seeks Biden Administration Views on Harvard Admissions Policies*, WALL ST. J. (June 14, 2021, 11:26 AM), <https://www.wsj.com/articles/supreme-court-seeks-biden-administration-views-on-harvard-admissions-policies-11623684411> (noting that the Justices ordered the U.S. Solicitor General to explain the federal government's views of the appeal).

11. See Benjamin L. Fu & Dohyun Kim, *DOJ Sues Yale for Racial Discrimination Amid Concurrent Harvard Investigation and Lawsuit*, HARV. CRIMSON (Oct. 13, 2020), <https://www.thecrimson.com/article/2020/10/13/doj-yale-admissions-lawsuit/> [<https://perma.cc/RR24-PFA8>] (quoting Indiana University law professor Kevin D. Brown, "Clearly what the plaintiffs are counting on is getting this up to the Supreme Court where, with a new Supreme Court now, it is a much more hostile Supreme Court with respect to affirmative action It's probably right to believe that with the addition of [Justice Amy V. Coney Barrett] on the Supreme Court, you'll have a solid person majority against affirmative action.").

is well established: There will be a dramatic reduction in the number of underrepresented minorities enrolled in elite institutions.¹²

The consequence of fewer underrepresented minorities in elite institutions is not, however, limited to the educational environment. Using data on nearly 500,000 college graduates, I introduce in this Article unique empirical evidence that demonstrates the close connection between elite status of an individual's undergraduate institution and the likelihood of earning a professional or graduate degree (i.e., advanced degrees),¹³ an outcome that is closely linked to employment in influential positions. This connection between elite undergraduate education and graduation from professional and graduate programs implies that a reduction in admission of underrepresented minority students at the undergraduate stage would decrease the number of URM students likely to be admitted to advanced-degree programs, and, ultimately, the number of URM in leadership positions.

Notably, among those who earn a bachelor's degree from an elite institution, there is little difference by race or ethnicity in the probability of earning an advanced degree. Among those students who earn a professional degree, there is no difference by race or ethnicity in the probability of being licensed in the profession.¹⁴ This means that any admissions advantage that raised the admissions chance of a URM applicant over a comparable nonminority is overcome by earning an elite undergraduate or advanced degree. This pattern implies that disadvantages in primary and secondary education may have a strong bearing on qualifications at the college application stage but are overcome over the longer course of college and graduate study.

The ramifications of limited diversity in leadership roles are far reaching. There are substantial benefits to society and to underserved communities to having diverse professionals, including physicians and lawyers, to serve their communities.¹⁵ Otherwise, the medical profession would continue to be dominated by white doctors who are more likely to offer a disparate level of care to patients of color, contributing to the dynamics that caused the COVID-19 crisis to

12. See discussion *infra* Part III.

13. There is no commonly accepted term in the United States that refers collectively to professional (e.g., JD, MD) and graduate degrees (e.g., MA, PhD). For convenience, I use the term advanced degree to refer collectively to professional and graduate degrees.

14. See *infra* subpart X.B.

15. See discussion *infra* Part IV.

disproportionately affect communities of color.¹⁶ Law and other professional degrees open doors in politics.¹⁷ Supreme Court clerks have outsized influence on society through their crucial role in selecting cases;¹⁸ the lack of diversity among Supreme Court clerks means that consequential decisions are made by those with little personal experience to contribute to the discussion.¹⁹ The dearth of diverse leadership makes it substantially more difficult to change the policies that have contributed to racial injustice in numerous areas including provision of health care, mass incarceration, policing, access to credit markets, and employment.

Furthermore, the limited diversity in leadership has not gone unnoticed by corporate America. In the wake of the Black Lives Matter movement,²⁰ a number of prominent firms, including Microsoft,²¹ Starbucks,²² and Wells Fargo,²³ have announced diversity goals for their workforce to be met by 2025, with executive compensation tied to reaching their specified goals. Other companies including Adidas

16. *Risk of Exposure to Covid-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html> [<https://perma.cc/4GYV-85NA>].

17. The prominence of law degree holders in the 116th Congress is noteworthy, with “161 [m]embers of the House . . . and 53 [members of the Senate] hold[ing] law degrees.” See JENNIFER E. MANNING, CONG. RSCH. SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE 5 (2019).

18. Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 MARQ. L. REV. 75, 101 (2014) (noting that justices follow their clerks’ recommendations about 75% of the time when granting certiorari).

19. Mauro, *supra* note 2 (“Clerks play a crucial role in helping justices pick which cases to grant, and in writing opinions. In both of those roles, the lack of diversity among clerks means the court’s handling of race and immigration cases, among others, continues to be shaped by players who have little personal experience to inform the discussion.”).

20. See Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

21. Khadeeja Safdar & Ben Eisen, *Labor Department Questions Microsoft and Wells Fargo Over Pledges to Hire More Black Employees*, WALL ST. J. (Oct. 6, 2020, 9:38 PM), <https://www.wsj.com/articles/microsoft-says-u-s-government-questions-its-pledge-to-hire-more-black-employees-11602020480>.

22. Heather Haddon, *Starbucks Ties Executive Pay to 2025 Diversity Targets*, WALL ST. J. (Oct. 14, 2020, 10:31 AM), <https://www.wsj.com/articles/starbucks-ties-executive-pay-to-2025-diversity-targets-11602680401>.

23. Microsoft and Wells Fargo pledged in June 2020 to double the number of Black leaders by 2025. See *id.*; Elliot Hannon, *Trump Administration Asks Microsoft to Prove Its Pledge to Increase Black Workforce Isn’t Discriminatory*, SLATE (Oct. 7, 2020, 8:35 AM), <https://slate.com/news-and-politics/2020/10/trump-labor-department-letter-microsoft-prove-diversity-program-discrimination.html> [<https://perma.cc/N2C8-79KT>].

and Facebook Inc. have likewise pledged to hire more Black employees.²⁴ The head of Yale's \$31.2 billion endowment notified the investment firms that manage Yale's money that they will be evaluated by "their progress [in] increasing the diversity of their investment staffs."²⁵ But a common—although sometimes vehemently challenged—refrain among employers seeking to increase the diversity of their workforce is that their efforts are thwarted by a narrow pipeline of qualified diverse candidates.²⁶

My argument in support of continued, and in fact expanded, use of race-conscious affirmative action in higher education rests on three bases that are recognized but undervalued under Supreme Court decisions and have considerable empirical support in the literature and in my empirical analysis.

First, universities are permitted to consider race in admissions in order to meet their compelling interest in pursuing the educational benefits of a diverse student body.²⁷ These educational benefits are broadly defined and permitted because they are deemed to be of value to the entire student body and include destruction of stereotypes, promoting cross-racial understanding, preparing for the challenges of an "increasingly diverse workforce," and acquisition of competencies required for future leaders.²⁸

24. Khadeeja Safdar, *Adidas Promises to Hire Black, Latino People for 30% of New U.S. Jobs*, WALL ST. J. (June 9, 2020, 2:22 PM), <https://www.wsj.com/articles/adidas-promises-to-hire-black-latino-people-for-30-of-new-u-s-jobs-11591726922>; Matt Grossman, *Facebook Outlines Plans to Improve Workforce Diversity*, WALL ST. J. (June 18, 2020, 3:27 PM), <https://www.wsj.com/articles/facebook-outlines-plans-to-improve-workforce-diversity-11592506973>.

25. Juliet Chung & Dawn Lim, *Yale's David Swensen Puts Money Managers on Notice About Diversity*, WALL ST. J. (Oct. 23, 2020, 7:00 AM), <https://www.wsj.com/articles/yales-david-swensen-puts-money-managers-on-notice-about-diversity-11603450800>.

26. The shortfall of diverse leaders in major corporations was attributed to a pipeline problem in a June 2020 *New York Times* article, which states: "When pressed on why their companies lack diversity, many managers fall back on the argument that there is a pipeline problem; that there simply aren't enough talented black men and women to fill the roles." David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html>. *But see, e.g.*, Helene Cooper, *'Is Austin on Your List?': Biden's Pentagon Pick Rose Despite Barriers to Diversity*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/us/politics/biden-lloyd-austin-defense-secretary.html> (describing efforts to diversify military leadership and suggesting that it is not insufficient supply of talent but lack of effort).

27. *Grutter v. Bollinger* 539 U.S. 306, 307-09, 328-30, 343 (2003) (quoting Brief for Am. Educ. Rsch. Ass'n et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398292, at *5).

28. *See id.* at 307-09, 330.

But the educational benefits of a diverse student body do not stop at graduation. Universities also have a compelling interest in educating leaders—indeed, this is typically in the mission statement of elite universities. At a time of heightened attention to the dearth of diverse leadership accompanied by new initiatives to overcome this shortfall, universities provide value to their entire student body by educating diverse students to meet unmet demand for diverse leadership. By ignoring the additional benefits of diverse leadership that follow from a diverse student body, the benefits accruing from consideration of race in higher education admissions are undervalued. A simple benefit-cost analysis indicates that full consideration of the benefits stemming from the compelling interest of diversity in education—namely, fostering a pipeline of future societal leaders—would imply fewer, not more, restrictions on consideration of race in admissions in the context of narrow tailoring.²⁹

Second, as expressed by Justice O'Connor in her majority opinion in *Grutter v. Bollinger*, race-conscious affirmative action is necessary to keep the pipeline to leadership roles open to individuals of all races and ethnicities.³⁰ Because the vast majority of colleges admit all minimally qualified applicants without regard to race or ethnicity, affirmative action plays an important admissions role only at the small number of elite universities.³¹ However, it is precisely these elite institutions that form the pipeline to leadership positions in the United States, and specifically into elite advanced-degree programs. There is substantial evidence that elite higher education confers advantages over and above any superior ability of those students who are admitted to elite institutions,³² and in particular, there are substantial benefits to Black and Hispanic/Latinx students of attending a more selective university, regardless of whether they may have benefited from affirmative action in admission.³³

My empirical analysis demonstrates that graduates of elite undergraduate institutions are far more likely than graduates of broad access institutions to earn professional or graduate degrees. A reduction

29. See discussion *infra* Part III.

30. 539 U.S. at 306, 331-32.

31. See Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* 17, 18 (Gary Orfield & Edward Miller eds., 1998).

32. See discussion *infra* subpart V.B.

33. Stacy B. Dale & Alan B. Krueger, *Estimating the Effect of College Characteristics over the Career Using Administrative Earnings Data*, 49 J. HUM. RES. 323, 346 (2014).

in admission of underrepresented minority students at the undergraduate stage would decrease the number of URM students likely to be admitted to professional and graduate programs, and ultimately, the number of URM in leadership positions.

Third, there are substantial benefits to society and to underserved communities to having a critical mass of diverse professionals.³⁴ In his controlling opinion in *Regents of the University of California v. Bakke*,³⁵ Justice Powell acknowledged that improving the delivery of health care services to underserved communities may be a compelling rationale for race-conscious admissions to medical school,³⁶ but concluded that evidence for this possible benefit was lacking at the time.³⁷ However, substantial evidence has amounted in support of this rationale.³⁸ Indeed, the disproportionate effect of COVID-19 on racial minorities has highlighted the importance of having Black and Latinx doctors in this health crisis.³⁹ My empirical analysis demonstrates that the elimination of race-conscious affirmative action would further exacerbate the underrepresentation of racially diverse physicians.

Two amicus briefs filed in *Students for Fair Admission v. Harvard* highlight the current undervaluation of the benefits flowing from diversity in higher education. First, fourteen leading U.S. businesses filed an amicus brief on behalf of Harvard in support of affirmative action, arguing that their continued success is dependent on the existence of affirmative action.⁴⁰ Second, fifteen states plus the District of Columbia filed a brief arguing that racial and ethnic gaps in representation diminish the legitimacy of various institutions and professions, including the judicial and legislative branches of both state and federal government, the legal field, the medical field, and

34. See discussion *infra* Part IV.

35. 438 U.S. 265 (1978).

36. *Id.* at 306, 310.

37. *Id.* at 310-11.

38. See discussion *infra* subpart IV.B.

39. For example, the Department of Health and Human Services created an initiative to provide \$40 million in additional funding to Morehouse School of Medicine, a historically Black college, to educate and improve testing and treatment access to those in underserved communities. Sheryl Gay Stolberg & Noah Weiland, *Fauci, Citing 'Disturbing Surge,' Tells Congress the Virus Is Not Under Control*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/06/23/us/politics/fauci-congress-coronavirus.html?searchResultPosition=1>.

40. Brief for Amgen, Inc. et al. as Amicus Curiae Supporting Appellee, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 980 F.3d 157 (2020) (No.19-2005), 2020 WL 3447865, at *1-2, *25.

education.⁴¹ Each of these briefs argued that the success of business and government is dependent on diversity within those institutions, which requires a sufficient pipeline of diverse candidates.⁴²

The Article proceeds as follows: Part II provides an overview of the Supreme Court decisions addressing the use of race in higher education admissions. Part III summarizes the existing legal challenges to use of affirmative action and the enrollment consequences associated with the elimination of race considerations, which are derived from legal cases and research. Part III also discusses the viability of using alternatives to race, such as socioeconomic status, to create a diverse student body; the review of the evidence firmly dismisses the possibility of achieving sufficient diversity without consideration of race. Part IV summarizes the substantial evidence that has amassed since *Bakke* showing the value to underserved communities of same-race concordance in provision of services, including health care.

Part V summarizes the evidence documenting a causal effect of elite education on earnings and on professional and graduate school outcomes that accrue above and beyond any ability advantages of those who are graduates of elite institutions. This background sets the stage for my unique empirical analysis. Part VI introduces the National Survey of College Graduates data that form the basis for the empirical analysis. Part VII shows how parents' education is related to race. Part VIII shows the relationship between race or ethnicity and status of undergraduate institutions and documents the strong relationship between an elite undergraduate degree and the likelihood of earning an elite advanced degree. Part IX considers the relationships between race, specific advanced degrees, and status of undergraduate institution. Part X addresses common criticisms of affirmative action, including mismatch, stigma, and negative impact on investment incentives; as the review of the evidence shows, none of these concerns are supported by

41. Brief for Massachusetts et al. as Amici Curiae Supporting Appellee, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 980 F.3d 157 (2020) (No.19-2005), 2020 WL 3046348, at *9-14.

42. Brief for Amgen, Inc. et al. as Amici Curiae Supporting Appellee, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 980 F.3d 157 (2020) (No.19-2005), 2020 WL 3447865, at *20 ("Important business interests confirm the settled view that diversity, including racial diversity, gives rise to a compelling and substantial interest for university admissions programs."); Brief for Massachusetts et al. as Amici Curiae Supporting Appellee, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 980 F.3d 157 (2020) (No.19-2005), 2020 WL 3046348, at *9 ("Ensuring meaningful diversity, including racial diversity, in college and university admissions remains vital to the goal of increasing the diversity of our country's leaders.").

empirical evidence. The Article concludes by discussing the implications for affirmative action of the findings reported in this paper.

II. EXISTING CASE LAW IN AFFIRMATIVE ACTION

A. *Supreme Court Decisions*

The constitutional legitimacy of consideration of race in higher education admissions was established in the landmark case *Regents of the University of California v. Bakke*.⁴³ At the time Allan Bakke applied to the University of California (UC) Davis Medical School in the early 1970s, sixteen of the one hundred places in each entering class were reserved for applicants who indicated that they wished to be considered as members of a "minority group."⁴⁴ Bakke, a white man, applied twice through the regular admissions process and was rejected both times, while some applicants with lower scores who applied through the special admissions process were accepted.⁴⁵ Bakke filed suit against the UC Regents, claiming that the special admissions program violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁶ This challenge required that UC Davis demonstrate that the program served a compelling state interest and that it was narrowly tailored to address that interest.

