

# THE NEW RACIAL SEGREGATION IN EDUCATION

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*The killing of George Floyd prompted a racial reckoning that quickly extended beyond the issue of police violence, prompting people of all backgrounds to confront the depth and breadth of racial inequality in American society. Education is central to either undermining or sustaining racial hierarchy. For much of American history, Blacks were either denied education or provided a segregated education inferior to that available to whites. The demise of de jure segregation fueled hopes that the expansion of educational opportunity would diminish racial inequalities.*

*Yet, while the promise of education remains undeniable, some aspects of schooling predictably exacerbate racial disparities. This Essay highlights a paradox at the intersection of education and racial justice: selective schools' laudable embrace of the principle of academic achievement now constitutes an impediment to educational opportunity for Black Americans in both secondary and higher education alike. When schools evaluate applicants on the basis of their prior academic achievement, the educational system becomes stratified on the basis of student achievement. Achievement segregation disadvantages Black Americans. When racial segregation results from achievement segregation, it may be especially difficult to dislodge, given the importance attached to the idea of academic achievement as a desirable basis for choosing among applicants. Nonetheless, this Essay unsettles the justifications that sustain achievement segregation. Doing so is essential to creating educational settings that are more racially equitable.*

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## INTRODUCTION

The killing of George Floyd prompted a racial reckoning throughout American society.<sup>1</sup> That horrific event catalyzed a shift in consciousness, prompting policymakers and institutional leaders to recognize racial injustice throughout American society and to reconsider their role in perpetuating it.<sup>2</sup>

Education is widely recognized as essential to racial progress. Black Americans have been oppressed by the denial of education, and they have fought for the opportunity to learn and achieve. But while the Supreme Court famously declared in *Brown v. Board of Education* that segregated education is inherently unequal,<sup>3</sup> educational systems in the United States are far from fully integrated or racially equitable.

This brief Essay identifies a paradoxical and potent mechanism of contemporary racial segregation in selective secondary schools and higher education alike: the practice of allocating educational opportunity on the basis of students' prior academic achievement. The use of that admissions criterion results in schools that are segregated on the basis of academic achievement. Achievement segregation may seem innocuous, even laudable, but in fact it relegates lower-achieving students, who are disproportionately Black, to inferior educational opportunities. Achievement segregation thus functions as a racially exclusionary means of rationing access to the most sought after educational opportunities. Even aside from its racially deleterious consequences, the justifications for achievement segregation are not especially persuasive.

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<sup>1</sup> See *America's Reckoning on Racism Spreads Beyond Policing*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/10/us/protests-black-lives-matter-george-floyd.html> ("Protests . . . have quickly given rise to a vast American reckoning with racism, as a backlash against entrenched inequality reverberates across society, from the upper echelons of corporations and media organizations to the pages of the dictionary."); Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why> (discussing how interest convergence associated with the circumstances of the COVID-19 pandemic has led to more attention by whites to issues of systemic racial injustice in the wake of Mr. Floyd's murder).

<sup>2</sup> See, e.g., Lauren Fox, Manu Raju & Clare Foran, *Democrats Offer Sweeping Police Reform Bill*, CNN (June 8, 2020, 3:55 PM), <https://www.cnn.com/2020/06/08/politics/democrats-police-legislation> (quoting Representative Karen Bass as saying, in reference to the shift in consciousness regarding racial justice among legislators and the public after the killing of George Floyd, that "[t]he world is witnessing the birth of a new movement in our country").

<sup>3</sup> 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.")

This Essay is organized as follows: Part I describes the centrality of education in the Black freedom struggle. Part II identifies the societal changes that have intensified achievement segregation and its racially segregative effects. Part III suggests that the most common justifications for achievement segregation either misconceive the role of education or rest on contestable empirical premises.

## I

### THE HISTORICAL INTERSECTION OF EDUCATION AND RACIAL JUSTICE

Education and race have long been intertwined. The denial of education has reinforced racial subjugation, and the provision of education has been viewed as a means of liberation and a path to equality.

Throughout the American south, slaves were prohibited from learning to read or write.<sup>4</sup> Efforts to teach a slave or evidence of a slave's literacy could result in harsh punishment.<sup>5</sup> The denial of literacy was central to the maintenance of slavery. Literacy would enable slaves to navigate society in ways at odds with their position as slaves.<sup>6</sup> Literacy might even enable slaves to become free.<sup>7</sup> A slave who could read documents, and therefore forge them, was dangerous to the stability of the system.

The denial of literacy also reinforced the racial ideology that was used to justify slavery.<sup>8</sup> Southerners reconciled slavery with the principles of individual rights on whose foundation the nation was founded by indulging the delusion that Blacks and their descendants were naturally fitted to slavery.<sup>9</sup> The slaves' lack of literacy, and all the learning it makes possible,

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<sup>4</sup> ELIZABETH MCHENRY, FORGOTTEN READERS: RECOVERING THE LOST HISTORY OF AFRICAN AMERICAN LITERARY SOCIETIES 2 (2002) ("Before the war, every southern state except Tennessee prohibited the education of slaves.").

<sup>5</sup> See Janet Cornelius, *"We Slipped and Learned to Read:" Slave Accounts of the Literacy Process, 1830-1865*, 44 *PHYLON* 171, 174 (1983) ("A common punishment for slaves who had attained more [reading and writing] skills . . . was amputation."); *id.* at 173 ("Patrols, mobs, and social ostracism faced owners who taught their slaves. One former slave even recalled whispered rumors that her master had been poisoned because he taught his slaves to read and write . . .").

<sup>6</sup> See *id.* at 171 ("Slaves who learned to read and write gained privacy, leisure time, and mobility. A few wrote their own passes and escaped from slavery. Literate slaves also taught others and served as conduits for information within a slave communication network.").

<sup>7</sup> *Id.*

<sup>8</sup> See Colette Coleman, *How Literacy Became a Powerful Weapon in the Fight to End Slavery*, *HISTORY* (Jan. 29, 2021), <https://www.history.com/news/nat-turner-rebellion-literacy-slavery> (quoting Clarence Lusane, a professor of political science at Howard University, who said that the idea that Black people were "less than human, permanently illiterate and dumb . . . gets disproven when African Americans were educated, and undermines the logic of the system").