UC Davis provided four rationales for its special admissions program: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;" (2) "countering the effects of societal discrimination;" (3) "increasing the number of physicians who will practice in [the] communities currently underserved;" and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."⁴⁷

In the splintered 1978 *Bakke* decision, Justice Powell concluded that only one of the proffered rationales met the burden of proof: "the attainment of a diverse student body . . . is a constitutionally

43. 438 U.S. 265, 299 (1978).

44. *Id.* at 271, 274-75.

45. *Id.*

46. Bakke also claimed violations of the California constitution and Title VI of the Civil Rights Act of 1964. *Id.* at 266.

47. *Id.* at 306 (quoting Brief for Petitioner, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (No. 76-811), 1977 WL 187977, at *32). The first two rationales were rejected. *Id.* at 307, 310.

permissible goal for an institution of higher education.”⁴⁸ Because universities have a constitutional right of educational autonomy,⁴⁹ they have the right to select students in fulfillment of their mission. Quotas were not permitted as this method did not satisfy strict scrutiny; race could be considered only if the method used satisfied strict scrutiny.⁵⁰

UC Davis’s third rationale is of particular relevance to the current Article. Justice Powell acknowledged that “improving the delivery of health-care services to [underserved] communities” may be a sufficiently compelling rationale.⁵¹ However, he concluded that the evidence on hand did not support that the special admissions program was needed or successful in meeting that goal,⁵² noting that UC Davis had not offered empirical evidence that “it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens.”⁵³

Although empirical evidence was lacking at the time of the 1978 *Bakke* decision, substantial evidence has amassed since then that demonstrates the value of race and ethnic concordance in health-care delivery to underserved populations.⁵⁴ Thus, further limitations on consideration of race in medical school admissions would have a direct detrimental impact on health outcomes of racial and ethnic minorities. As my empirical analysis shows, elite undergraduate education is closely related to the odds that someone of any race earns a medical degree, so further limitations on consideration of race at the undergraduate admissions stage would reduce the number of URM candidates in the pipeline for medical school admission.

The next Supreme Court decision to take up the constitutionality of affirmative action in higher education admissions occurred twenty-five years after *Bakke* in a case brought by Barbara Grutter, a white

48. *Id.* at 311-12. See also Joel K. Goldstein, *Beyond Bakke: Grutter–Gratz and the Promise of Brown*, 48 ST. LOUIS UNIV. L.J. 899, 899-900 (2004) (calling the decision “badly splintered,” pointing out that thirteen opinions were produced in this 5-4 decision, and that none of his colleagues joined Justice Powell’s opinion); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538-39 (2004). Diversity as a compelling state interest has been reaffirmed in *Gratz*, *Grutter*, *Fisher I*, and *Fisher II*, and the Court has not considered other compelling state interests since *Bakke*. See Meera E. Deo, *Affirmative Action Assumptions*, 52 U.C. DAVIS L. REV. 2407, 2412 (2019).

49. *Bakke*, 438 U.S. at 312; *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

50. *Bakke*, 438 U.S. at 317-18.

51. *Id.* at 310-11.

52. *Id.* at 310 n.46.

53. *Id.* at 311.

54. See discussion *infra* Part IV.

woman who had been declined admission to the University of Michigan Law School. With the goal of diversity in mind, the Law School conducted a holistic review of applicants, with race used as a “plus” factor among many individual factors considered in the admissions process.⁵⁵

In *Grutter v. Bollinger*,⁵⁶ the Supreme Court accepted that the Law School’s admissions process was a narrowly tailored plan that survived strict scrutiny because the admissions decision was based on considering and treating each applicant individually through a process in which race was only one small factor.⁵⁷ Furthermore, the Court affirmed the use of race-conscious admissions on diversity grounds, reiterating Justice Powell’s rationale in *Bakke* that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”⁵⁸

Consideration of race as endorsed in *Bakke* was challenged in *Hopwood v. Texas*, which involved admission to public universities in Texas.⁵⁹ The United States Court of Appeals for the Fifth Circuit in 1996 held that any consideration of race in college admissions violates the Equal Protection Clause. In light of *Hopwood*, the State of Texas adopted the Top Ten Percent Plan, in which approximately the top 10% of graduates of public high schools in Texas were guaranteed admission to one of the public universities in Texas. However, this Plan alone did not yield the desired student body diversity. After *Grutter*, which overruled *Hopwood*’s prohibition of any consideration of race,⁶⁰ the state continued to enroll 75% of the students under the Plan but allowed for some consideration of race for the remaining 25%.

Abigail Fisher, a white woman who had been declined admission to the University of Texas, challenged the consideration of race in the Top Ten Percent Plan, arguing that race-neutral methods could yield

55. *Grutter v. Bollinger*, 288 F.3d 732, 746 (6th Cir. 2002).

56. 539 U.S. 306, 343 (2003).

57. In contrast, in *Gratz v. Bollinger*, argued the same day as *Grutter*, the Court struck down the process used by the University of Michigan for undergraduate admissions, which allocated specific extra points for racial minority applicants. 539 U.S. 244, 251, 255 (2003).

58. *Grutter*, 539 U.S. at 325; *id.* at 328 (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body.”). In contrast to *Bakke*, in which no rationale received majority support, in *Grutter*, five justices supported the diversity rationale.

59. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

60. *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2205 (2016) (“In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*’s categorical prohibition.”).

sufficient diversity.⁶¹ In *Fisher I*, the Supreme Court again endorsed consideration of race in higher education admissions based on the educational benefits of a diverse student body, as long as the specific plan used was narrowly tailored to reach its specified goal.⁶² In 2016 the case returned to the Supreme Court, which again reached this decision.⁶³

B. Reaching Sufficient Diversity in Higher Education

Because race was a factor that gave a tip to some students based on their race, and because quotas had been disallowed in *Bakke*, it was also necessary for the Court in *Grutter* to grapple with how the number of students from underrepresented groups relates to the institutional goal of providing the educational benefits of diversity.⁶⁴ Enrolling very few students from underrepresented groups may not yield the educational benefits of a diverse student body and could reduce the presence of those enrolled to acting merely as a token. The Court accepted the university's argument that it was necessary to enroll a

61. Of interest is the admissions rate of 43.5% at the University of Texas at the time Abigail Fisher applied for admission. *Fisher v. Univ. of Tex.* (*Fisher I*), 570 U.S. 297, 304-06 (2013) (“In 2008, when petitioner sought admission to the University’s entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted . . .”).

62. *Id.* at 314-15 (“In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context . . .”). See also *id.* at 312 (highlighting that “[s]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”).

63. *Fisher II*, 136 S. Ct. at 2208 (“Though ‘[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative’ or ‘require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,’ it does impose ‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’”) (first quoting *Grutter*, 539 U.S. at 339, then quoting *Fisher I*, 570 U.S. at 312).

64. *Grutter*, 539 U.S. at 337-38.

“critical mass”⁶⁵ of minority students to promote the educational objectives of diversity.⁶⁶

What constitutes a critical mass is not defined by law, nor is there a specific commonly accepted number.⁶⁷ In *Grutter*, “critical mass” was understood to refer to “meaningful numbers” or “meaningful representation” and was described as “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.”⁶⁸ Thus, in addition to recognizing that a diverse student body has broad educational benefits, the Court recognized that the number of students from underrepresented groups relates to achievement of these benefits. Notably, the Court has tied the concept of critical mass to the compelling interest at stake, stating that the “concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”⁶⁹ In other words, to the extent that the compelling interest of educational diversity has been undervalued, the concept of critical mass cuts against any additional restrictions that would further reduce the share of URM students.

C. *Broader Societal Benefits of a Diverse Student Body*

In *Grutter*, Justice O’Connor emphasized the broader societal benefits that flow from providing greater opportunities to those

65. The critical mass theory was developed by Rosabeth Moss Kanter, who characterized a critical mass as the point at which women’s role in corporations move beyond tokenism and into sufficient representation where their presence led to measurable outcomes with respect to firm performance. Kanter identifies that a critical mass is reached when members of a minority group can speak as individuals rather than as representatives of their identified group. See Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOCIO. 965, 966-68 (1977).

66. *Grutter*, 539 U.S. at 335-36. The value to law students of a diverse student body was also recognized in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (“The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”).

67. See Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54 (2017), <https://columbialawreview.org/wp-content/uploads/2017/08/Joshi-vFinal-031317-2.pdf> (discussing use of data and metrics in race-conscious admissions).

68. *Grutter*, 539 U.S. at 318 (quoting Erica Munzel, Director of Admissions). Other descriptions of critical mass offered in *Grutter* were “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race,” *id.* at 318-19 (quoting Jeffrey Lehman, Dean of the Law School), and when “racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students,” *id.* at 319-20 (quoting Professor Kent Syverud).

69. *Id.* at 330.

historically disadvantaged because of race, citing numerous amici from educators, business, and military leaders. Of particular relevance to the current Article, these benefits include ensuring access to the professional pipeline:⁷⁰

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity⁷¹

Seventeen years later, Justice O’Connor’s observation about the breakdown of political leaders with elite law degrees still holds true. In 2015, all nine members of the Supreme Court and 125 judges serving on the U.S. Court of Appeals were graduates of the most selective law schools, and one-fifth of the U.S. Senate were graduates of six law schools.⁷²

The grip of Harvard and Yale Juris Doctors (JD) on the Supreme Court had been so complete that Amy Coney Barrett’s degree from Notre Dame Law School was frequently remarked upon and led to much speculation on whether she will expand her clerkship hiring

70. *Id.* at 330-31.

71. *Id.* at 331-32.

72. Brief for Ass’n of Am. L. Schs. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex.* (*Fisher II*), 136 S. Ct. 2198 (2016) (No.14-981), 2015 WL 6690035, at *6 (“While all law schools produce leaders in the profession and society, a small group of law schools produces a remarkable share of the federal judiciary and Congress. All nine members of this Court attended highly selective law schools, and 125 judges serving on the United States Courts of Appeals received an LL.B. or JD from a dozen of the most selective schools. A half dozen law schools have produced fully one-fifth of the current United States Senate.”).

beyond a small number of elite law schools. Since the 2017 term, more than half of the clerks came from Harvard or Yale, and 85% of the clerks came from the top ten law schools.⁷³

III. LEGAL CHALLENGES AND ENROLLMENT CONSEQUENCES

Although consideration of race in higher education admissions is currently permitted by Supreme Court decisions, affirmed most recently by the 2016 *Fisher II* decision, it is facing renewed challenges. Supported by anti-affirmative action activist Edward Blum, there are currently ongoing lawsuits launched by Students for Fair Admissions against the University of Texas,⁷⁴ University of North Carolina,⁷⁵ and Harvard.⁷⁶ Furthermore, although the educational benefit of diversity is the only justification for race-conscious affirmative action that is currently accepted by courts, the Supreme Court may be growing more skeptical of the diversity rationale.⁷⁷

73. Kimberly Strawbridge Robinson, *Harvard-Yale Duopoly on Clerks Doesn't Fit Barrett's Background*, BLOOMBERG L. NEWS (Oct. 27, 2020, 11:03 AM), <https://news.bloomberglaw.com/us-law-week/harvard-yale-duopoly-on-clerks-doesnt-fit-barretts-background>.

74. *Students for Fair Admissions Files New Federal Lawsuit Against the Univ. of Texas-Austin*, STUDENTS FOR FAIR ADMISSIONS (July 21, 2020), <https://studentsforfairadmissions.org/students-for-fair-admissions-files-new-federal-lawsuit-against-the-univ-of-texas-austin/> [<https://perma.cc/J6V9-M5MZ>].

75. Anemona Hartocollis, *Affirmative Action Cases May Reach Supreme Court Even Without Trump*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/11/09/us/affirmative-action-north-carolina.html>. On October 18, 2021, U.S. District Judge Loretta C. Biggs found in favor of the University of North Carolina. Stephanie Saul, *University of North Carolina Can Keep Affirmative Action, Judge Rules*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/us/politics/affirmative-action-university-of-north-carolina-court.html>.

76. *See Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

77. Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729, 747 (2015) ("There are only two interests that have been recognized as compelling in the affirmative action context. The first—remediating the state's own discrimination, which could support properly tailored government contracting set-asides—has become increasingly unavailable as that discrimination recedes into the past. The second—diversity in higher education—is likewise on the way out, if *Fisher* means what it seems to."). Other arguments in support of race-conscious affirmative action that do not rely on the educational benefits of a diverse student body have been offered. *See generally* Kimberly Jenkins Robinson, *Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185 (2016) (arguing race-conscious affirmative action to overcome educational disadvantage in primary and secondary education); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Implicit Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063 (2006) (to overcome implicit bias); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600 (2020) (treating people as individuals does not require ignoring ascribed race).

The main legal challenge to affirmative action policies is that the admissions policies are not narrowly tailored and that race-neutral alternatives exist that would yield the educational benefits of diversity.⁷⁸ In *Grutter*, the Court recognized that tradeoffs exist between workable alternatives that simultaneously yield student body diversity as well as maintain academic excellence.⁷⁹ It is important to recognize that universities are adamant that underqualified students are not being admitted in pursuit of diversity.⁸⁰ In the affirmative action cases involving the University of Texas system, University of Michigan Law School, and Harvard, the universities documented the extensive efforts made to achieve diversity without use of race in the admissions process. In all of these cases, the courts accepted that the procedures utilized by the universities were indeed narrowly tailored and that there was no workable alternative. Nonetheless, the challenges in *Fisher* have led to an increasingly restrictive interpretation of narrow tailoring.⁸¹

Any consideration of tradeoffs requires a consideration of both benefits and costs. By recognizing that the benefits extend beyond the educational benefits of a diverse student body to include educating individuals who will contribute to diversity in leadership roles in society, the Court should be less willing to accept a “workable alternative” to consideration of race that results in fewer URM students enrolled at elite colleges under narrow tailoring.

78. *Students for Fair Admissions*, 397 F. Supp. 3d at 133 (“SFFA does not contest the importance of diversity in education, but argues that Harvard’s emphasis on racial diversity is too narrow and that the full benefits of diversity can be better achieved by placing more emphasis on economic diversity.”). It should be noted that SFFA opposes any race-based consideration in admissions, as stated on its website. See generally STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> [<https://perma.cc/7BLY-B2FV>] (last visited Nov. 6, 2021) (describing the organization’s belief that race considerations “in college admissions are unfair, unnecessary, and unconstitutional”); see also Jeannie Suk Gersen, *The Many Sins of College Admissions*, NEW YORKER (Oct. 7, 2019), <https://www.newyorker.com/news/our-columnists/the-many-sins-of-college-admissions> (describing Edward Blum as “a conservative activist who opposes affirmative action”).

79. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

80. *Id.* at 337-38 (“With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified.”); *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019) (“The Court notes that Harvard’s current admissions policy does not result in underqualified students being admitted in the name of diversity—rather, the tip given for race impacts who among the highly-qualified students in the applicant pool will be selected for admission to a class that is too small to accommodate more than a small percentage of those qualified for admission.”).

81. See Robinson, *supra* note 77, at 190-95.

A. *Predicted Enrollment Outcomes from Case Law if Affirmative Action Is Banned*

Expert testimony in *Grutter* showed that in the absence of consideration of race as a factor in admissions to University of Michigan Law School, the share of admitted URM applicants would likely have fallen from admission of 35% of underrepresented minority applicants to 10% in 2000.⁸² The corresponding consequence of race-blind admissions would have been to reduce the share of URM students from 14.5% to 4% of the 2000 entering class.⁸³ Alternatives that were proposed, such as a lottery system or decreased consideration for all applicants of undergraduate GPA and LSAT, “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”⁸⁴

Evidence on the importance of race in admissions provided in the Harvard affirmative action case shows that the “tip” given to African American and Hispanic/Latinx applicants was a determinative factor in nearly half of the admission decisions of these applicants.⁸⁵ Eliminating consideration of race and ethnicity would likely reduce the share of the student population of African American students from 14% to 6%, and of Hispanic/Latinx students from 14% to 9%.⁸⁶ Although the plaintiffs introduced a simulation that they claimed would achieve the same share of URM as the current method without consideration of race, their simulation required assumptions that would drastically change the admissions process used by Harvard and was not deemed by the District Court to be a workable alternative.⁸⁷

82. 539 U.S. at 320.

83. *Id.*

84. *Id.* at 340.

85. *Students for Fair Admissions*, 397 F. Supp. 3d at 178.

86. *Id.* (“Currently, although always considered in conjunction with other factors and metrics, race is a determinative tip for approximately 45% of all admitted African American and Hispanic applicants. At least 10% of Harvard’s admitted class, including more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard’s race-conscious admissions process. In the absence of any other adjustments to Harvard’s admissions policy, eliminating consideration of race would cause the African American representation at Harvard to decline from approximately 14% to 6% of the student population and Hispanic representation to decline from 14% to 9%. Over the course of four years, the number of African American and Hispanic students at Harvard would fall by nearly 1,000 students.”).

87. This simulation assumes that the current admissions preferences that Harvard provides to the “recruited Athletes, Legacies, [those] on the Dean’s or Director’s interest list, or Children of faculty and staff” (ALDC group)—and specifically, children of alumni, donors,

B. Research Evidence on Enrollment Outcomes in the Absence of Affirmative Action

Evidence presented from litigation has documented that elimination of affirmative action would result in substantially fewer students of color at the elite universities that were the target of litigation. However, universities that become involved in litigation over their admissions practices may not be representative of the broader universe of academic institutions. Using applications and admissions data from large nationally representative samples of students, a substantial academic literature has analyzed the likely impact on enrollment as well as alternatives to consideration of race in admissions to achieve a diverse student body. The evidence from research analyses shows a reduction in the enrollment of those from underrepresented minorities that is similar to that presented by the universities that faced legal challenges. The research also confirms the inability of alternatives to consideration of race to achieve sufficient diversity. Some of the research findings are summarized here.

A comprehensive analysis of the role of race in admissions to elite colleges was conducted by William G. Bowen and Derek Bok.⁸⁸ Bowen and Bok estimated that the representation of Black students under a race-neutral policy would result in far fewer Black students, with the reduction more pronounced the more selective the school is.⁸⁹ For example, at the most selective schools, the share of Black students was 7.8%. Simulations show that basing admission on verbal SAT would reduce this share to 2.1%, and basing admission on quantitative SAT would reduce the share to 1.6%. Other studies using different data sets and in different time periods reach the same conclusion about the

faculty, and staff—would be eliminated, standardized tests would not be considered, and the weight given to socioeconomic and geographical indicators of disadvantage would be increased. *Students for Fair Admissions*, 397 F. Supp. 3d at 138, 177, 182. The District Court, however, agreed with Harvard's position that the analysis submitted by SFFA did not provide a workable alternative to consideration of race in admissions to achieve the level of diversity that Harvard viewed as necessary to achieve its academic mission, that other institutional goals were met by the tips given to the ALDC groups, and that the proposed alternatives to provide tips based on socioeconomic characteristics were unworkable and/or would lead to decline in class quality. Among other reasons, removing athletic preferences would make Harvard less competitive in Ivy League intercollegiate sports and would adversely affect the student experience; removing tips for legacies, those on dean's or director's lists, and children of faculty and staff would have a negative effect on faculty and staff recruiting and relationships with alumni and others who made contributions to Harvard. *Id.* at 179-80.

88. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

89. *Id.* at 41, 351.

substantial reduction in the expected share of Black students in elite institutions if affirmative action is eliminated.⁹⁰

A study based on law school applicants in 1990-91 and first year law students in fall 1991 found that making admissions decisions solely on the basis of LSAT score and undergraduate GPA, and eliminating race considerations, would reduce admission of Black students to *any* law school in the study by at least half.⁹¹ A more recent study likewise finds that elimination of affirmative action in law school admissions would lead to a dramatic reduction in the enrollment of Black students in law schools, with a 53% decline in Black matriculants to any law school and a 90% decline in elite law schools.⁹² This indicates that even if graduation and bar passage rates are lower among those admitted to law school by affirmative action, elimination of affirmative action would likely result in a substantial reduction in the number of Black lawyers.

Individual states can, and have, banned affirmative action in consideration for admission to their public universities.⁹³ Between 1996 and 2020, ten states banned affirmative action in higher education admissions, and nine of those ten continue to ban the policy.⁹⁴ The impact on minority enrollment after California and Texas prohibited

90. Peter Arcidiacono, *Affirmative Action in Higher Education: How Do Admission and Financial Aid Rules Affect Future Earnings?*, 73 *ECONOMETRICA* 1477, 1519-20 (2005); Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 *REV. ECON. & STAT.* 1020, 1032-33 (2004).

91. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 *N.Y.U. L. REV.* 1, 4, 15, 22 (1997); *id.* at 15 (“Among the 3435 [B]lack applicants who were accepted to at least one law school to which they applied, only 687 would have been accepted if the LSAT/UGPA-combined model had been used as the sole means of making admission decisions.”). *See also* Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 *J. LEGAL EDUC.* 229, 251-53 (2003) (noting that when race is not a factor in law school admissions, the impact on Black applicants is substantial).

92. *See* Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 *U. CHI. L. REV.* 649, 700-01 (2008).

93. *See* *Schuette v. Coalition to Defend Affirmative Action*, 572 *U.S.* 291 (2014).

94. The states and year the ban was enacted are California (1996), Texas (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), Oklahoma (2012), and Idaho (2020). Texas’s ban was reversed in 2003 with *Grutter v. Bollinger*. California Proposition 16, which would have overturned California’s 1996 ban, was defeated in the 2020 vote. *See* *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *ARIZ. CONST.* art. II, § 36; *CAL. CONST.* art I, § 31, subdiv. (a); *Fla. Exec. Order No. 11-04* (Jan. 4, 2011); *IDAHO CODE* § 67-5909A (2020); *MICH. CONST.* art. I, § 26; *NEB. CONST.* art. I, § 30; *H.B. 623*, 162d Leg., 2011 Sess. (N.H. 2011); *OKLA. CONST.* art II, § 36A; *WASH. REV. CODE ANN.* § 49.60.400(1) (2013).

consideration of race in admissions to their public universities has been extensively studied.⁹⁵ Even with adoption in these states of alternative methods to continue to enroll a diverse student body, enrollment of URM students dropped to well below levels prior to changes in state policies.⁹⁶ For example, before the 1996 California ban, the African American share of students at UC Berkeley was 6% to 7%, a share commensurate with the racial share of public school graduates; after the ban, the share dropped to under 3% for most of the last decade.⁹⁷

Admissions to law and medical schools in California following the affirmative action ban likewise showed substantial drops. The admissions rate of Black applicants to UC Los Angeles and UC Berkeley law schools was half that of the pre-ban rate.⁹⁸ Enrollment of Black and Latinx students to UC medical schools showed reductions of 38% (Black) and 29% (Latinx).⁹⁹

C. *Alternatives to Consideration of Race*

Because admissions decisions that consider race must be narrowly tailored, the universities facing legal challenges to their consideration of race in admissions have provided extensive documentation of their recruiting efforts to generate a racially diverse applicant pool and of their procedures by which they consider race as only a small component of their holistic review process.¹⁰⁰ For example, Harvard describes extensive efforts to encourage URM applicants and their generous financial aid policy, but despite these

95. See Kate Antonovics & Ben Backes, *The Effect of Banning Affirmative Action on College Admissions Policies and Student Quality*, 49 J. HUM. RES. 295 (2014); Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions Post-Hopwood*, 30 EDUC. EVALUATION & POL'Y ANAL. 255 (2008).

96. Antonovics & Backes, *supra* note 95, at 321-22 (analyzing the effect of California's Proposition 209, which in 1996 banned race-based affirmative action); Long & Tienda, *supra* note 95, at 266, 268, 270 (analyzing the effect of the Texas Top Ten Percent Plan adopted after consideration of race was banned by the *Hopwood* decision in 1996; although after *Grutter* consideration of race is allowed, the Top Ten Percent Plan is still used in admissions decisions).

97. Melissa Korn & Christine Mai-Duc, *California Campaign to Revive Affirmative Action Is Struggling*, WALL ST. J. (Oct. 22, 2020, 9:52 AM), <https://www.wsj.com/articles/california-campaign-to-revive-affirmative-action-is-struggling-11603364415>.

98. Danny Yagan, *Supply vs. Demand Under an Affirmative Action Ban: Estimates from UC Law Schools*, 137 J. PUB. ECON. 38, 47 (2016).

99. Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 REV. HIGHER EDUC. 93, 101 (2012).

100. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126, 135-36 (D. Mass. 2019).

efforts the share of URM applicants is well below their population share.¹⁰¹ In *Fisher II*, the University of Texas describes its year-long review of alternatives to any consideration of race and the process by which race is considered but only as a small component in the overall assessment.¹⁰²

The limitations of race-blind methods to achieve diversity are reflected in academic research. Alternatives to consideration of race in admissions, specifically placing greater weight on socioeconomic status and reducing weight on standardized test scores, likewise show a substantial reduction in the share of URM.¹⁰³ Greater emphasis on socioeconomic status would still reduce the share of URM students in elite institutions because numerically there are more low income white households than low income minority households, even though poverty rates are higher among minority households.¹⁰⁴ Notably, studies show that overall student body quality would suffer if admissions are race-blind.¹⁰⁵

Although Justice O'Connor famously conjectured in *Grutter* that affirmative action in higher education admissions would be unnecessary in twenty-five years,¹⁰⁶ research shows that this prediction is unlikely to be realized because of the strong influence of family income on standardized test scores and the slow racial convergence of

101. *Id.*

102. *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2205-06 (2016).

103. See generally Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. LAB. ECON. 113 (2010) (finding that race-neutral admissions will dramatically reduce minority representation at selective institutions); Mark C. Long, *Is There a 'Workable' Race-Neutral Alternative to Affirmative Action in College Admissions?*, 34 J. POL'Y ANAL. & MGMT. 162 (2015) (concluding that calculating an applicant's likelihood of being underrepresented, rather than traditional affirmative action, is not "workable" for universities); Alan Krueger, Jesse Rothstein & Sarah Turner, *Race, Income, and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 AM. L. & ECON. REV. 282 (2006) (finding that consideration of family income is not a suitable proxy for consideration of race); Roland G. Fryer, Jr., Glenn C. Loury & Tolga Yuret, *An Economic Analysis of Color-Blind Affirmative Action*, 24 J.L. ECON. & ORG. 319 (2007) (finding that race-blind affirmative action is inefficient compared to "sighted" affirmative action); Sean F. Reardon et al., *What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model*, 37 J. POL'Y ANAL. & MGMT. 630 (2018) (finding that socioeconomic status-based affirmative action alone does not produce the same diversity level as race-based affirmative action).

104. Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. POL'Y ANAL. & MGMT. 463, 476 n.27 (2006).

105. Long, *supra* note 103, at 174, 180-81; see Reardon et al., *supra* note 103.

106. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

family income.¹⁰⁷ In the absence of race-conscious affirmative action, the share of Black students at selective institutions twenty-five years after *Grutter* is predicted to be only 42% of the share assuming affirmative action is retained.¹⁰⁸

IV. DIVERSITY IN INFLUENTIAL POSITIONS

A. *Current Lack of Diversity*

It is widely recognized that the share of underrepresented minorities in leadership roles and in professional occupations such as medicine, law, and academia falls far short of their racial or ethnic representation in the population.¹⁰⁹ For instance, the legal profession has received substantial attention for its lack of diversity at the higher levels of the profession.¹¹⁰ Black, Latinx, and Asian lawyers comprise only 5% of the lawyers arguing before the Supreme Court despite comprising 37% of the population, and only 2% of all law firm partners are Black.¹¹¹ Only 5% of doctors are Black.¹¹² The share of large companies with Black leadership is exceedingly low, with only four Black CEOs among Fortune 500 companies as of June 2020.¹¹³ Among the many institutions that have received substantial attention for lack

107. Krueger, Rothstein & Turner, *supra* note 103, at 306-08.

108. *Id.* at 308.

109. See ABA, PROFILE OF THE LEGAL PROFESSION 2020 33-34 (ABA Media Rel. & Strategic Comm'n Div. ed., 2d ed. 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> (last visited Nov. 6, 2021) (lawyers by race and ethnicity); *Diversity in Medicine: Facts and Figures 2019*, ASS'N AM. MED. COLLS., <https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018> [<https://perma.cc/YJ8X-B4XE>] (last visited Nov. 6, 2021) (physicians by race and ethnicity); Leslie Davis & Richard Fry, *College Faculty Have Become More Racially and Ethnically Diverse, But Remain Far Less So Than Students*, PEW RSCH. CTR. (July 31, 2019), <https://www.pewresearch.org/fact-tank/2019/07/31/us-college-faculty-student-diversity/> [<https://perma.cc/R25Z-AV4G>] (professors by race and ethnicity).

110. See, e.g., ABA, DIVERSITY & INCLUSION 360 COMMISSION: EXECUTIVE SUMMARY, 4 (2016), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/di-360-commission-executive-summary.pdf> ("The legal profession is one of the least diverse professions in the nation.").

111. Kimberly Strawbridge Robinson, *Noel Francisco's Exit Trims Scant High Court Minority Presence*, BLOOMBERG L. NEWS (June 19, 2020, 3:51 AM), <https://news.bloomberglaw.com/us-law-week/noel-franciscos-exit-trims-scant-high-court-minority-presence>.

112. *Diversity in Medicine: Facts and Figures 2019*, *supra* note 109, at fig. 18.

113. Phil Wahba, *The Number of Black CEOs in the Fortune 500 Remains Very Low*, FORTUNE (June 1, 2020, 10:19 AM), <https://fortune.com/2020/06/01/black-ceos-fortune-500-2020-african-american-business-leaders/> [<https://perma.cc/UGR5-3HLN>].

of diversity at higher professional levels are the military,¹¹⁴ State Department,¹¹⁵ and the economics profession.¹¹⁶

As expressed in *Grutter*, reaching a critical mass of URM students is a key component to achieving the educational benefits of diversity by encouraging participation of minority students and preventing isolation.¹¹⁷ But the value of a critical mass is not unique to higher education. A parallel issue arises after students leave their educational institutions and enter the workforce. Many Black leaders have spoken publicly about experiences of isolation and marginalization in an otherwise all-white leadership environment.¹¹⁸ The shortfall of diverse leaders to serve as role models or mentors has been identified as among the many barriers to achieving diversity in leadership roles.¹¹⁹

There is no widely recognized composition of the workforce that achieves the goal of diversity. In environments that mandate quotas, for instance, for corporate boards or legislative bodies, different representation standards are applied.¹²⁰ Academic research has

114. Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html>.

115. Christopher Richardson, *The State Department Was Designed to Keep African-Americans Out*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/state-department-racism-diversity.html>.

116. Amara Omeokwe, *Economics Profession Turns Attention to its 'Race Problem'*, WALL ST. J. (Jan. 3, 2020, 11:30 AM), <https://www.wsj.com/articles/economics-profession-turns-attention-to-its-race-problem-11577974899>.