<sup>9</sup> See EQUAL JUST. INITIATIVE, *SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE* 12 (2018), [https://eji.org/wp-content/uploads/2020/08/slavery\\_report-08-20-20-web.pdf](https://eji.org/wp-content/uploads/2020/08/slavery_report-08-20-20-web.pdf). ("Advocates of slavery argued that science and religion proved white racial superiority: under this view, white people were smart, hard-working, and more intellectually and morally evolved, while Black people were dumb, lazy, child-like, and in need of guidance and supervision.").

bolstered that belief. Restrictions on the education of slaves thus promoted a narrative of racial inferiority that would persist long after the end of slavery. It is unsurprising, then, that slaves and their descendants have long constituted the group that defines the bottom—materially and metaphorically—in American society.<sup>10</sup>

After the end of the Civil War, America underwent the greatest expansion of literacy in its history.<sup>11</sup> As the freed slaves struggled to learn to read and write, primary and secondary schools were established throughout the South.<sup>12</sup> As a result of the Morrill Act, land grant colleges were established throughout the South.<sup>13</sup>

Subsequently, the Supreme Court blessed the regime of de jure segregation through its decision in *Plessy v. Ferguson*;<sup>14</sup> segregated schooling became a way to deny Black Americans a high quality education. As the NAACP Legal Defense Fund attacked de jure segregation during the first half of the twentieth century, it made education central to its efforts.<sup>15</sup> That struggle brought about one of the most momentous decisions in Supreme Court history, *Brown v. Board of Education*.<sup>16</sup> There, the Supreme Court famously declared that “[s]eparate educational facilities are inherently unequal”<sup>17</sup> and could “affect the[] hearts and minds [of Black children] in a way unlikely ever to be undone.”<sup>18</sup> Justice Warren also emphasized the centrality of education in forging good citizenship, “awakening the child to cultural values, . . . preparing him for later professional training, and . . . helping him to adjust normally to his environment.”<sup>19</sup>

Higher education has also figured prominently in the racial justice

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<sup>10</sup> See Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019> (detailing income, poverty, and insurance coverage statistics by demographic).

<sup>11</sup> See NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 21 (Thomas D. Snyder ed., 1993) (noting that illiteracy rates among the non-white population decreased from eighty percent in 1870 to thirty percent in 1910).

<sup>12</sup> See David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 236 (1986) (“For a brief period after the Civil War, Blacks gained a measure of political influence in Southern states. They used this nascent power first in a grass roots movement to build, fund, and staff schools.”).

<sup>13</sup> Act of July 2, 1862, ch. 130, § 1, 12 Stat. 503 (codified as amended at 7 U.S.C. § 301).

<sup>14</sup> 163 U.S. 537, 550–51 (1896).

<sup>15</sup> See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 34 (1987) (describing the inception of the NAACP’s focus on education).

<sup>16</sup> 347 U.S. 483 (1954).

<sup>17</sup> *Id.* at 495.

<sup>18</sup> *Id.* at 494.

<sup>19</sup> *Id.* at 493.

struggle. The cases that paved the way to the Court's decision in *Brown* were the so-called Graduate School cases.<sup>20</sup> In one case, the state created a separate school for Black students.<sup>21</sup> In another, the state required that the lone Black student be segregated within the school.<sup>22</sup>

In the aftermath of *Brown*, colleges and universities embraced an ethos of racial equity. Rather than resist the inclusion of Black Americans, many universities have sought to promote racial justice. Selective universities now laud the importance of diversity and have willingly adopted voluntary race-based affirmative action policies in admissions. Nearly every leading selective university engages in race-based affirmative action in admissions.<sup>23</sup> Advocates have challenged and continue to challenge affirmative action admissions policies,<sup>24</sup> yet the Supreme Court has consistently upheld policies in which race is considered holistically, as one factor among many, in an effort to create a diverse student body.<sup>25</sup> Even if embattled in the courts,<sup>26</sup> affirmative action is entrenched in the actual practices of many of our nation's selective institutions of higher education.

## II

### THE INCREASING RACIAL INEQUITY OF ACHIEVEMENT SEGREGATION

This Part first identifies the societal changes that have intensified achievement segregation and exacerbated its racially inequitable effects. It

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<sup>20</sup> See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (holding that establishing a separate law school for Black students rather than admitting them to the University of Texas Law School violated the Equal Protection Clause because such separate schools could not provide substantially equal educational opportunities); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 642 (1950) (holding that subjecting a Black graduate student to segregated conditions, such as the requirement that he sit away from his peers in a separate adjoining classroom during classes, violated the Equal Protection Clause).

<sup>21</sup> *Sweatt*, 339 U.S. at 632–33.

<sup>22</sup> *McLaurin*, 339 U.S. at 640.

<sup>23</sup> See, e.g., Delano R. Franklin & Samuel W. Zwickel, *Top Universities Defend Harvard's Race-Conscious Admissions Policies in Court*, HARV. CRIMSON (July 31, 2018), <https://www.thecrimson.com/article/2018/7/31/top-universities-defend-harvard> (describing the ongoing battle between institutions of higher education and anti-affirmative action groups).

<sup>24</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (upholding the University of Michigan Law School's race-conscious admissions policy because it used race as a "plus" factor rather than to meet quotas); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's race-conscious undergraduate admissions policy because rather than considering race on an individual basis alongside other factors, the policy automatically allocated points based on race).

<sup>25</sup> See *Grutter*, 539 U.S. at 334; *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016) (upholding the University of Texas's race-conscious admissions policy).

<sup>26</sup> See, e.g., *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 184–95 (1st Cir. 2020), *petition for cert. filed* (2021) (upholding Harvard's race-conscious admissions policy because, while subject to strict scrutiny under Title VI, the policy was narrowly tailored to its substantial interest in diversity, did not engage in impermissible racial balancing, and was not shown to be intentionally discriminatory against Asian American applicants).

then examines the distinct dynamics of achievement segregation and racial inequity in secondary schools and in universities.

### A. *The Increasing Value of Education*

During the last half century, advanced education has become a more significant determinant of an individual's economic outcomes.<sup>27</sup> In short, college degrees have become more valuable. The earnings gap between people with college degrees and people without college degrees has grown wider due to an evolving labor market.<sup>28</sup> As jobs have been automated or outsourced overseas, opportunities for the least educated workers have diminished dramatically.<sup>29</sup> For the least educated workers, earnings have stagnated since the 1970s.<sup>30</sup> At the other end of the educational spectrum, the incomes of those with advanced education have grown considerably.<sup>31</sup> These developments reflect the growth of economic inequality in American society.<sup>32</sup> During the last several decades, the incomes of those professionals with high status jobs has increased significantly, while the incomes of working-class Americans have stagnated.<sup>33</sup>

Research also indicates that there is an economic payoff for attending a more selective college or university rather than a less selective (or nonselective) one.<sup>34</sup> The elite professional services firms that offer the most lucrative opportunities for college graduates tend to recruit primarily or exclusively from a small group of selective universities.<sup>35</sup> Thus, students who

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<sup>27</sup> See Mark A. Heckler, Opinion, *The Importance of a College Education*, CHI. TRIB. (Sept. 11, 2018, 2:30 PM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-heckler-guest-column-st-0912-story.html>.

<sup>28</sup> See David H. Autor, *Skills, Education, and the Rise of Earnings Inequality Among the "Other 99 Percent,"* 344 SCI. 843, 843 (2014).