117. *Grutter v. Bollinger*, 539 U.S. 306, 332-36 (2003).

118. Shannon Bond, *'We Have A Black People Problem': Facebook Worker Claims Racial Discrimination*, NPR (July 2, 2020, 12:51 PM), <https://www.npr.org/2020/07/02/886544638/we-have-a-black-people-problem-facebook-worker-claims-racial-discrimination> [<https://perma.cc/X2XS-NZFR>]. Barriers seem especially steep for Black women who are subject to both race and gender discrimination. See, e.g., Courtney Connley, *How Corporate America's Diversity Initiatives Continue to Fail Black Women*, CNBC (Jan. 12, 2021, 9:26 AM), <https://www.cnbc.com/2020/07/01/how-corporate-americas-diversity-initiatives-continue-to-fail-black-women.html> [<https://perma.cc/T2G2-KQQK>] (explaining that Black women face both sexism and racism in the workplace and that corporate diversity and inclusion initiatives fail to offer adequate support).

119. There has been substantial discussion of Vice President Kamala Harris's status as a role model. See, e.g., Danielle Campoamor, *On Inauguration Day, Kamala Harris Gives America's Boys (and Girls) a New Role Model*, NBC NEWS (Jan. 20, 2021, 12:01 PM), <https://www.nbcnews.com/think/opinion/inauguration-day-kamala-harris-gives-america-s-boys-girls-new-ncna1254955> [<https://perma.cc/LWG6-HYNJ>] (noting that having women in leadership positions, like Vice President of the United States, benefits people of all genders).

120. California now requires at least one woman on the board of publicly traded corporations headquartered in California, with corporations that fail to do so facing fines. See Kim Elssesser, *California Mandates Women On Corporate Boards, But Do Quotas*

indicated that 30% of positions would need to be held by women to reach a critical mass in which women would have influence.¹²¹ The Rooney Rule adopted by the NFL in 2003 requires consideration of at least one minority candidate for vacant head coaching and, as amended in 2009, for senior management roles.¹²² Concerns over lack of diversity in law firms has led to an initiative that certifies firms that consider diverse candidates for at least 30% of their leadership and governance roles.¹²³ Nasdaq Inc. launched an initiative to require companies listed on its stock exchange to have on their boards at least one woman and at least one person who identifies as a racial minority or as LGBTQ+.¹²⁴

Without a larger pool of diverse candidates, whether these and other initiatives will be successful in increasing diversity in leadership roles is uncertain. One study, for example, found that despite increasing board representation, women do not advance to the highest levels of leadership.¹²⁵ Furthermore, diverse individuals in influential positions

Work?, FORBES (Oct. 2, 2018, 5:04 PM), <https://www.forbes.com/sites/kimelsesser/2018/10/02/california-mandates-women-on-corporate-boards-but-do-quotas-work/#52a05aab5866> [<https://perma.cc/VZE5-X9R5>]. Gender quotas for parliaments around the world are listed by the International Institute for Democracy and Electoral Assistance (IDEA) at <https://www.idea.int/data-tools/data/gender-quotas> [<https://perma.cc/KF8V-3G54>] (last visited Nov. 6, 2021).

121. Drude Dahlerup, *The Story of the Theory of Critical Mass*, 2 POL. & GENDER 511, 511 (2006) (reviewing critical mass literature and finding that while a specific critical mass of 30% has been used in different studies and electoral quotas in different countries, there is no evidence to support a specific percentage as a critical mass); Jasmin Joecks, Kerstin Pull & Karin Vetter, *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a “Critical Mass?”*, 118 J. BUS. ETHICS 61, 68 (2013) (finding evidence in data from German firms for the years 2000-2005 that 30% is a critical mass that associates with higher firm performance, as compared to completely male boards).

122. Cynthia DuBois, *The Impact of “Soft” Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL’s Rooney Rule*, 18 AM. L. & ECON. REV. 208, 227 (2016) (finding that the Rooney Rule led to an increase in minority candidate hiring to fill an NFL head coaching vacancy).

123. *Mansfield Rule: Boosting Diversity in Leadership*, DIVERSITY LAB, <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0> [<https://perma.cc/GW4H-ZGKC>] (last visited Nov. 6, 2021) (initiative to certify law firms that “considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for leadership and governance roles”).

124. Alexander Osipovich & Akane Otani, *Nasdaq Seeks Board-Diversity Rule That Most Listed Firms Don’t Meet*, WALL ST. J. (Dec. 1, 2020, 5:26 PM), <https://www.wsj.com/articles/nasdaq-proposes-board-diversity-rule-for-listed-companies-11606829244>.

125. Ross Kerber, *Women’s Share of U.S. Corporate Board Seats Rises, but Not Top Roles: Study*, REUTERS (Feb. 3, 2020, 6:12 AM), <https://www.reuters.com/article/us-usa-directors-women/womens-share-of-u-s-corporate-board-seats-rises-but-not-top-roles-study-idUSKBN1ZX1K3> [<https://perma.cc/CC7Q-MNE3>].

are often called upon to engage in work-related activities designed to improve diversity and inclusion. The time involved in such efforts is not always rewarded by institutional structures, presenting an additional barrier to advancement.¹²⁶

B. *Benefits of Diversity in Influential Positions*

There is massive evidence that Black people do not receive the same quality of health care as their white counterparts, and the consequences of inequitable health care is reflected in racial differences on numerous health outcomes including life expectancy, maternal and infant mortality rates, diabetes, and heart disease.¹²⁷ In *Bakke*, Justice Powell acknowledged that provision of health care to underserved communities may be a compelling state interest, but noted a lack of evidence at that time that URM physicians were more likely to provide services to underserved (minority and low income) communities.¹²⁸ However, extensive evidence since *Bakke* shows that URM physicians are more likely to serve minority and low income communities.¹²⁹

In addition to greater provision of services to underserved communities, research has shown that Black patients have better health outcomes when treated by a doctor of their same race.¹³⁰ In fact, when treated by a provider of their own race or ethnic group, individuals are

126. Miguel F. Jimenez et al., *Underrepresented Faculty Play a Disproportionate Role in Advancing Diversity and Inclusion*, 3 NATURE ECOL. & EVOL. 1030, 1030 (2019).

127. INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003).

128. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978).

129. Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENG. J. MED. 1305, 1307-08 (1996); Kara Odom Walker, Gerardo Moreno & Kevin Grumbach, *The Association Among Specialty, Race, Ethnicity, and Practice Location Among California Physicians in Diverse Specialties*, 104 J. NAT'L MED. ASS'N 46, 46, 49 (2012); Ernest Moy & Barbara A. Bartman, *Physician Race and Care of Minority and Medically Indigent Patients*, 273 JAMA 1515, 1517 (1995); Joel C. Cantor et al., *Physician Service to the Underserved: Implications for Affirmative Action in Medical Education*, 33 INQUIRY 167, 167, 176 (1996).

130. Komaromy et al., *supra* note 129, at 1305; Lyndonna M. Marrast et al., *Minority Physicians' Role in the Care of Underserved Patients: Diversifying the Physician Workforce May Be Key in Addressing Health Disparities*, 174 JAMA INTERNAL MED. 289 (2014); Thomas E. Perez, *Enhancing Access to Health Care and Eliminating Racial and Ethnic Disparities in Health Status: A Compelling Case for Health Professions Schools to Implement Race-Conscious Admissions Policies*, 9 J. HEALTH CARE L. & POL'Y 77, 79 (2006).

not only more likely to visit for preventative care,¹³¹ but they also share more medical information.¹³² A study in which Black men were randomly assigned to either a male Black doctor or a male non-Black doctor shows that Black doctors could reduce the Black-white gap in cardiovascular mortality among men by 19%.¹³³ Superior health outcomes among race-concordant patients and health care providers is attributed to increased trust and communication.¹³⁴ The vastly disproportionate effect of COVID-19 on people of color has brought additional attention to the underrepresentation of racial and ethnic minorities among health care providers.¹³⁵ Research suggests a racial gap in coronavirus testing among people with similar symptoms,¹³⁶ and the Centers for Disease Control and Prevention (CDC) has advised health care professionals to refrain from implicit bias in their treatment of coronavirus patients.¹³⁷

Evidence also shows that a diverse faculty provides benefits to students. Community college students have smaller racial gaps in dropout rates and grades when URM students are taught by an URM instructor.¹³⁸ Random assignment to own-race teachers improved performance on standardized tests for both white and Black students.¹³⁹

131. Alyson Ma, Alison Sanchez & Mindy Ma, *The Impact of Patient-Provider Race/Ethnicity Concordance on Provider Visits: Updated Evidence from the Medical Expenditure Panel Survey*, 6 J. RACIAL & ETHNIC HEALTH DISPARITIES 1011, 1014 (2019); Marcella Alsan, Owen Garrick & Grant Graziani, *Does Diversity Matter for Health? Experimental Evidence from Oakland*, 109 AM. ECON. REV. 4071, 4107 (2019).

132. See generally Jordan J. Cohen, Barbara A. Gabriel & Charles Terrell, *The Case for Diversity in the Health Care Workforce*, 21 HEALTH AFFS. 90 (2002) (detailing the improvements to patient care when doctors look like their patients).

133. Alsan, Garrick & Graziani, *supra* note 131, at 4071, 4077-78, 4107.

134. Megan Johnson Shen et al., *The Effects of Race and Racial Concordance on Patient-Physician Communication: A Systematic Review of the Literature*, 5 J. RACIAL & ETHNIC HEALTH DISPARITIES 117, 137-38 (2018).

135. *Risk of Exposure to COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html> [<https://perma.cc/4MNY-MTXC>].

136. John Eligon & Audra D. S. Burch, *Questions of Bias in Covid-19 Treatment Add to the Mourning for Black Families*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/10/us/coronavirus-african-americans-bias.html>.

137. *What We Can Do To Promote Health Equity*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/what-we-can-do.html> [<https://perma.cc/Q2N7-XQJC>].

138. Robert W. Fairlie, Florian Hoffmann & Philip Oreopoulos, *A Community College Instructor Like Me: Race and Ethnicity Interactions in the Classroom*, 104 AM. ECON. REV. 2567, 2577 (2014).

139. Thomas S. Dee, *Teachers, Race, and Student Achievement in a Randomized Experiment*, 86 REV. ECON. & STAT. 195, 204 (2004).

Black students who are paired with Black teachers early in their schooling are more likely to graduate from high school and to enroll in college.¹⁴⁰ There is substantial evidence that female students who are randomly assigned to female professors in math and science classes perform better.¹⁴¹

C. *Importance of a Critical Mass in Influential Positions*

In *Grutter*, Justice O'Connor emphasized the importance of enrolling a critical mass of students from underrepresented groups in order to achieve the educational benefits of a diverse student body.¹⁴² A parallel issue arises after students leave their educational institutions and enter the workforce. The term homophily refers to the tendency of individuals to develop positive relationships with others similar to themselves.¹⁴³ There is substantial evidence of this tendency in many contexts. For example, hiring in elite professional services such as law and business shows substantial preferential treatment of applicants similar to those doing the hiring.¹⁴⁴ Recruiters are more likely to call back applicants who have names signaling shared ethnicity.¹⁴⁵ Scientific papers are coauthored by authors of similar ethnicity more often than is predicted by their ethnic proportion among authors, and notably, papers with more ethnically diverse coauthors have higher impact factors and citations.¹⁴⁶ Venture capitalists are more likely to invest in start-ups with executives of their own ethnicity.¹⁴⁷ Black

140. Seth Gershenson et al., *The Long-Run Impacts of Same-Race Teachers*, 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25254, 2021).

141. Scott E. Carrell, Marianne E. Page & James E. West, *Sex and Science: How Professor Gender Perpetuates the Gender Gap*, 125 Q.J. ECON. 1101, 1122-24, 1142 (2010); see Eric P. Bettinger & Bridget Terry Long, *Do Faculty Serve as Role Models? The Impact of Instructor Gender on Female Students*, 95 AM. ECON. REV. 152, 156 (2005).

142. *Grutter v. Bollinger*, 539 U.S. 306, 307, 333 (2003).

143. *Homophily*, DICTIONARY.COM, <https://www.dictionary.com/browse/homophily> [<https://perma.cc/D84P-LHNE>] (last visited Nov. 6, 2021) (defining homophily as "the tendency to form strong social connections with people who share one's defining characteristics, as age, gender, ethnicity, socioeconomic status, personal beliefs, etc.").

144. Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOCIO. REV. 999, 1017 (2012).

145. Anthony Edo, Nicolas Jacquemet & Constantine Yannelis, *Language Skills and Homophilous Hiring Discrimination: Evidence from Gender and Racially Differentiated Applications*, 17 REV. ECON. HOUSEHOLD 349, 368, 370 (2019).

146. Richard B. Freeman & Wei Huang, *Collaborating with People Like Me: Ethnic Coauthorship Within the United States*, 33 J. LAB. ECON. S289, S299-304 (2015).

147. Deepak Hegde & Justin Tumlinson, *Does Social Proximity Enhance Business Partnerships? Theory and Evidence from Ethnicity's Role in U.S. Venture Capital*, 60 MGMT. SCI. 2355, 2355 (2014).

applicants are hired at a higher rate in establishments with Black hiring agents.¹⁴⁸ Doctors are 10% more likely to refer their patients to specialists of the doctor's own gender.¹⁴⁹

Low and stagnant enrollment of Black students in graduate business programs has been identified as a factor in the low representation of corporate leaders who are Black.¹⁵⁰ The reason cited for low enrollment of Black students in Master of Business Administration (MBA) programs includes a lack of corporate mentors and diverse leadership. The high cost of MBA programs is also singled out as a barrier because the cost is more burdensome for Black students, who have lower wealth on average and who also are less likely to receive grant aid from their employers. Harvard Business School (HBS) announced new initiatives to increase enrollment of Black students and recruitment of Black faculty and staff and to give higher priority to issues related to race, noting that the share of Black students at HBS has stayed at around 5% of enrollment for three decades.¹⁵¹

The benefits of diversity in the legal profession include signaling the availability of elite opportunities, bringing in a different perspective, and adding legitimacy to the court and its decisions.¹⁵² The pipeline problem to enhancing diversity is specifically noted.¹⁵³ The appellate bar has been singled out for being comprised mostly of white males who are graduates of elite law schools. The founders of The Appellate Project, an initiative to enhance diversity at the appellate bar, note the value to defendants of having diverse representation in a

148. Michael A. Stoll, Stephen Raphael & Harry J. Holzer, *Black Job Applicants and the Hiring Officer's Race*, 57 INDUS. & LAB. RELS. REV. 267, 279, 283-84 (2004).

149. Dan Zeltzer, *Gender Homophily in Referral Networks: Consequences for the Medicare Physician Earnings Gap*, 12 AM. ECON. J. APP. ECON. 169, 177, 188 (2020).

150. Patrick Thomas, *A Decade-Long Stall for Black Enrollment in M.B.A. Programs*, WALL ST. J. (June 17, 2020, 7:30 AM), <https://www.wsj.com/articles/a-decade-long-stall-for-black-enrollment-in-m-b-a-programs-11592393431>.

151. Patrick Thomas, *Harvard Business School Pledges to Tackle Race Issues*, WALL ST. J. (Sept. 23, 2020, 5:55 PM), <https://www.wsj.com/articles/harvard-business-school-pledges-to-tackle-race-issues-11600879674>.