<sup>29</sup> *Id.* at 846.

<sup>30</sup> *Id.* at 849.

<sup>31</sup> *Id.*

<sup>32</sup> See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 597 (Arthur Goldhammer trans., Belknap Press 2017) (2013) (arguing that wealth inequality is increasing globally); ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 136 (2015) ("[W]ages at the bottom have continued to drop . . . . By 2013, the ranks of the working poor had swelled to forty-seven million people . . . , one out of every seven Americans. . . . Between 2010 and 2013, average incomes for the bottom fifth dropped 8 percent, and their average wealth declined 21 percent.").

<sup>33</sup> See Ryan Nunn & Jay Shambaugh, *Whose Wages are Rising and Why?*, BROOKINGS INST. (Jan. 21, 2020), <https://www.brookings.edu/policy2020/votervital/whose-wages-are-rising-and-why> (explaining that growth of high-end wages has continued to outstrip growth of middle-tier wages); DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 183–84 (2019).

<sup>34</sup> Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23 J. ECON. PERSPS. 95, 114–15 (2009) (discussing the relative payoff of attending a more selective college).

<sup>35</sup> LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 87 (2015).

attend such schools have access to professional opportunities that simply are not available to their counterparts at less selective schools.

The increasing economic value of education has increased parents' incentive to invest in the education of their children. Parents know that boosting their child's academic achievement will boost their child's chance of gaining admission to a selective and prestigious university, and so they invest accordingly.<sup>36</sup> Affluent, well-educated parents are able to make investments that include both direct financial investments (e.g., paying for good schools, hiring tutors, enrolling their children in summer camp, and so forth) and also in-kind investments in the form of parental know-how, advice, and help with coursework.<sup>37</sup>

Families' differential ability to invest in their children's education enlarges gaps in academic achievement between the children of affluent, highly educated parents on one hand and the children of lower-earning and less well-educated parents on the other.<sup>38</sup> Systematic data confirms that in recent decades the achievement gap between the children of affluent families and children from working-class families has been widening.<sup>39</sup>

These achievement gaps have also likely grown during the pandemic.<sup>40</sup> Children from affluent families have been able to continue learning, even if they are not in school, while children from disadvantaged families have been less able to do so.<sup>41</sup> There have been widespread failures of schools and cities to provide for the educational needs of those students from economically

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<sup>36</sup> See generally Catherine Brown, Scott Sargrad & Meg Benner, *Hidden Money: The Outsized Role of Parent Contributions in School Finance*, CTR. FOR AM. PROGRESS (Apr. 8, 2017, 12:46 PM), <https://www.americanprogress.org/issues/education-k-12/reports/2017/04/08/428484/hidden-money> (discussing disparities in school resourcing based on parental donations).

<sup>37</sup> See generally ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 266 (2d ed. 2011) (discussing the ways that middle-class parents, as compared to working-class parents, are able to play a more active role in their children's education).

<sup>38</sup> See Hechinger Report, *The Growing Achievement Gap: Income Inequality Is Exacerbating the Gap Between Rich and Poor School Children*, U.S. NEWS & WORLD REP. (May 28, 2018, 6:00 AM), <https://www.usnews.com/news/education-news/articles/2018-05-28/income-inequality-exacerbates-the-achievement-gap> (noting that rising income inequality boosts the ability of the rich to invest more in their children).

<sup>39</sup> See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor*, 24 CMTY. INVS. 19 (2012) (discussing how the relationship between family socioeconomic characteristics and academic achievement has changed over the last fifty years).

<sup>40</sup> See Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html> (noting that low income students' educational outcomes appear to be suffering more than affluent students' outcomes during the pandemic).

<sup>41</sup> See Maya King & Nicole Gaudiano, *The Pandemic Could Widen the Achievement Gap. A Generation of Students Is at Risk*, POLITICO: THE FIFTY (Sept. 23, 2020, 7:55 PM), <https://www.politico.com/news/2020/09/23/how-the-coronavirus-is-making-school-segregation-worse-420839>.

disadvantaged families.<sup>42</sup> Children from affluent families, in contrast, are more likely to have been in school during the pandemic and have more opportunities to learn outside of school if they are not.<sup>43</sup>

In addition to motivating parents to increase investment in their child's education, the increased economic value of education motivates parents to seek out the very best school for their child, at each step of the child's educational journey. And what best school often means, in the view of many parents, is the school that is the most prestigious, highly ranked, and most selective in admissions.<sup>44</sup> The logic is that the way to gain admission to a highly selective college is to gain admission to a highly selective high school, and the best way to gain admission to a highly selective high school is to gain admission to a highly selective middle school, and so on. And the magic key that helps to unlock these highly selective institutions? High academic achievement, with test scores and, sometimes, grades that set one apart from the competition.

### B. Race and Achievement Segregation in Primary and Secondary Schools

Many school districts have long maintained magnet schools where admission is competitive and is determined primarily on the basis of an applicant's prior academic achievement.<sup>45</sup> Growing disparities in academic achievement lead to diminished representation of disadvantaged students,

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<sup>42</sup> See Laura Meckler & Hannah Natanson, 'A Lost Generation': Surge of Research Reveals Students Sliding Backward, Most Vulnerable Worst Affected, WASH. POST (Dec. 6, 2020, 7:11 PM), [https://www.washingtonpost.com/education/students-falling-behind/2020/12/06/88d7157a-3665-11eb-8d38-6aea1adb3839\\_story.html](https://www.washingtonpost.com/education/students-falling-behind/2020/12/06/88d7157a-3665-11eb-8d38-6aea1adb3839_story.html) (noting that on Zoom low-income districts had lower attendance than high-income districts and that vulnerable students had worse grade outcomes).

<sup>43</sup> Paul Sullivan, *Private Schools Hold New Attraction for Rich Parents*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/09/your-money/private-schools-wealthy-parents.html>; John Woolfolk, Nico Savidge & Harriet Blair Rowan, *Coronavirus: Rich Bay Area Kids Head Back to Class, Others Stay Home*, MERCURY NEWS (Feb. 12, 2021, 6:28 AM), <https://www.mercurynews.com/2021/02/11/coronavirus-rich-kids-head-back-to-class-others-stay-home>; Emily Tate, *Wealthy Families More Likely To Hire Tutors, Less Concerned About Kids' Learning Loss*, EDSURGE (Oct. 30, 2020), <https://www.edsurge.com/news/2020-10-30-wealthy-families-more-likely-to-hire-tutors-less-concerned-about-kids-learning-loss>.

<sup>44</sup> MARKOVITS, *supra* note 33, at 33 (explaining the competitive process of applying to preschool and how that competition continues from preschool until undergraduate admissions); see also CHARLES T. CLOTFELTER, UNEQUAL COLLEGES IN THE AGE OF DISPARITY 208–11 (2017) (discussing the importance of university rankings and the factors they reflect in prospective students' attendance decisions).

<sup>45</sup> Amy Stuart Wells, *Once a Desegregation Tool, Magnet Schools Become Schools of Choice*, N.Y. TIMES (Jan. 9, 1991), <https://www.nytimes.com/1991/01/09/archives/once-a-desegregation-tool-magnet-schools-become-schools-of-choice.html> (claiming that although magnet schools "successfully desegregated the student populations within the magnet schools themselves, . . . their selection criteria excluded all but the highest achieving students or those with the most involved parents").



especially Black students, in such schools.

The ongoing controversy about the admissions process at selective public schools in New York City is instructive. There are several tiers of secondary schools in New York City. In addition to public schools that serve the neighborhoods surrounding them, the City has two types of selective schools. The so-called Specialized high schools, which include Stuyvesant, Bronx Science, and Brooklyn Tech, have been the subject of significant public controversy. These schools admit applicants on the basis of their score on a single standardized test. In addition to the eight Specialized schools, there is a much larger group of middle and high schools that are known as Screened schools; these schools admit applicants on the basis of a variety of academic factors, such as prior grade point average, and also non-academic factors, such as prior school attendance record (i.e., tardy arrivals or absences).<sup>46</sup>

At New York City's Specialized schools, the enrollment of Black students has declined precipitously during the last few decades.<sup>47</sup> Only seven Black students were accepted to Stuyvesant High School, the city's most elite public high school, in 2019.<sup>48</sup> Black students represented roughly one percent of admitted students, in a city where they are roughly twenty-five percent of public-school students. Even after calls for reform following the 2019 results, Stuyvesant accepted only ten Black students in 2020 to join the 760-person freshman class at the school.<sup>49</sup>

Similar inequities exist at the city's Screened schools. Despite representing approximately seventy percent of the New York City Public School District's population, Black and Latinx students represent a tiny portion of the students who are selected to attend elite Screened schools.<sup>50</sup> In 2020, amid the COVID-19 pandemic, Mayor Bill de Blasio implemented

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<sup>46</sup> Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2020/12/18/nyregion/nyc-schools-admissions-segregation.html> (“About 200 middle schools — 40 percent of the total — use metrics like grades, attendance, and test scores to determine which students should be admitted.”).

<sup>47</sup> Eliza Shapiro, *This Year, Only 10 Black Students Got Into N.Y.C.'s Top High School*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/03/19/nyregion/nyc-schools-numbers-black-students-diversity-specialized.html> (“Black and Hispanic enrollment in the schools has plummeted over the last two decades in particular.”).

<sup>48</sup> Eliza Shapiro, *Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html>.

<sup>49</sup> See Shapiro, *supra* note 47.

<sup>50</sup> Michael Elsen-Rooney, *NYC High School Admissions Rules Violates Civil Rights Act: Federal Complaint*, N.Y. DAILY NEWS (Nov. 16, 2020, 2:01 PM), <https://www.nydailynews.com/new-york/education/ny-civil-rights-act-admission-screens-20201116-wjpy2dbvgjaftgcl5cjmsoutge-story.html>; Julian Shen-Berro, *'Unconscionable': Latino, Black Student Numbers at NYC Elite Public High Schools Stay Low*, NBC NEWS (Mar. 23, 2020, 3:20 PM), <https://www.nbcnews.com/news/latino/unconscionable-latino-black-student-numbers-nyc-elite-public-high-schools-n1166741>.

some large-scale reforms to address the issue, including eliminating admissions screening for one year at all middle schools and eliminating geographic preferences for high schools (which had also led to inequity, as the best schools were located in the most affluent neighborhoods).<sup>51</sup> However, Mayor de Blasio's 2019 effort to eliminate the entrance exam altogether at New York City's most coveted elite schools, the Specialized schools, failed when the New York State Legislature, which controls the rules regarding the exams at these schools, adjourned without acting on the bill.<sup>52</sup>

There has also been significant controversy at the elite Thomas Jefferson School in Virginia, a magnet school which, as a result of the controversy, has recently changed its admissions policies.<sup>53</sup> The Black student population there has also become vanishingly small, and, once again, achievement testing is partly to blame.<sup>54</sup> The Fairfax County Public School administers an achievement test to first- and second-graders, which then earns them a spot in the district's advanced placement track.<sup>55</sup> Many members of the Fairfax community believe that this track leads to admission to Thomas Jefferson for high school.<sup>56</sup> Such advance placement tracks tend to be disproportionately comprised of students from affluent and well educated families, a group in which Black students are underrepresented.<sup>57</sup>

The problem is not confined to the East Coast. Prior to 2020, admissions at Lowell High School in San Francisco, one of the nation's most elite public high schools, was similarly governed by achievement test scores.<sup>58</sup> Specifically, the school admitted students based on a combination of state testing scores and the student's middle school GPA.<sup>59</sup> Once again, Black

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<sup>51</sup> Shapiro, *supra* note 46 ("The city will eliminate all admissions screening for the schools for at least one year, the mayor said.").

<sup>52</sup> Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html>.

<sup>53</sup> Hannah Natanson, *Fairfax School Board Eliminates Admissions Test at Thomas Jefferson High School*, WASH. POST (Oct. 8, 2020, 11:48 PM), [https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-change/2020/10/07/0a1f8faa-08a7-11eb-9be6-cf25fb429f1a\\_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-change/2020/10/07/0a1f8faa-08a7-11eb-9be6-cf25fb429f1a_story.html).

<sup>54</sup> Hannah Natanson, *At a Top Magnet School with Few Black or Latino Students, a Push for Change Meets Resistance*, WASH. POST (July 2, 2020, 9:07 AM), [https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-diversity/2020/07/01/802fbc02-badb-11ea-80b9-40ece9a701dc\\_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-diversity/2020/07/01/802fbc02-badb-11ea-80b9-40ece9a701dc_story.html).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 64 (2d. ed. 2005) (noting that poor and minority students disproportionately represent lower tracks).

<sup>58</sup> Katie Dowd, *Despite Backlash, San Francisco's Lowell High Will Use Lottery System Next Year*, SFGATE (Oct. 21, 2020, 6:53 AM), <https://www.sfgate.com/education/article/sf-school-lottery-Lowell-High-15663889.php>.