152. Robinson, *supra* note 111.

153. *Id.* (quoting Sam Spital, Director of Litigation at the NAACP Legal Defense & Educational Fund: "The lack of diversity extends beyond just the bar itself to the pipeline of clerkships, prestigious law schools, and elite law firms that set attorneys up to practice before the justices.").

criminal justice system that disproportionately affects Black offenders.¹⁵⁴

The dramatic underrepresentation of Black leaders in the largest corporations,¹⁵⁵ and their individual experiences,¹⁵⁶ highlight the consequences of the absence of a critical mass of URM in leadership roles. In the absence of a critical mass of URM in the professions and leadership roles, the benefits of homophily will accrue primarily to those in the racial or ethnic majority, which, historically and currently, is predominantly white and male.

V. THE PRIVATE BENEFITS OF ELITE UNDERGRADUATE EDUCATION

A. *The National Obsession with Elite Universities*

Education is understood to be the main mechanism for achieving upward mobility. The returns to higher education are considerable, with college graduates earning almost twice as much as high school graduates,¹⁵⁷ and the returns to college education relative to high school have grown over time.¹⁵⁸ The notion that anyone in the United States, regardless of their origins, can achieve success by hard work—known as the “American Dream”—is appealing. But it ignores substantial evidence that there is relatively little intergenerational mobility in the

154. Kimberly Strawbridge Robinson & Perry Cooper, *Diversifying Appellate World Means Starting at the Beginning*, BLOOMBERG L. NEWS (Dec. 23, 2020, 3:46 AM), <https://news.bloomberglaw.com/social-justice/diversifying-appellate-world-means-starting-at-the-beginning>.

155. Wahba, *supra* note 113.

156. *See, e.g.*, Gelles, *supra* note 26 (noting a lack of corporate support of Black leadership and representation). Experiences of racism and isolation have been reported by many Black leaders. For more examples, see articles published in the *New York Times* on the topic of race and ethnicity at <https://www.nytimes.com/topic/subject/race-and-ethnicity>.

157. The considerable earnings advantage to college education is widely established. For example, in the second quarter of 2020, median weekly earnings of full-time workers ages twenty-five and over were \$789 among high school graduates (no college) and \$1,416 among those with at least a bachelor's degree. *See Median Weekly Earnings by Education, Second Quarter 2020*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/opub/ted/2020/median-weekly-earnings-by-education-second-quarter-2020.htm> [<https://perma.cc/6F7V-NDRS>] (last visited Nov. 6, 2021).

158. Philip Oreopoulos & Uros Petronijevic, *Making College Worth It: A Review of the Returns to Higher Education*, 23 FUTURE CHILD. 41, 42 (2013).

United States,¹⁵⁹ and there is substantial evidence of increasing income inequality.¹⁶⁰

Among the barriers to upward mobility is the outsized role played by elite colleges.¹⁶¹ By one estimate, graduates of elite institutions occupy about 50% of leading occupational roles in the public and private sector.¹⁶² This research shows, for example, that 85% of those deemed as “Forbes powerful men” were graduates of elite colleges, as were 41% each of senators and Fortune 500 CEOs.¹⁶³

Substantial time investment and financial resources are expended, especially by families at the higher end of the income distribution, to maximize their offspring’s chances of admission to elite institutions.¹⁶⁴ Admission to selective colleges has become even more competitive over time, as the number of slots has not increased, and the earnings benefits to graduating from a more selective college have increased.¹⁶⁵ Many articles and books purport to reveal the secrets of college admissions committees and provide guidance to shape an application and credentials to improve admissions odds to an elite college.¹⁶⁶

159. Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSPS. 79, 80 (2013).

160. Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 AM. ECON. REV. 141, 141-42, 146 (2014); Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCI. 838, 838 (2014).

161. Charles T. Clotfelter, *The Big Test*, 38 J. ECON. LIT. 963, 964 (2000) (reviewing NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999)) (describing the influence of the elite educated on the world).

162. Jonathan Wai & Heiner Rindermann, *What Goes Into High Educational and Occupational Achievement? Education, Brains, Hard Work, Networks, and Other Factors*, 28 HIGH ABILITY STUD. 127, 127 (2017). The authors categorize as “elite” the eight Ivy League schools and top national universities and liberal arts colleges that are consistently ranked high by U.S. News. *Id.* at 131.

163. Jonathan Wai & Heiner Rindermann, *The Myth of the College Dropout*, CONVERSATION (Apr. 19, 2017, 6:33 PM), <https://theconversation.com/the-myth-of-the-college-dropout-75760> [<https://perma.cc/WX7P-GLA9>].

164. Garey Ramey & Valerie A. Ramey, *The Rug Rat Race*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2010, at 129, 129-30, 152-53 (showing that more educated parents have increased their time on childcare since the mid-1990s, which they attribute to greater competition for the limited slots in highly selective colleges). *See generally* NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999) (discussing the test prep industry).

165. *See generally*, Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23 J. ECON. PERSPS. 95 (2009) (noting that students no longer apply to schools based on proximity to their home, but largely national reputation and what the schools provide to students).

166. *See, e.g.*, Jason England, *The Mess That Is Elite College Admissions, Explained by a Former Dean*, VOX (May 8, 2019, 9:10 AM), <https://www.vox.com/the-highlight/2019/>

Substantial financial donations have long been associated with admission to elite schools.¹⁶⁷ The lengths to which some parents went to secure admission to elite institutions were revealed in the college admissions scandal that resulted in jail time for prominent actors.¹⁶⁸

B. Elite Undergraduate Education Confers Earnings Benefits over and Above Ability Effects

A substantial literature based on data from a range of sources and time periods documents a large earnings premium to elite undergraduate education.¹⁶⁹ Although this may seem the obvious consequence of selective schools enrolling students with greater ability who would earn more no matter what college they attend, substantial evidence shows that the earnings premium is not simply due to their greater ability. Studies that account for extensive ability measures,¹⁷⁰ as

5/1/18311548/college-admissions-secrets-myths [https://perma.cc/7GEC-GUN2] (noting the correlation between a student's parental income and educational level and their chances of being admitted to a top school); Jeffrey Selingo, *The Secrets of Elite College Admissions*, WALL. ST. J. (Aug. 28, 2020, 10:59 AM), https://www.wsj.com/articles/the-secrets-of-elite-college-admissions-11598626784 (chronicling the decision-making process of three U.S. universities and noting the weight given to a student's financial situation); CHRISTOPHER AVERY, ANDREW FAIRBANKS & RICHARD ZECKHAUSER, *THE EARLY ADMISSIONS GAME: JOINING THE ELITE, WITH A NEW CHAPTER* (2004).

167. Daniel Golden, *The Story Behind Jared Kushner's Curious Acceptance Into Harvard*, PROPUBLICA (Nov. 18, 2016, 2:00 PM), https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard [https://perma.cc/LW7Z-QM8D] (reporting as one example that Charles Kushner pledged \$2.5 million to Harvard shortly before his son Jared Kushner was admitted).

168. Jacob Shamsian & Kelly McLaughlin, *Here's the Full List of People Charged in the College Admissions Cheating Scandal, and Who Has Pleaded Guilty So Far*, INSIDER (July 2, 2021, 8:10 AM), https://www.insider.com/college-admissions-cheating-scandal-full-list-people-charged-2019-3 [https://perma.cc/VF5L-GR6M].

169. For an overview of the literature, see generally, Hoxby, *supra* note 165 (noting the impact a degree from an elite university can have on a student's future earnings).

170. See, e.g., Rodney J. Andrews, Jing Li & Michael F. Lovenheim, *Quantile Treatment Effects of College Quality on Earnings*, 51 J. HUM. RES. 200 (2016) (studying post-graduation earnings of students from two public universities and one community college in Texas); Dominic J. Brewer, Eric R. Eide & Ronald G. Ehrenberg, *Does It Pay to Attend an Elite Private College? Cross-Cohort Evidence on the Effects of College Type on Earnings*, 34 J. HUM. RES. 104 (1999) (finding that attending a private, elite university offers students greater wage-earning benefits compared to students from less elite private schools or public universities); Mark C. Long, *College Quality and Early Adult Outcomes*, 27 ECON. EDUC. REV. 588, 601 (2008) (arguing that although certain colleges confer specific benefits on their students' "labor market and educational outcomes," "there is no such thing as a single index of quality"); James Monks, *The Returns to Individual and College Characteristics: Evidence from the National Longitudinal Survey of Youth*, 19 ECON. EDUC. REV. 279 (2000) (noting the earnings premium enjoyed by graduates of elite universities and the higher premium enjoyed by non-white graduates).

well as quasi-experimental studies,¹⁷¹ consistently find that those with elite undergraduate degrees have an earnings advantage relative to their counterparts without an elite degree, indicating that elite education itself causally improves earnings outcomes beyond any effects of ability. Furthermore, the benefits to attending a more selective college are greatest among Black and Hispanic/Latinx students and those who have less educated parents.¹⁷²

Graduates of elite institutions are likely to benefit from highly privileged family environments,¹⁷³ but factors that potentially provide benefits to all students also have an important influence on earnings. Elite institutions have far greater endowments,¹⁷⁴ and private universities spend far more per student than broad access institutions, which are mostly public.¹⁷⁵ Part of the earnings advantage is due to monetary investments in educational quality that would benefit all

171. See Massimo Anelli, *The Returns to Elite University Education: A Quasi-Experimental Analysis*, 18 J. EUR. ECON. ASS'N 2824 (2020); Jere R. Behrman, Mark R. Rosenzweig & Paul Taubman, *College Choice and Wages: Estimates Using Data on Female Twins*, 78 REV. ECON. & STAT. 672, 683 (1996); Serena Canaan & Pierre Mouganie, *Returns to Education Quality for Low-Skilled Students: Evidence from a Discontinuity*, 36 J. LAB. ECON. 395 (2018); Justine S. Hastings, Christopher A. Neilson & Seth D. Zimmerman, *Are Some Degrees Worth More Than Others? Evidence from College Admissions Cutoffs in Chile* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19241, 2013); Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 REV. ECON. & STAT. 717 (2009); Lars J. Kirkebøen, Edwin Leuven & Magne Mogstad, *Field of Study, Earnings, and Self-Selection*, 131 Q.J. ECON. 1057 (2016); Sheetal Sekhri, *Prestige Matters: Wage Premium and Value Addition in Elite Colleges*, 12 AM. ECON. J. APP. ECON. 207 (2020).

172. Dale & Krueger, *supra* note 33, at 323, 326, 350.

173. See PAUL TOUGH, *THE YEARS THAT MATTER MOST: HOW COLLEGE MAKES OR BREAKS US* (2019); Richard V. Reeves & Eleanor Krause, *Raj Chetty in 14 Charts: Big Findings on Opportunity and Mobility We Should All Know*, BROOKINGS (Jan. 11, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/01/11/raj-chetty-in-14-charts-big-findings-on-opportunity-and-mobility-we-should-know/> [<https://perma.cc/2VRC-FPE2>]; Chetty, *supra* note 4.

174. Endowment data show substantial disparities in resources between elite and broad access institutions. For example, the 120 institutions with the largest endowments account for about three-fourths of the market value of the total national endowment of post-secondary institutions. Five institutions alone (Harvard, Yale, Princeton, Stanford, and University of Texas System) account for nearly one-quarter of the total 2018 market value of endowments. See Table 333.90. *Endowment Funds of the 120 Degree-Granting Postsecondary Institutions with the Largest Endowments, by Rank Order: Fiscal Year 2018*, NAT'L CTR. FOR EDUC. STAT. (Jan. 2020), https://nces.ed.gov/programs/digest/d19/tables/dt19_333.90.asp [<https://perma.cc/D4EM-LFCM>].

175. See *Condition of Education: Postsecondary Institution Expenses*, NAT'L CTR. FOR EDUC. STAT. (May 2021), https://nces.ed.gov/programs/coe/indicator_cue.asp [<https://perma.cc/23ZM-RQ7E>].

students regardless of their ability.¹⁷⁶ Other benefits come from positive peer effects.¹⁷⁷ Elite universities also include educating future leaders as a specific part of their mission,¹⁷⁸ in contrast to universities that are not considered elite.¹⁷⁹

C. *Elite Education as the Path to Advanced Degrees*

As noted earlier, the vast majority of colleges admit all minimally qualified applicants without regard to race.¹⁸⁰ In a world in which most college graduates are just that—college graduates, and not “Harvard” graduates—concerns about affirmative action can largely be put aside. But in the context of creating a critical mass of diverse professionals, the link between status of undergraduate institution and advanced education is relevant at two junctures: first, with respect to the likelihood of earning advanced degrees, and second, with earnings after graduate degree completion.

Starting with the likelihood of earning an advanced degree, research confirms that elite undergraduate education confers an advantage with respect to admissions¹⁸¹ and degree completion.¹⁸² In

176. Amanda L. Griffith & Kevin N. Rask, *The Effect of Institutional Expenditures on Employment Outcomes and Earnings*, 54 *ECON. INQUIRY* 1931, 1931 (2016).

177. Scott E. Carrell, Richard L. Fullerton & James E. West, *Does Your Cohort Matter? Measuring Peer Effects in College Achievement*, 27 *J. LAB. ECON.* 439, 441, 462 (2009); Dennis Epple, Richard Romano & Holger Sieg, *Peer Effects, Financial Aid and Selection of Students into Colleges and Universities: An Empirical Analysis*, 18 *J. APP. ECONOMETRICS* 501, 523-24 (2003); Nirav Mehta, Ralph Stinebrickner & Todd Stinebrickner, *Time-Use and Academic Peer Effects in College*, 57 *ECON. INQUIRY* 162 (2019).

178. *Mission, Vision, & History*, HARV. COLL., <https://college.harvard.edu/about/mission-vision-history> [<https://perma.cc/KG76-675W>] (last visited Nov. 6, 2021) (“The mission of Harvard College is to educate the citizens and citizen-leaders for our society.”); *Mission Statement*, YALE, <https://www.yale.edu/about-yale/mission-statement> [<https://perma.cc/LD6S-G82P>] (last visited Nov. 6, 2021) (“Yale educates aspiring leaders worldwide who serve all sectors of society.”).

179. *E.g.*, *Mission Statement*, MIDDLE TENN. ST. UNIV. <https://www.mtsu.edu/about/mission.php> [<https://perma.cc/7MSH-4MQ3>] (last visited Nov. 6, 2021) (“[P]repare graduates to thrive in their chosen professions and a changing global society.”).

180. Kane, *supra* note 31, at 18.

181. Gregory Attiyeh & Richard Attiyeh, *Testing for Bias in Graduate School Admissions*, 32 *J. HUM. RES.* 524, 542 (1997) (finding that among applicants with similar standardized test scores, selectivity of undergraduate institution resulted in an increased chance of graduate school admission).

182. Eric Eide, Dominic J. Brewer & Ronald G. Ehrenberg, *Does It Pay to Attend an Elite Private College? Evidence on the Effects of Undergraduate College Quality on Graduate School Attendance*, 17 *ECON. EDUC. REV.* 371 (1998); Joni Hersch, *Catching Up Is Hard to Do: Undergraduate Prestige, Elite Graduate Programs, and the Earnings Premium*, 10 *J.*

fact, the likelihood of earning an advanced degree from an elite institution is overwhelmingly related to status of undergraduate institution. Those with elite undergraduate degrees are ten times more likely to earn an elite advanced degree as are those with an undergraduate degree from a broad access institution.¹⁸³ Furthermore, the type of advanced degree is also closely related to institutional type, with those with undergraduate degrees from elite institutions far more likely to earn a Doctor of Philosophy (PhD), Doctor of Medicine (MD), JD, or MBA, and far less likely to earn a master's degree in education, than graduates of broad access institutions.¹⁸⁴

Not only are earnings higher for those with an elite undergraduate degree, but the earnings advantage persists even among those with advanced degrees. It is often assumed that students can “scrub” a less prestigious undergraduate degree by earning an elite advanced degree.¹⁸⁵ However, research shows this premise is largely false: Students without elite undergraduate degrees do not catch up monetarily with those with elite degrees, even by earning an advanced degree from an elite institution.¹⁸⁶ For example, among men who earn elite advanced degrees, those with an undergraduate degree from the most selective universities earn 41% more than comparable men with an undergraduate degree from a broad access institution.¹⁸⁷ Similarly large earnings premiums appear for those with MBA, MD, and JD degrees.¹⁸⁸

To summarize, elite undergraduate education confers advantages in advanced education and in earnings beyond the effect of ability, and these advantages cannot be overcome by earning an elite advanced degree. Because of this relationship, without affirmative action in undergraduate admissions, minorities would be underrepresented in elite institutions that serve as feeders to advanced-degree programs. In turn, there would be fewer URM in the pipeline to leadership roles and in professions such as medicine, law, and academia.