<sup>59</sup> *Id.*

students, while comprising eight percent of the district students, only comprised two percent of the Lowell High population.<sup>60</sup> As a result of the increasing racial disparity in access, the San Francisco Board of Education recently voted to drop the academic criterion from the school's admissions process and instead to allocate slots at the school through a lottery, just as access to other San Francisco public high schools is allocated.<sup>61</sup>

While these cases attest to the pressures for change once racial disparities become sufficiently extreme, they also highlight the extent of the problem. In each of these cases, racial disparities in enrollment became worse over time, due to increasing levels of advantaged parents' investment in their child's education.<sup>62</sup>

### C. *Race and Achievement Segregation in Colleges and Universities*

The college admissions process builds on the same achievement gaps that result in racial exclusion from the most sought after secondary schools. The increased investment in the education of the children of the most affluent and well educated parents provides them an advantage in the college application process too. As the children from the most privileged families are advantaged in the admissions process, so too are Black students disproportionately disadvantaged.

There are two ways, though, in which the college context presents a different dynamic than in primary and secondary schools. One difference is that higher education has become more stratified by academic achievement during the past half century due to the emergence of a national market for education.<sup>63</sup> It used to be that most colleges had a wide range of student achievement represented in their student body.<sup>64</sup> Elite schools had middling students, and middling schools had top performing students.<sup>65</sup> The academic mixture within student bodies reflected the fact that most students attended schools fairly close to home; competition among universities was regional,

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<sup>60</sup> Jill Tucker, *S.F. School Board Strips Lowell High School of its Merit-Based Admissions System*, S.F. CHRON. (Feb. 10, 2021, 8:49 PM), <https://www.sfchronicle.com/bayarea/article/S-F-school-board-strips-Lowell-High-of-its-15938565.php>.

<sup>61</sup> *Id.*

<sup>62</sup> ALLISON RODA, *INEQUALITY IN GIFTED AND TALENTED PROGRAMS: PARENTAL CHOICES ABOUT STATUS, SCHOOL OPPORTUNITY, AND SECOND-GENERATION SEGREGATION* 155–56 (2015) (attributing an increase in racial inequality in New York public schools partially to parental “choices that privilege their children and perpetuate the status quo”).

<sup>63</sup> Hoxby, *supra* note 34, at 98–99.

<sup>64</sup> Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* 40 (Nat'l Bureau of Econ. Rsch., Working Paper No. 6323, 1997) (“The distribution of student ability *within* any individual college has narrowed.”).

<sup>65</sup> MARKOVITS, *supra* note 33, at 111 (“Yale . . . admitted fully 90 percent of applicants in the years before World War II. . . . Even into the 1940s and 50s, elite universities retained, as quasi-official policy, the principle that the sons of alumni would be admitted as long as they were minimally able to do their schoolwork.”).

so while there was some sorting of students across schools on the basis of achievement, schools were not nearly as academically stratified as they have now become.

What enabled the national market to develop was not only the increased economic significance of education, but also the decreased cost of keeping in touch with family, both of which increased students' willingness to travel a long way from home for college. Prior to the 1980s, travel and long-distance phone calls were expensive. Students' college selection priorities shifted as the cost of airfare declined and, even more dramatically, as the cost of communications declined.<sup>66</sup> First telephone calls became less expensive, then email became widespread. Now, the incremental cost of communicating across long distances is essentially zero. Thus, students are much more inclined to attend a school far from home. The higher education market went from being regional to being national, with students sorted across schools on the basis of academic achievement more than ever.

Now, students are sorted across schools on the basis of student achievement and school prestige. The highest-achieving students attend the highest-status schools, which have become less heterogenous within their student bodies in terms of academic achievement during the past several decades.<sup>67</sup> The higher status colleges that high-achieving students attend are typically better resourced—they have larger endowments and spend more money per student—than the schools attended by their lower-achieving counterparts.<sup>68</sup> And just as economic inequality has grown among the population of American society in recent decades, so too has inequality grown among American universities.<sup>69</sup> The schools at the top of the hierarchy are richer, relative to other schools, than would have been the case decades ago.<sup>70</sup> Thus, the highest-achieving students attend the most highly resourced colleges and universities.

There is a second difference between the university and high school admissions processes that cuts against what would otherwise be the racial consequences of the system. Nearly all selective universities embrace the importance of student body diversity<sup>71</sup> and employ a holistic admissions

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<sup>66</sup> Hoxby, *supra* note 64, at 11 (noting that lower prices in airline and telecommunication industries are potential causes of geographic integration in the market for higher education).

<sup>67</sup> CHARLES T. CLOTFELTER, *UNEQUAL COLLEGES IN THE AGE OF DISPARITY* 207–27 (2017); MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 175–76 (2020).

<sup>68</sup> CLOTFELTER, *supra* note 67, at 137 fig.5.5, 141 fig.5.7.

<sup>69</sup> *Id.* at 145.

<sup>70</sup> *Id.*

<sup>71</sup> All twenty of the top universities listed in the 2021 U.S. News and World Report rankings have shown some level of commitment to embracing diversity either by making specific mention of the value of diversity on their admissions or diversity websites or by joining with other universities to submit a brief supporting the right of universities to consider race as part of a whole-