BENEFIT-COST ANAL. 503, 518-19 (2019) (both studies finding that graduates of elite institutions are more likely to earn advanced degrees as well as more likely to earn their graduate degrees from higher-status institutions).

183. See Hersch, *supra* note 182, at 519.

184. See *id.* at 540.

185. Nancy Hass, *Why You Can't Catch Up*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/03/education/edlife/why-you-cant-catch-up.html>.

186. See Hersch, *supra* note 182, at 519, 523, 525.

187. *Id.* at 526.

188. *Id.* at 529-33.

D. *Preferential Hiring of Graduates of Elite Institutions*

Elite firms recruit from elite colleges.¹⁸⁹ For example, more than 80% of Facebook employees are graduates of elite colleges.¹⁹⁰ A survey of hiring managers shows that 29% prefer to only hire graduates from top schools.¹⁹¹ This practice has been justified as a means of reducing hiring costs.¹⁹² But in a modest departure, Google, which had a reputation for hiring only elite graduates,¹⁹³ reported that it reduced prior reliance on SAT scores and college GPA and instead is applying data-driven decisions that incorporate other factors, as its analysis showed that SAT and GPA alone were not important predictors of success at Google.¹⁹⁴

Preferential hiring by elite firms of elite graduates is so well-established that any departure from this policy is not only itself newsworthy, but cited as a reason that diversity within elite firms is limited. For example, even a brief *Wall Street Journal* article announcing the departure of the Goldman Sachs Human Resources director mentioned her efforts to hire a more diverse workforce by recruiting beyond elite schools.¹⁹⁵

Given their focus on recruiting diverse talent, a group of “America’s most successful companies,” including Apple, Microsoft, General Electric, Twitter, and Verizon (and many others), filed an amicus brief in support of continued affirmative action in the Harvard

189. Rivera, *supra* note 144, at 1004; *see generally* LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS (2015) (detailing how elite students obtain highly sought after and extremely competitive jobs).

190. Ryan Craig, *Top Employers Are Looking For Talent In All The Wrong Places*, FORBES (June 7, 2019, 9:00 AM), <https://www.forbes.com/sites/ryanacraig/2019/06/07/top-employers-are-looking-for-talent-in-all-the-wrong-places/> [<https://perma.cc/GC92-KZGN>].

191. *Id.*

192. *See* Lauren Rivera, *Firms Are Wasting Millions Recruiting on Only a Few Campuses*, HARV. BUS. REV. (Oct. 23, 2015), <https://hbr.org/2015/10/firms-are-wasting-millions-recruiting-on-only-a-few-campuses> [<https://perma.cc/PX3Y-B342>].

193. *See* Gregory Ferenstein, *Why Google Wants To Stop Hiring Based On Ivy League Credentials*, FORBES (Nov. 23, 2015, 1:39 PM), <https://www.forbes.com/sites/gregoryferenstein/2015/11/23/why-google-wants-to-stop-hiring-based-on-ivy-league-credentials/> [<https://perma.cc/DY8R-M83L>].

194. *See* Max Nisen, *Google Cares Less About SAT Scores and GPA Because They Have Better Hiring Data*, BUS. INSIDER (Apr. 24, 2013, 8:15 AM), <http://www.businessinsider.com/data-in-the-workplace-2013-4> [<https://perma.cc/Q24Z-W39Z>]; Steve Lohr, *Big Data, Trying to Build Better Workers*, N.Y. TIMES (Apr. 20, 2013), <https://www.nytimes.com/2013/04/21/technology/big-data-trying-to-build-better-workers.html>.

195. Liz Hoffman, *Goldman Sachs’ Edith Cooper to Leave Firm*, WALL ST. J. (Sept. 11, 2017, 7:29 PM), <https://www.wsj.com/articles/goldman-sachs-edith-cooper-to-leavefirm-1505143357>.

case.¹⁹⁶ The brief describes the educational benefits of diversity that are fostered by affirmative action as being “essential to [the companies’] continued success.”¹⁹⁷ The interest of these large companies highlights that the educational benefits of diversity extend well beyond graduation.

VI. THE NATIONAL SURVEY OF COLLEGE GRADUATES

Although research described in Part V shows the strong relationship between elite undergraduate status and advanced-degree outcomes, these studies do not report these relationships by race or ethnicity. I now turn to providing empirical evidence on these relationships, which supports my assertion that elite status of undergraduate institutions dominates the role of race in advanced-degree outcomes. In this Part, I describe the data used in the following analyses and present descriptive data on educational outcomes by institutional selectivity.

The National Survey of College Graduates (NSCG) is a large and nationally representative sample of the U.S. population of college graduates who were under age seventy-six in the year they were surveyed.¹⁹⁸ The data I use are from five waves of the NSCG conducted in 2003, 2010, 2013, 2015, and 2017. Over this period, there are 456,861 observations. Because of the large number of observations, there is an adequate number of underrepresented minorities in the sample with advanced degrees for statistical power.

The NSCG reports a wealth of information on education, employment characteristics, and demographic information. Of particular importance is unique information that allows categorizing degrees by selectivity of the degree-granting institution for all earned degrees. In addition, field of advanced degrees (e.g., JD, MD, MBA) can be identified, whether the individual is or is not employed in an

196. Brief for Amgen, Inc. et al. as Amici Curiae Supporting Appellee, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 980 F.3d 157 (2020) (No.19-2005), 2020 WL 3447865, at *1.

197. *Id.* at *23.

198. *National Survey of College Graduates*, NAT’L SCI. FOUND., <https://www.nsf.gov/statistics/srvygrads/> [<https://perma.cc/Z67M-KL4H>] (Jan. 2021). The NSCG is one of the surveys included in the Scientists and Engineering Statistical Data System (SESTAT) sponsored by the National Science Foundation. The NSCG oversamples populations of special interest. Sample weights are used to make the sample representative of the U.S. college-educated population.

occupation usually associated with the degree.¹⁹⁹ The NSCG also includes unique information on occupational licenses.

A. Education

The NSCG includes detailed information on academic degrees for up to five degrees per respondent, including for each degree the type (bachelor's, master's, doctorate, professional)²⁰⁰ and field of study.²⁰¹ To examine specific professional degrees, I use information on degree type in conjunction with field of study to identify those with MD degrees (which per survey includes as field of study any professional medical degree such as dentistry, optometry, osteopathic, podiatry, veterinary), JD (professional degree with field of study law), PhD (which includes any doctorate), and MBA (master's degree with field of study business administration and related business fields).

It is worth emphasizing at this point that all statistics reported in this Article are based on individuals who have actually earned the specified degree. Students who enter college but do not graduate are not included in the NSCG data. College graduates who are, for instance, admitted to medical school, law school, or a PhD program but do not graduate will be reported in the data under the highest degree earned before entering their professional or graduate program.

B. Race and Ethnicity

Respondents indicate whether they are of Hispanic, Latinx, or Spanish origin. Following this question about ethnicity, respondents indicate their race or races. Those of Hispanic, Latinx, or Spanish origin can be of any race. To create mutually exclusive race or ethnicity

199. National surveys such as the Current Population Survey that report labor market information report years of education or highest degree, but do not report college major. The American Community Survey (ACS) records undergraduate major for college graduates but provides no information on field of any graduate degrees.

200. The survey instrument includes examples of degrees within each category as follows: "Bachelor's degree (e.g., BS, BA, AB)"; "Master's degree (e.g., MS, MA, MBA)"; "Doctorate (e.g., PhD, DSc, EdD)"; "Other professional degree (e.g., JD, LLB, MD, DDS, DVM)." I group MBAs with professional degrees for the survey respondents. Those reporting a professional degree other than MD, JD, or MBA are also included in the statistics for "any professional degree," so the sum of the share with MDs, JDs, and MBAs is less than the share with any professional degree. It is not possible to identify whether parents have an MBA from the survey data.

201. The survey instrument includes a list of 140 fields. See Alison F. Del Rossi & Joni Hersch, *The Private and Social Benefits of Double Majors*, 7 J. BENEFIT-COST ANAL. 292, 299 (2016).

categories, I create one group for those who select Hispanic, Latinx, or Spanish ethnicity, regardless of race; the remaining observations are grouped into mutually exclusive categories of single-race white, Black, or Asian, with a final category grouping the small number of observations reporting more than one race, American Indian/Alaskan Native, or Native Hawaiian/other Pacific Islander, as these racial categories have too few observations to analyze separately.²⁰²

C. Institutional Selectivity

The NSCG has unique information on type of institution, recorded using the 1994 Carnegie classification system.²⁰³ The Carnegie classifications are designed to group U.S. institutions of higher education based on similarity of structure and mission (e.g., research focus, undergraduate or graduate education, under public or private control). In the 1994 classification system, there are eight broad categories for bachelor's degree-granting institutions: Research I, Research II, Doctoral I, Doctoral II, Master's (Comprehensive) I, Master's (Comprehensive) II, Liberal Arts (Baccalaureate) I, and Liberal Arts (Baccalaureate) II.²⁰⁴ Non-U.S. institutions are not included in the classifications.

By comparing institutions by name within each Carnegie classification to each institution's selectivity category in Barron's Profiles of American Colleges for 1994,²⁰⁵ I developed a system to group institutions into four tiers.²⁰⁶ Specifically, institutions are stratified within each Carnegie classification and public or private control status into groups in which the share of schools rated by Barron's as most or highly competitive is significantly different between groups.²⁰⁷

202. These observations are included in the figures and tables when statistics for the full sample are reported.

203. *Carnegie Classification of Institutions of Higher Education*, IND. UNIV., <https://carnegieclassifications.iu.edu/> [<https://perma.cc/P7U5-MUV5>] (last visited Nov. 6, 2021). The Carnegie classification system has been used since 1973 and is updated periodically. *Id.*

204. The Carnegie classification system also included specific codes for specialized institutions (e.g., theology, art), but there are too few observations within each specialized group to analyze separately for the purposes of this Article.

205. TESSA KRILING, BARRON'S EDUCATION SERIES, BARRON'S PROFILES OF AMERICAN COLLEGES: DESCRIPTIONS OF THE COLLEGES (20th ed. 1994).

206. See Joni Hersch, *Opting Out Among Women with Elite Education*, 11 REV. ECON. HOUSEHOLD 469, 470 (2013).

207. *Id.* at 480.

The four tier groupings derived by this procedure are as follows. Tier 1 is comprised of private Research I and II; tier 2 is private Liberal Arts I colleges; tier 3 is public Research I institutions; and tier 4 are all other U.S. institutions that are not categorized under the Carnegie system as specialized or missing Carnegie classification.²⁰⁸ Affirmative action may play an admissions role at the selective institutions that are grouped into tiers 1-3.

VII. FAMILY BACKGROUND

Disadvantages in primary and secondary education, which relate to socioeconomic status and parental education, may have a strong bearing on qualifications at the college application stage.²⁰⁹ The share of the population with a college degree has risen substantially in the past fifty years, from 11% in 1970 to 36% in 2019 among those age twenty-five and older.²¹⁰ Although everyone included in the NSCG data is a college graduate, the educational background of their parents differs considerably by race or ethnicity. Figure 1²¹¹ shows this relationship. For two-thirds of the college graduates who are Black or Latinx, neither parent was a college graduate. In contrast, 50% of white college graduates and 45% of Asian college graduates are first generation college graduates.

The difference by race or ethnicity is even greater when considering the share of parents with either a professional degree (e.g., MD, JD; MBAs cannot be identified) or PhD.²¹² As shown in Figure 2, white and Asian college graduates are more than twice as likely to have a father who has a professional degree or PhD.

There is a close relationship between education and income, as well as intergenerational connections between parents' education and that of their offspring. Figures 1 and 2 show that even among college graduates, Black and Latinx students enter college with a disadvantage

208. See Hersch, *supra* note 182, at 536-39, Table A1 (appendix table listing the institutions in tiers 1, 2, and 3).

209. Robinson, *supra* note 77, at 185, 207-09.

210. Table 104.10: Rates of High School Completion and Bachelor's Degree Attainment Among Persons Age 25 and Over, by Race/Ethnicity and Sex: Selected Years, 1910 through 2019, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d19/tables/dt19_104.10.asp [<https://perma.cc/9CBA-RX2Y>] (last visited Nov. 6, 2021).

211. For brevity in the figures and tables, I shorten "Black or African American" to "Black" and "Hispanic/ Latinx" to "Latinx."

212. As illustrated in Figure 2 of this Article.

with respect to their parents' education. I turn now to the educational outcomes of the college graduates represented in the NSCG.