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person review in the admissions process in the recent affirmative action case *Students for Fair Admissions, Inc. v. Harvard*. Brief for Brown Univ. et al. as Amici Curiae Supporting Appellees, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2020 WL 3265898, at \*12 (1st Cir. June 15, 2020) (No. 19-2005). The following list of the top twenty universities includes the language provided on most of the colleges' admissions or diversity webpages and includes an indicator (\*) for whether the university joined in the brief in the aforementioned case: Princeton\*: "Princeton aspires to be a truly diverse community in which individuals of every gender, race, ethnicity, religion, sexual orientation and socioeconomic status can flourish equally." *Many Voices, One Future*, PRINCETON UNIV., <https://inclusive.princeton.edu/about/demographics> (last visited Apr. 12, 2021); Harvard\*: "Harvard welcomes students from across the country and all over the world, with diverse backgrounds and far-ranging talents and interests." *Admissions Statistics*, HARVARD COLL., <https://college.harvard.edu/admissions/admissions-statistics> (last visited Apr. 12, 2021); Columbia\*: "Diversity in education is transformative – enriching individuals as it enriches the community and society as a whole. Students from all backgrounds and with divergent needs will find opportunities at Columbia that allow them to thrive and succeed." *Diversity*, COLUMBIA UNIV., <https://undergrad.admissions.columbia.edu/learn/studentlife/diversity> (last visited Apr. 12, 2021); MIT\*: "A diverse student body is and has long been critical to the educational mission of MIT." *Policies*, MIT, <https://mitadmissions.org/policies> (last visited Apr. 12, 2021); Yale\*: *Yale Joins Legal Brief in Defense of Diversity in Admissions*, YALE: YALENEWS (May 26, 2020), <https://news.yale.edu/2020/05/26/yale-joins-legal-brief-defense-diversity-admissions>; Stanford\*: "We believe that the best education can develop only in a vibrant, diverse community that actively affirms both the differences among its members and their numerous points of connection." *Diversity at Stanford*, STANFORD UNIV., <https://admission.stanford.edu/diversity> (last visited Apr. 12, 2021); University of Chicago\*: "Multiculturalism is an integral part of daily life at the University of Chicago. Our community is a rich mix of individuals who, with their own distinctive viewpoints, contribute to the intellectually challenging culture of the University through academic pursuits as well as extracurricular interests." *Diversity*, UNIV. OF CHI., <https://collegiadmissions.uchicago.edu/campus-life/diversity> (last visited Apr. 12, 2021); UPenn\*: "To prepare today's students for their lives after graduation, Penn admits and fosters a community vibrant with a breadth of experience across cultural identity, academic interest, religious belief, sexual orientation, extracurricular interest, regional affiliation, national origin, and more." *Penn Admissions: Diverse Community*, UNIV. OF PA., <https://admissions.upenn.edu/living-at-penn/diverse-community> (last visited Apr. 12, 2021); Caltech: "At Caltech, we value diversity and actively support student access, equity, and inclusion." *Undergraduate Admissions: Diversity*, CALTECH, <https://www.admissions.caltech.edu/explore/student-life/diversity> (last visited Apr. 12, 2021); Johns Hopkins\*: "Johns Hopkins University is deeply committed to the dignity and equality of all persons—inclusive of sex, gender, marital status, pregnancy, race, color, ethnicity, national origin, age, disability, religion, sexual orientation, gender identity or expression, and veteran status." *Diversity at JHU*, JOHNS HOPKINS UNIV., <https://diversity.jhu.edu> (last visited Apr. 12, 2021); Northwestern: "A diverse student body makes for more thoughtful students. And ultimately leads to more thoughtful leaders (and a better world)." NW. UNIV., (last visited Apr. 12, 2021), <https://admissions.northwestern.edu/student-life/diversity.html>; Duke\*: "At Duke, we believe that diversity and inclusion are essential to a thriving community." *Diversity and Inclusion*, DUKE UNIV., <https://inclusive.duke.edu> (last visited Apr. 12, 2021); Dartmouth: "At Dartmouth, diversity is one of our great natural resources. It's the foundation of the learning experience and a core element of the campus environment." *Dartmouth Admissions: Commitment to Diversity*, DARTMOUTH COLL., <https://admissions.dartmouth.edu/about/commitment-diversity> (last visited Apr. 12, 2021); Brown\*: "The DIAP reflects Brown's strategic commitment to supporting diversity, equity and inclusion in all aspects of University life — recognizing that these values are essential to carrying out Brown's mission of education and research with excellence." *Diversity & Inclusion Action Plan*, BROWN UNIV., <https://diap.brown.edu> (last visited Apr. 12, 2021); Vanderbilt\*: "Douglas Christiansen, Vice Provost for University Enrollment Affairs and Dean of Admissions and Financial Aid, says 'We recognize . . . top students can be found among all racial,

process in which they consider applicants' race in pursuit of the educational benefits of diversity.<sup>72</sup>

The pursuit of diversity and the consideration of applicants' race cuts against the racially exclusionary force of the academic achievement criterion, but it does not fully counteract those racially exclusionary effects. Despite schools' commitment to diversity, Black students are less well represented at elite schools than they are at less selective schools.<sup>73</sup> The higher status the school tier, the fewer Black students attend those schools.

The combination in the admissions process of elite schools' emphasizing academic achievement *and* diversity has significantly reduced

ethnic, and socioeconomic groups, and our recruiters work hard to identify them and to make them aware of the opportunities available to Vanderbilt students.” *Undergraduate Admissions*, VAND. UNIV., <https://admissions.vanderbilt.edu/life/diversity.php> (last visited Apr. 12, 2021); Rice: “We not only celebrate, but actively seek out broad diversity across our student body as a central and meaningful part of the Rice experience.” *Life at Rice: Diversity*, RICE UNIV., <https://admission.rice.edu/life-rice/diversity> (last visited Apr. 12, 2021); WashU\*: “With students and faculty from across the country and around the world, WashU values diversity in the people you will meet here on campus.” *Undergraduate Admissions: Diversity and Inclusion*, WASH. UNIV. SAINT LOUIS, <https://admissions.wustl.edu/life-at-washu/diversity-and-inclusion> (last visited Apr. 12, 2021); Cornell\*: “Many of today’s colleges and universities promote the diversity of their student bodies and academic programs as something new. At Cornell, diversity and multiculturalism have been a defining focus for more than 150 years.” *Diversity: Cornell’s Long-Standing Commitment to Diversity*, CORNELL UNIV., <https://admissions.cornell.edu/living/diversity> (last visited Apr. 12, 2021); Notre Dame: “The University of Notre Dame promotes a spirit of diversity and inclusion through academic inquiry, and programs and opportunities that reflect our foundational belief in the dignity of all men and women.” *Diversity and Inclusion*, UNIV. NOTRE DAME, <https://diversity.nd.edu> (last visited Apr. 12, 2021); UCLA: “Diverse, progressive and centered in one of the most influential cities in the world, UCLA is a truly international university that offers a world of opportunity.” *Facts & Figures*, UCLA, <https://www.ucla.edu/about/facts-and-figures> (last visited Apr. 12, 2021).

<sup>72</sup> Allen Grove, *What Are Holistic Admissions? Selective Colleges Consider More Than Just Grades and Test Scores*, THOUGHTCO (Sept. 29, 2019), <https://www.thoughtco.com/what-are-holistic-admissions788426>. The universities that filed a brief supporting Harvard’s right to consider race as a part of the whole-person review in admissions (Brown University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, the Massachusetts Institute of Technology, Princeton University, Stanford University, the University of Chicago, the University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University) almost assuredly joined the brief because they, too, use race as a part of their whole-person review. Brief for Brown Univ. et al. as Amici Curiae Supporting Appellees, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2020 WL 3265898, at \*1 (No. 19-2005). Assuming that other selective universities follow the same pattern to stay competitive with those universities that joined the brief, it is safe to say that nearly all selective universities consider race in pursuit of the benefits of diversity.

<sup>73</sup> TOMAS MONARREZ & KELIA WASHINGTON, *URB. INST., RACIAL AND ETHNIC REPRESENTATION IN POSTSECONDARY EDUCATION* 15 (2020); Jeremy Ashkenas, Haeyoun Park & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> (“Blacks and Hispanics have gained ground at less selective colleges and universities but not at the highly selective institutions . . .”).

the representation of an important subgroup of Black students from the student bodies of many elite schools. The group of Black students who have fared especially poorly are those, ironically, who are descended from the slaves whose labor built much of this country. These Black Americans, the so-called descendants, are underrepresented on the campuses of our nation's leading universities, relative to their percentage of the Black population.<sup>74</sup> The exceptions to this trend seem to be the children of some of the most affluent Black Americans in our nation and some bi-racial Black Americans.<sup>75</sup>

Statistics in this area are notoriously difficult to come by, as schools tend to lump together immigrants and their children on one hand, with the descendants of American slaves on the other. There have been a number of efforts to assess the composition of the Black student population at our nation's selective universities, and nearly every assessment of which I am aware has found Black immigrants and their children to be dramatically overrepresented.<sup>76</sup>

The combination of diversity and academic achievement as admissions criteria benefits immigrant Blacks at the expense of descendants. Black immigrants and their children, as with immigrants of all races, tend to be higher achieving academically than their non-immigrant United States counterparts.<sup>77</sup> Immigration is a selective process, and Black immigrants tend to be better educated and higher earning than non-immigrant Blacks.<sup>78</sup> Yet, Black immigrants benefit from the consideration of diversity because,

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<sup>74</sup> See, e.g., Josie F. Abugov, "Are We In The Minority?," HARV. CRIMSON, (Oct. 15, 2020), <https://www.thecrimson.com/article/2020/10/15/gaasa-scrut> (noting the belief among Black Harvard students that, if one were to count the number of students "who were descended from enslaved people . . . that number would be so low," although official statistics are obscure on this matter). See generally Douglas S. Massey, Margarita Mooney, Kimberly C. Torres & Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 248–49 (2007) (showing that the share of immigrant Blacks is higher at private universities compared to public universities, and the share gets even higher if the data is spliced to only include those students from the ten most selective schools in the sample).

<sup>75</sup> PAUL TOUGH, THE INEQUALITY MACHINE: HOW COLLEGE DIVIDES US 122–23 (2019).

<sup>76</sup> See, e.g., Aditi Balakrishna, *Many Blacks at Ivies Not From U.S.*, HARV. CRIMSON (Mar. 9, 2007), <https://www.thecrimson.com/article/2007/3/9/many-blacks-at-ivies-not-from>.

<sup>77</sup> See CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 7 fig. 5 (2016) (noting that in 2015, there was a ten-percentage point difference between the percentage of native-born Blacks who hold a bachelor's degree or higher (20%) compared to their foreign-born counterparts (30%)); Jesse J. Tauriac & Joan H. Liem, *Exploring the Divergent Academic Outcomes of U.S.-Origin and Immigrant-Origin Black Undergraduates*, 5 J. DIVERSITY HIGHER EDUC. 10, 12 (2012) (finding that immigrant-origin Black students at predominately white higher education institutions have different academic experiences and attain higher college persistence than U.S.-origin Black students); cf. NIELSEN CO., INCREASINGLY AFFLUENT, EDUCATED AND DIVERSE: AFRICAN-AMERICAN CONSUMERS: THE UNTOLD STORY 13 (2015) (noting that foreign-born Blacks have a thirty percent higher median income than U.S.-born Blacks).

<sup>78</sup> See sources cited *supra* note 77.

well, they do add diversity to a college student body that would otherwise have few Black people. If diversity is about differences in perspective and experiences, rather than about redressing the history of racial subjugation in the United States, then it is perfectly sensible to prefer higher-achieving immigrant Blacks to their lower-achieving descendant counterparts. But if one thinks that universities should be serving the group of people descended from the slaves whose labor, literally, constructed so much of this nation, then there is something troubling about the near disappearance of the descendants from our nation's leading universities.

### III

#### THE JUSTIFICATIONS FOR ACHIEVEMENT SEGREGATION

There are undeniably powerful intuitions that support the primacy of academic achievement as an admissions criterion, and hence, the justifiability of achievement segregation. Yet the common intuitions in support of achievement segregation are not nearly as unassailable as many assume.

##### *A. From Aristocracy to Opportunity*

The primacy of academic achievement in school admissions is laudable in many ways.<sup>79</sup> It marks the divide between a society in which positions and opportunities are allocated on the basis of pedigree and one in which advancement is open to all, with positions and opportunities as the reward for effort and achievement.<sup>80</sup> The achievement principle thus represents the overthrow of the aristocratic system typical of the European regimes that Americans left behind.<sup>81</sup> The achievement principle seems to embody an ethos of our nation, one that is central to the American dream, that of a land where opportunity is open to all, and in which the class structure is fluid across the generations, a place where there are no permanent winners or losers.<sup>82</sup>

##### *B. The Moral Desert Argument*

One intuition in favor of achievement segregation is that schools should admit the most deserving students, and that, in turn, the highest-achieving

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<sup>79</sup> See generally NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999) (recounting the rise of standardized testing for college admission in the mid-twentieth century and describing the then-prevailing view that such testing was fairer than earlier, more ascriptive standards).

<sup>80</sup> SANDEL, *supra* note 67, at 33–58.

<sup>81</sup> MARKOVITS, *supra* note 33, at 111–12.

<sup>82</sup> SANDEL, *supra* note 67, at 59–80.



students are, by virtue of their high achievement, the most deserving.<sup>83</sup> This intuition reflects and draws on a broader moral premise that societal rewards should go to the deserving.<sup>84</sup> By virtue of their achievement, they have prevailed in the competition that is the college application process, and they deserve the prize just as much as, say, the team that prevails in March Madness deserves to be crowned the NCAA champion.

There are at least two problems with the claim that the highest-achieving applicants deserve admission. The first problem is that there is no account of deservingness sufficient to compel *any* particular admissions criteria. Even if such applicants do deserve to be admitted when it has been announced and widely known that applicants will be evaluated and admitted based on their prior achievement, that sort of desert argument doesn't resolve the question *whether* schools should categorically prefer the highest-achieving applicants. This form of deservingness derives from existing institutional policies; it does not justify them.

The other problem is that it is not clear on what basis one might be said to "deserve" admission, in any deep sense, based on one's academic achievement when said achievement is itself the result of opportunities and fortuities that one did not deserve. The goal of desert-based distribution of admissions slots would be to recognize those relevant individual attributes or achievements that reflect one's autonomous will and agency, attributes, or characteristics for which one is morally responsible.<sup>85</sup> But how responsible is one for the outcomes of life? One chooses neither one's environment, nor one's innate ability, which are the two primary contributors to academic achievement (and much else!).<sup>86</sup> Even the choices that feel most deeply one's own might well be re-described as the product of the confluence of unchosen, contingent factors.<sup>87</sup> As every parent knows, a child's achievement is a collective undertaking, a consequence of the opportunities and resources made available to them by others.

Where the social determinism conundrum leaves us is that thinking of school admissions as a reward for prior achievement is not the right way to think about the issue.<sup>88</sup> Admission to a sought-after high school or college

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<sup>83</sup> ROBERT KLITGAARD, CHOOSING ELITES 81 (1985) ("[A]mong all the allocative mechanisms found in society, selection policies for universities . . . are perhaps the most extreme example of allocation on the basis of 'worthiness.'").

<sup>84</sup> GEORGE SHER, DESERT 5 (1987); Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFFS. 299, 301 (1992) (arguing that desert plays an important role in people's attitudes toward particular public policies).