Figure 1
Percent First Generation College Graduate by Race or Ethnicity

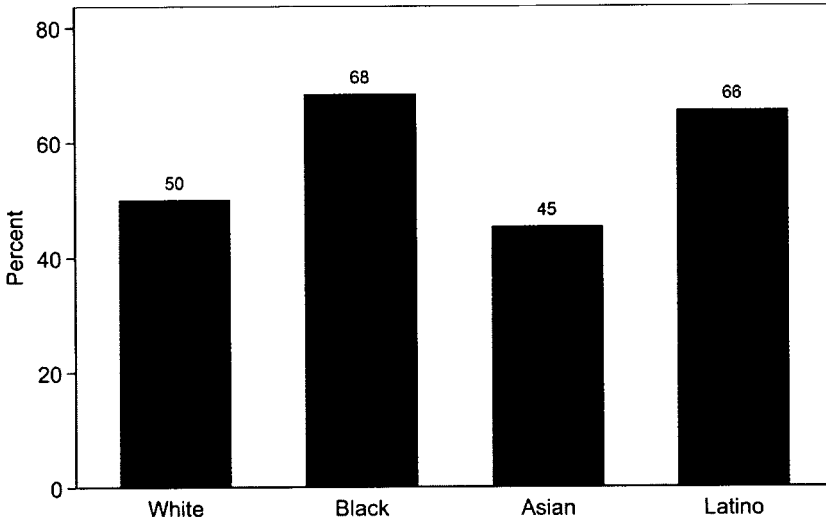
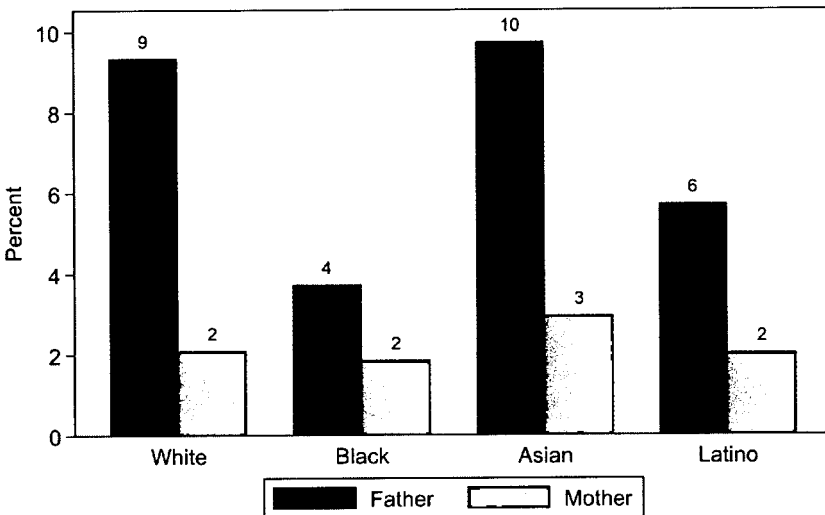


Figure 2
Percent with Parents' Education Professional or PhD by Race or Ethnicity

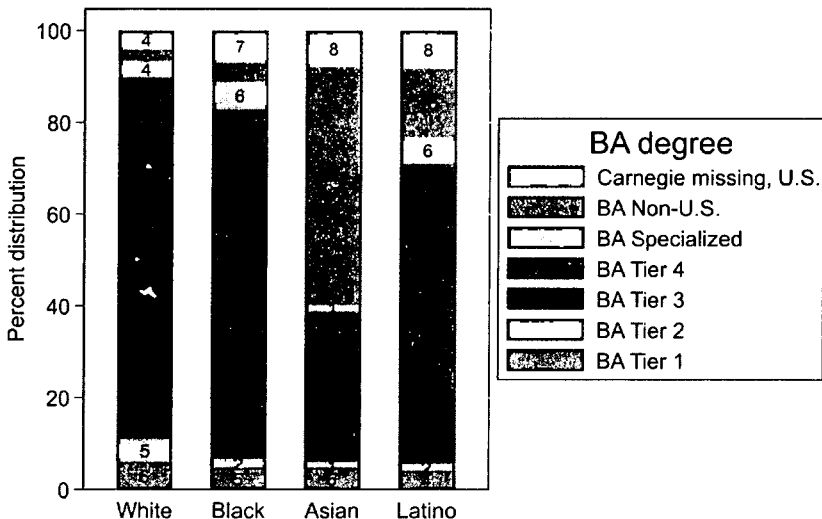


VIII. UNDERGRADUATE STATUS AND ADVANCED DEGREES

A. *Undergraduate Status by Race or Ethnicity*

Using my categorization into tiers that are based on selectivity of colleges and universities, Figure 3 shows the distribution of NSCG respondents by race or ethnicity based on their bachelor's degree tier. There are notable differences in racial and ethnic composition by undergraduate tier. Among all bachelor's degree graduates represented in the NSCG sample, relative especially to whites, Blacks are far more likely to be graduates of tier 4 institutions and far less likely to be graduates of the more selective institutions in tiers 1, 2, or 3. Specifically, 32% of whites are graduates of the more selective institutions in tiers 1-3. In contrast, only about half as many Blacks at 17% and Latinx at 19% are graduates of these more selective institutions. Thus, despite any admissions advantage that affirmative action policies may currently provide, Black and Latinx college graduates are underrepresented as graduates of selective institutions.

Figure 3
Distribution of BA Degree Tier by Race or Ethnicity

B. *Undergraduate Tier and Advanced-Degree Outcomes*

Professional (e.g., MD, JD, MBA) or graduate (e.g., PhD) degrees are often or definitely required for leadership roles and for occupations

such as physician, lawyer, or professor. As discussed in Part V, previous research shows that undergraduate status is strongly related to the likelihood of earning an advanced degree and to the status of that degree. Figure 4 provides statistics confirming these findings. For 68% of tier 4 graduates, their highest degree is bachelor's. In contrast, among graduates of selective institutions in tiers 1 and 2, fewer than half (48%) earn a bachelor's as their highest degree.

Advanced degrees are grouped into tiers using the classification strategy reported for undergraduate tiers.²¹³ Notably, Figure 4 also shows that the likelihood of moving from a non-selective institution to graduating from a selective institution for professional or graduate study is quite low. Only 2% of those with a bachelor's degree from a tier 4 institution earn an advanced degree from the most selective private institutions in tier 1, in contrast to 24% of those with an undergraduate degree from a tier 1 institution.

Figure 4
Distribution of Post-BA Outcomes by BA Tier

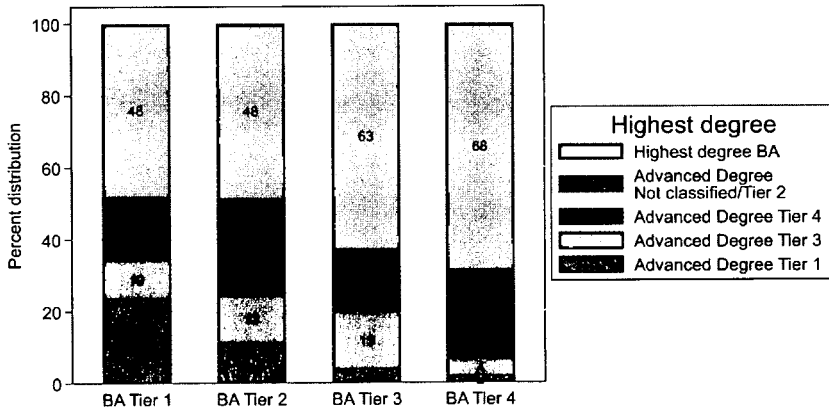


Table 1 reports the share who earned specific advanced degrees by undergraduate tier. The likelihood of earning a professional or PhD degree depends strongly on undergraduate tier. Specifically, within the full sample, the share of graduates with a professional or

213. See Hersch, *supra* note 182, at 512-14 (providing a detailed explanation of the tier groupings for advanced degrees). Because liberal arts colleges offer few graduate degrees, those with advanced degrees from tier 2 institutions are grouped with other not classified institutions.

PhD degree is 32.9% of tier 1 graduates, 24.8% of tier 2 graduates, 18.1% of tier 3 graduates, and only 10.5% of tier 4 graduates. The share of tier 1 graduates who earn an MD is 6.8%; by contrast, it is only 1.2% among tier 4 graduates. A similar disparity by BA tier arises among JDs, with nearly 10% of tier 1 graduates earning a JD, in contrast to less than 2% of tier 4 graduates. The pattern also appears among PhDs and MBAs.

Table 1
Percent with Specific Advanced Degrees by BA Tier

	All	BA Tier 1	BA Tier 2	BA Tier 3	BA Tier 4
<hr/> Degree					
Any Professional Degree or PhD	15.4	32.9	24.8	18.1	10.5
MD	2.5	6.8	4.8	2.9	1.2
JD	2.9	9.7	7.4	4.4	1.9
PhD	3.5	6.6	6.4	3.6	2.0
MBA	6.1	9.7	5.9	6.8	5.1

The statistics shown in Figures 3 and 4 and in Table 1 tell an important story with respect to the importance of affirmative action in admissions. Figure 3 confirms that URM are underrepresented at elite institutions, and Figure 4 shows the rarity that graduates of non-selective institutions will earn elite advanced degrees. Table 1 shows the strong relationship between undergraduate status and the likelihood of earning those advanced degrees that lead to influential roles in society.

The elite universities that use affirmative action are selecting the most qualified URM students. Furthermore, substantial evidence discussed in Part V shows that elite education improves student outcomes over and beyond the effects of students' greater ability. But, as evidence discussed in Part III shows, in the absence of race-conscious admissions, less than half of these URM students would be admitted. By moving down in institutional selectivity, URM students become part of a student body in which advanced-degree study, especially at elite institutions, is not common.

Peer effects are powerful, and having fewer professional or graduate school bound peers would alone reduce the share of URM

headed on for these degrees. Elimination of affirmative action would reduce the number of URM individuals in the pipeline for advanced degrees of any kind and, in particular, in the pipeline for elite degrees, limiting the supply of people of color in leadership and professional roles.

IX. SPECIFIC ADVANCED DEGREES BY RACE OR ETHNICITY

A. *All Professional or PhD Degrees*

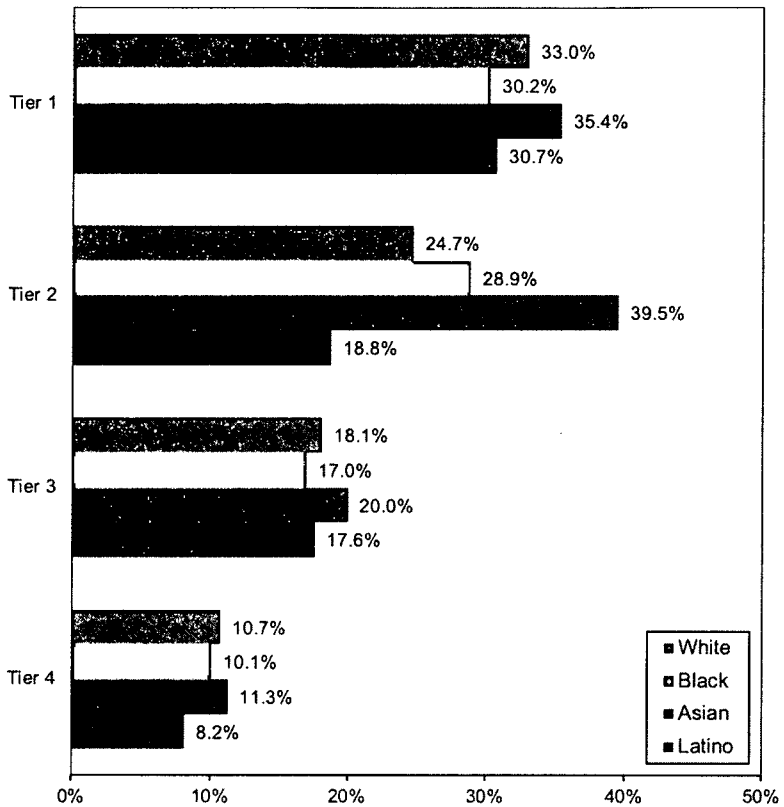
Table 1 shows the strong overall relationship between earning an advanced degree and status of undergraduate institution. This Part examines the relationship between undergraduate tier and advanced degrees by race or ethnicity.

Beginning with professional or PhD degrees, Figure 5 shows that the likelihood of earning a professional or PhD degree depends strongly on undergraduate tier for all races or ethnicity, with graduates of more selective institutions considerably more likely to earn such a degree (with the exception of Asian graduates, in which the share is higher for tier 2 graduates than tier 1 graduates).

Overall, within race or ethnicity, those graduates of tier 1 institutions are four to five times more likely to earn a professional or PhD degree than are graduates of tier 4 institutions, with smaller but still substantial differences between tiers 2 and 3 relative to tier 4. For example, among Black graduates, those with a bachelor's degree from a tier 1 institution are three times more likely to earn a professional or PhD degree than are tier 4 graduates.

But, among graduates of the same undergraduate tier, the likelihood of earning a professional degree varies considerably less by race or ethnicity. For example, among tier 1 graduates, white graduates are only 19% more likely to earn a professional or PhD degree than are Black graduates. For comparison, Asian graduates of tier 1 are 15% more likely to earn a professional or PhD degree than are white graduates of tier 1.

Figure 5
Percent Professional or PhD by Undergraduate Tier



B. MD, JD, PhD, and MBA Degrees

Figures 6, 7, 8, and 9 separate out specific degrees and provide corresponding statistics for MDs (Figure 6), JDs (Figure 7), PhDs (Figure 8), and MBAs (Figure 9). The same pattern as presented in Figure 5 is evident from examining specific degrees: There are substantial differences in the share of students earning these degrees by tier, and far smaller differences by race or ethnicity among graduates of the same tier. Consistent with the overall statistics reported in Table 1, the disparities in advanced degree attainment by BA tier are substantially larger for MD and JD degrees than for PhDs and MBAs, but the overall pattern and strength of relationships between undergraduate tier and advanced degrees holds by race and ethnicity.

Figure 6
Percent MD by Undergraduate Tier

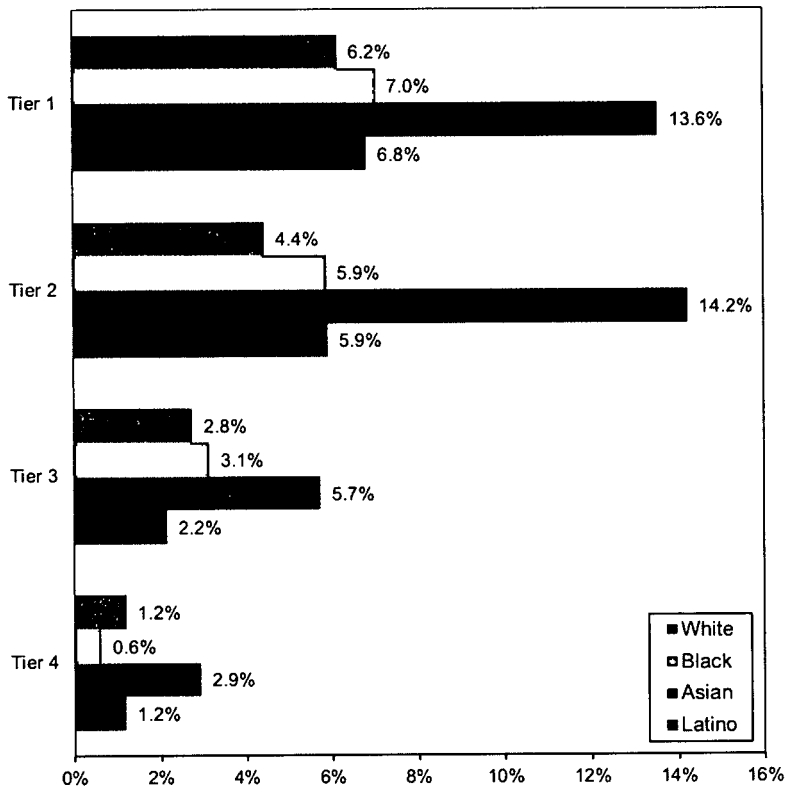


Figure 7
Percent JD by Undergraduate Tier

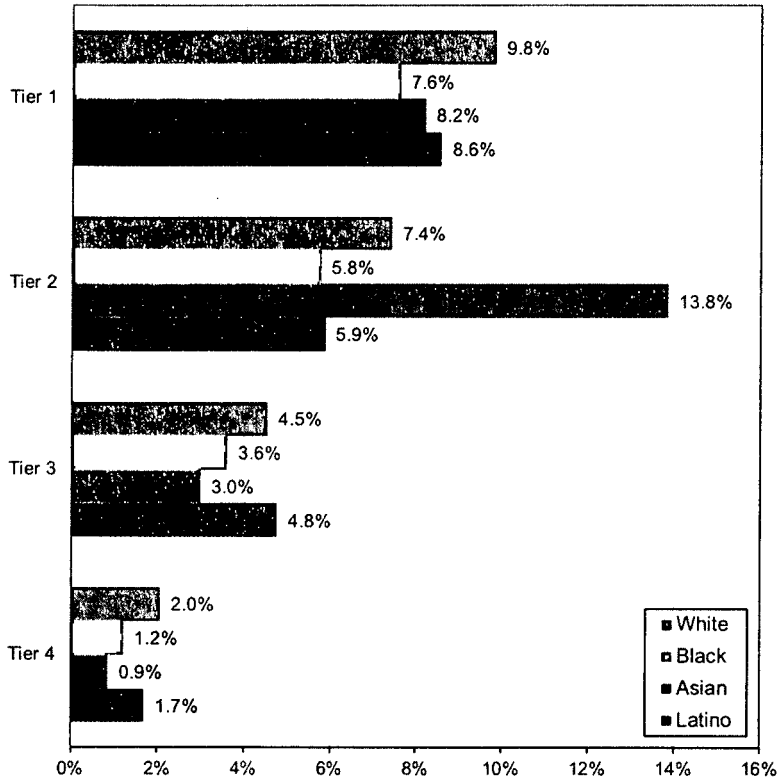


Figure 8
Percent PhD by Undergraduate Tier

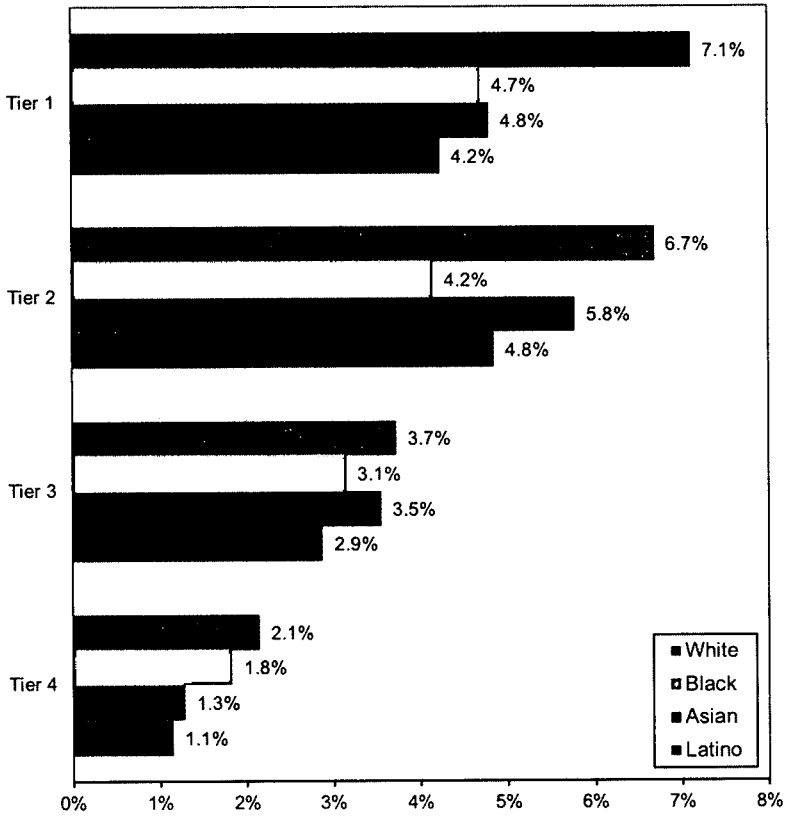
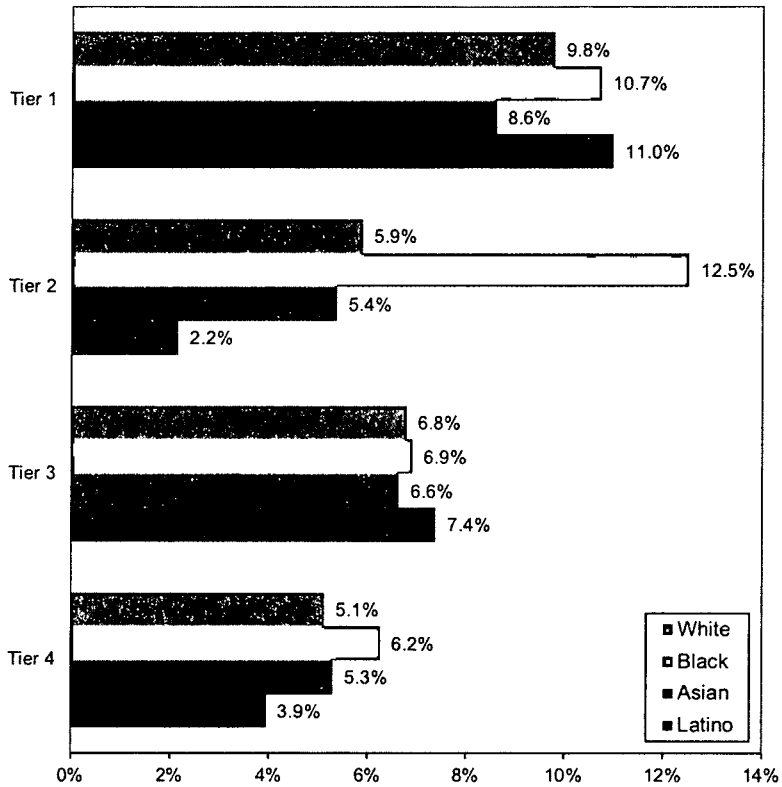


Figure 9
Percent MBA by Undergraduate Tier



X. ADDRESSING COMMON CRITICISMS OF AFFIRMATIVE ACTION

Survey evidence shows considerable public support for affirmative action programs for students of color.²¹⁴ Affirmative action may expand students' educational options, and having more options would seemingly be an advantage to any applicant. Having more options is likewise a plus for students who receive preferential treatment for non-race reasons, such as those applicants to Harvard

214. *Americans' Views on Affirmative Action Programs for Women and Minorities (Trends)*, GALLUP, <https://news.gallup.com/poll/247130/americans-views-affirmative-action-programs-women-minorities-trends.aspx> [<https://perma.cc/SL5T-4YY8>] (last visited Nov. 6, 2021). The question asked is: "Do you generally favor or oppose affirmative action programs for racial minorities?" with possible responses favor, oppose, or no opinion. In the 2018 survey, 61% favored, 30% opposed, and 9% had no opinion. *Id.* at 10.

who fall into the ALDC group.²¹⁵ But concerns have been raised that affirmative action is harmful to those who gain an admissions advantage or are perceived as gaining such an advantage. Critics of affirmative action in higher education point to several possible unintended consequences. These can be grouped into three categories: mismatch, stigma, and reduced incentives for individuals to invest in college preparation.

A. Mismatch

In the broader economics literature on education, students are characterized as “mismatched” if they attend colleges either substantially below or substantially above their ability level as measured by test scores and high school grades. This form of mismatch is common, with students from better educated households more likely to attend selective schools for which they are relatively underqualified.²¹⁶ High ability, low income students are less likely than their counterparts from higher income families to attend or apply to selective colleges that they would otherwise be qualified for and often do not apply to any elite colleges even when their expected net costs would be less than at the less selective colleges they do attend.²¹⁷ These are general findings in the economics literature, and this type of mismatching is not attributed to affirmative action.

In the affirmative action context, a substantial debate has arisen over what is termed the “mismatch” hypothesis, which argues that minorities are adversely affected by affirmative action in admissions to elite law schools and for undergraduate study.²¹⁸ The mismatch interpretation in the law school context is that because of affirmative action, elite law schools admit underprepared Black students who struggle with the level and pace of material and consequently learn less than they would have had they enrolled at a law school better matched

215. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126, 138 (D. Mass. 2019).

216. Eleanor Wiske Dillon & Jeffrey Andrew Smith, *Determinants of the Match between Student Ability and College Quality*, 35 J. LAB. ECON. 45, 57 (2017).

217. Caroline Hoxby & Christopher Avery, *The Missing ‘One-Offs’: The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2013, at 1-2, 8, 31.

218. For an extended discussion of this debate, see Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Trade-off*, 54 J. ECON. LIT. 3, 11-22 (2016).

with their observable incoming credentials.²¹⁹ This hypothesis gained high visibility in the context of a study of bar passage rates, which predicted a lower bar passage rate among Black students who are graduates of elite law schools.²²⁰

It is important to note that the mismatch hypothesis has been vociferously disputed on both empirical grounds and implications. Notably, a number of studies reanalyzed the same data and came to a contrary result, pointing to unusual empirical decisions made in the analysis that generated results that are not robust to alternative and more defensible estimation approaches.²²¹

The tenability of mismatch theory was debated in the Harvard case. In the original complaint from 2014, Students for Fair Admission discussed in detail the implications of mismatch theory.²²² In 2016, soon after *Fisher II* was decided, an amicus brief was submitted supporting Harvard's motion for partial judgment on the pleadings that discussed mismatch theory. The brief argued that empirical evidence rendered mismatch theory untenable and that the theory had been "repeatedly rejected" by the Supreme Court in both *Fisher I* and *Fisher II*.²²³ Notably, the district court neither mentioned mismatch

219. Justice Thomas expressed this concern in *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., dissenting). More recently, Justice Scalia raised this argument during oral arguments in *Fisher II*. See Transcript of Oral Argument at 67, *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981).

220. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 445-47 (2004).

221. See, e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857 (2005) ("The conclusions in [Sander's article] rest on a series of statistical errors, oversights, and implausible assumptions."); Rothstein & Yoon, *supra* note 92, at 683 (showing that any mismatch effects are modest and limited to Black students with the weakest incoming academic credentials); Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005) (identifying six required logical "truths" that are unsupported by Sander's analysis).

222. Complaint at ¶ 383-99, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-DJC), 2014 WL 6241935.

223. Brief for Student as Amici Curiae Supporting Defendant's Motion for Judgment on the Pleadings on Counts IV and VI, *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB), 2016 WL 10805895.

theory in its decision on partial judgment on the pleadings²²⁴ nor in the opinion itself.²²⁵

It is also questionable whether mismatch is actually harmful to Black students or whether it invalidates the educational benefits of a diverse student body rationale. First, at the individual level, law students at elite schools may benefit from superior education and access to their law school peers, whether or not they themselves become lawyers, and whether or not they received an affirmative action advantage. Second, the justification for race-conscious admissions is that a diverse student body provides educational benefits to the student body as a whole, regardless of the private benefits (or costs) to individuals.²²⁶

It is also worth noting here the relation of this mismatch hypothesis to my contribution in the current Article. Undergraduate institution is not accounted for in the bar passage study that launched the mismatch hypothesis.²²⁷ To the extent that affirmative action results in admission of students to elite universities in which they are mismatched, we would expect far fewer URM students to earn advanced degrees relative to white students who would not have received an affirmative action advantage. In contrast, I find little difference by race in the probability of earning advanced degrees among graduates of similar institutions, thus refuting this implication of the mismatch hypothesis.

B. Licensing Information Shows No Evidence of Mismatch

This Part examines the mismatch question of whether possible admission to professional programs of URM by affirmative action causes underperformance in their professional careers. Starting in 2015, the NSCG asks about licenses or certifications for the current job, which is information uniquely available in the NSCG. Specifically,

224. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 261 F. Supp. 3d 99, 99 (D. Mass. 2017).

225. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

226. For a discussion of these points, see Roosevelt, *supra* note 77, at 733 (“The point of affirmative action under the diversity rationale, after all, is not to enhance the career prospects of its recipients, but rather to improve the educational experience of all students who are, in the schools where such programs are typically employed, mostly white.”).

227. Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *YALE L.J.* 1997, 2001 n.18 (2005) (noting, among other concerns, the interpretation problem arising from not accounting for status of undergraduate institution).

respondents are asked if they have a currently active professional certification or a state or industry license.

Table 2 provides statistics on the share of JD and MD graduates with active professional licenses. Among those with a JD from any law school, there is little difference in the share holding an active professional license between white graduates, Black graduates, and Asian graduates. Considering those who are JD graduates of elite (tier 1) law schools that have been the subject of the mismatch controversy, the share of Black graduates with an active professional license is the highest among all racial or ethnicity groups. Hispanics/Latinx who are graduates of elite medical schools likewise have the largest share with an active professional license.

Table 2
Percent with Active Professional License by Race or Ethnicity,
JD and MD

	All	White	Black	Asian	Latino
Any JD	83.1	83.9	84.9	87.1	68.5
Tier 1 JD	85.3	84.3	94.9	93.9	89.1
Tier 1 or 3 JD	84.9	84.5	85.7	93.7	85.0
Any MD	89.3	91.9	81.4	82.9	85.0
Tier 1 MD	94.1	93.8	97.4	91.0	98.8
Tier 1 or 3 MD	94.1	93.7	97.7	93.1	98.6

C. *Stigma*

Turning to the second criticism of affirmative action, if URM students are perceived as admitted to selective programs primarily because of their race and are assumed to be unqualified, all members of the group may be stigmatized and assumed to be unqualified. Elimination of race-conscious admissions would then signal that those from minority groups who were admitted were admitted solely on merit.

But evidence that affirmative action stigmatizes students is lacking. Survey evidence indicates that law students are not affected by either internal stigma (one's own feeling of inadequacy) or external stigma (other's resentment or doubts about one's qualifications)

associated with affirmative action.²²⁸ White students randomly assigned to Black roommates at a university that utilized race-conscious affirmative action became more favorable toward affirmative action, which is the opposite relation that would hold if Black students are perceived as admitted despite being underqualified.²²⁹

D. Academic Investments

It has been proposed that affirmative action itself reduces incentives for investment in preparation for college if students expect that their race would confer an admissions advantage and that eliminating racial preferences would incentivize URM students to work harder and in that way reduce racial disparities.²³⁰ However, studies overwhelmingly show the opposite relationship. Affirmative action enhances high school students' academic investments.²³¹ URM high school students in states that had bans on affirmative action that were eliminated following *Grutter* improved their pre-college human capital relative to students in states that had never banned affirmative action.²³²

By reference to models of statistical discrimination, elimination of affirmative action may reduce incentives for students to make academic investments. Economic models of statistical discrimination show that in the face of employment discrimination in which employers have negative stereotypes about minority workers, those in the minority group optimally have less incentive to invest in skills and education, causing and perpetuating an earnings gap that persists as an equilibrium outcome.²³³ By this self-fulfilling cycle, elimination of

228. Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1343 (2008).

229. Johanne Boisjoly et al., *Empathy or Antipathy? The Impact of Diversity*, 96 AM. ECON. REV. 1890, 1902 (2006).

230. Stephen Coate & Glenn C. Loury, *Will Affirmative-Action Policies Eliminate Negative Stereotypes?*, 83 AM. ECON. REV. 1220, 1221 (1993) (analyzing the possibility that affirmative action reduces investment incentives in an equilibrium model).

231. Nicolás Grau, *The Impact of College Admissions Policies on the Academic Effort of High School Students*, 65 ECON. EDUC. REV. 58, 72-73 (2018); Christopher S. Cotton, Brent R. Hickman & Joseph P. Price, *Affirmative Action and Human Capital Investment: Evidence from a Randomized Field Experiment*, J. LAB. ECON. (forthcoming 2022), <https://doi.org/10.1086/713743>.

232. Mitra Akhtari, Natalie Bau & Jean-William Laliberté, *Affirmative Action and Pre-College Human Capital* 38-39 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27779, 2020).

233. Coate & Loury, *supra* note 230, at 1224-25.

affirmative action may be perceived by potential applicants as a form of discrimination and result in less effort to build a strong record for college applications.

XI. CONCLUSION

The dearth of people of color in leadership roles is widely recognized and much bemoaned. Race-conscious affirmative action in higher education admissions has played an important role in admission of a diverse student body to elite universities. But affirmative action is under attack, with the lawsuit *Students for Fair Admissions v. Harvard* challenging Harvard's affirmative action policies for undergraduates expected to reach the Supreme Court in the near future. In this Article, I show what is at stake if affirmative action is banned. Using data on nearly 500,000 college graduates, I demonstrate the close connection between elite status of an individual's undergraduate institution and the likelihood of earning an advanced degree. In the absence of affirmative action, far fewer students from underrepresented minority groups would be admitted to the elite colleges and universities that are the feeders to professional and graduate programs. In turn, without a critical mass of undergraduates in the pipeline to earn these credentials, the current underrepresentation of minorities in leadership and professional roles will be further exacerbated. The negative consequences to society of leadership that is unrepresentative of the population is increasingly evident as the United States has become forced to confront its history of racial injustice.