<sup>85</sup> SANDEL, *supra* note 67, at 59–60, 68–71.

<sup>86</sup> JOHN RAWLS, A THEORY OF JUSTICE 311 (1971) (noting that "no one deserves his place in the distribution of natural assets any more than he deserves his initial starting place in society").

<sup>87</sup> *Id.*

<sup>88</sup> Of course, not all philosophers would agree. Some would contend that in order to deserve particular treatment one need not deserve, in any deep sense, all of the aspects of the self that would

should not be viewed as a prize so much as an opportunity. The orientation of the admissions committee should not be a backward-looking celebration of triumphs, as the award of the NCAA championship trophy rightly is. Rather, the allocation of educational opportunity should be forward-looking, focused on the human growth and development made possible by granting that educational opportunity.

### C. *The Consequentialist Perspective*

If school admissions are to be forward-looking, what outcomes should it seek to envision and maximize? One view is that in admitting students, a school should seek to maximize future academic achievement. This approach would incline the school to admit the highest-achieving students, as their past performance would be a likely indicator of their future success.

There are many questions, though, that this approach raises. Should a school seek to admit those applicants who will achieve the most in the future or those applicants for whom admission could make the biggest difference? Wouldn't it make the most sense for the school to admit those applicants to whom it could add the most value? Identifying which applicants those are, of course, is extraordinarily difficult, but conceptually, should not that be the goal?

Another set of questions derives from the fact that the benefit students take from the educational experience will depend partly (maybe largely) on the composition of the student body. Assuming that students benefit from having smart classmates, it might seem justifiable for a school to enroll the highest-achieving students possible. The students' collective high achievement would enable each other to become higher-achieving than they would be if they were part of a student body with lower-achieving classmates. So one question is whether that intuition is correct.

Another question is whether that is the correct framing of the calculus. In evaluating applicants, should the more prestigious school consider only the optimal composition of its student body? Or should it consider the optimal mix of students across schools? To see the difference, imagine a society with two universities, one highly selective and elite (School X), the other less selective and less elite (School Y). All students who attend college will attend one or the other of these schools, and all applicants would prefer to attend School X, which is known as the better school and whose graduates usually fare better professionally than those of School Y. Applicants not admitted to School X will attend School Y. Under these circumstances, should School X admit so as to maximize the learning growth of the students

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serve as the basis for that particular treatment. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 224–27 (1974) (detailing the “negative argument” which is used to rebut possible counterarguments to Rawls’s theory of justice).

at its school only? Or should it admit applicants so as to maximize the aggregate learning growth across the two schools?

Most schools only take their own interests into account, in admissions and elsewhere. But if education is meant to serve society (which it is), and if schools are wholly supported or, in the case of private universities, massively subsidized in myriad ways by the taxpayers (which they are),<sup>89</sup> then why shouldn't schools (even the most elite ones) make decisions on the basis of what is good for society?

The two alternative approaches would only lead to identical admissions policies if the highest future achievers also lose the most by attending School Y rather than School X. If the highest future achievers do not benefit more than other students from attending School X, then admitting the highest-achieving students would not maximally increase aggregate student achievement. In that case, a decision by School X to admit applicants in a way that best serves its interests would be suboptimal for society.

In trying to forecast academic growth as a result of an educational opportunity, a number of questions arise: Is it even possible to forecast the likely educational growth that would occur for one person versus another? And what about the difficulty of estimating the effects on academic growth of grouping students in one way versus another? Does the achievement stratification characteristic of our university system enhance the growth of students at the most elite universities? And what are the effects of that achievement stratification on the achievement of students at less elite universities? How might we determine the optimal mix of achievement levels across institutions?

A similar set of questions arises with secondary school: Does grouping the highest-achieving students in New York City, for example, into a set of magnet schools actually boost the achievement of those students, compared to if they had attended a more academically heterogeneous school? And what of the achievement of those students excluded from the high-demand magnet schools? Is their achievement diminished by having been excluded from the magnet schools? Would their achievement rise if more high-achieving students attended school with them? These are the sorts of questions we would need to consider in order to evaluate the practice of achievement segregation.

The best reading of the available evidence,<sup>90</sup> in my view, is that if the

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<sup>89</sup> See Jeffrey J. Selinger, *Are Harvard, Yale, and Stanford Really Public Universities?*, WASH. POST (Apr. 6, 2015, 9:28 AM), <https://www.washingtonpost.com/news/grade-point/wp/2015/04/06/are-harvard-yale-and-stanford-really-public-universities> (explaining that none of the endowment money held by the top ten schools are taxed).

<sup>90</sup> See Ruth Curran Neild, *The Effects of Magnet Schools on Neighborhood High Schools: An Examination of Achievement Among Entering Freshmen*, 9 J. EDUC. STUDENTS PLACED RISK 1, 1–21 (2004) (documenting how magnet schools can harm neighborhood schools by taking the best

goal is to promote educational growth for all students, then achievement segregation is not nearly as justifiable as common intuitions suppose.

#### CONCLUSION

This Essay has probed a paradox: while schools of all types should value academic achievement, according it primacy in the admissions process may lead to achievement segregation and, in turn, racial segregation as well. Compared to earlier eras, this dynamic is more likely and more extreme now that education has become so economically valuable. While the racially inequitable effects of achievement segregation constitute an argument against it, I have suggested in this Essay that even putting aside its racial consequences, achievement segregation may not be justifiable from a societal perspective. Secondary schools and universities alike should thus consider approaches to admissions that more equitably allocate the educational opportunities that such schools provide.

Our nation's aspiration for racial justice cannot be realized unless we provide greater educational opportunity for Black people. To do so, we need to confront difficult questions about how to allocate educational opportunity and to relinquish our reflexive embrace of established ways of doing things. Rethinking the admissions policies of selective schools—high schools and universities alike—is a good place to start.

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students); *see also* Jia Wang, Jonathan D. Schweig & Joan L. Herman, *Is There a Magnet-School Effect? A Multisite Study of MSAP-Funded Magnet Schools*, 22 J. EDUC. STUDENTS PLACED RISK 77, 77–99 (2017) (showing that some magnet schools can have negative effects on student outcomes); Maureen E. Pylman, *Did Magnet Schools Improve Student Educational Outcomes?* (Dec. 2016) (Ph.D. dissertation, University of Wisconsin-Milwaukee), <https://dc.uwm.edu/cgi/viewcontent.cgi?article=2410&context=etd> (finding that a magnet school education had little if any impact on educational outcomes). *But see* Jia Wang, Joan L. Herman & Daniel Dockterman, *A Research Synthesis of Magnet School Effect on Student Outcomes: Beyond Descriptive Studies*, 12 J. SCH. CHOICE 157, 157–80 (2018) (finding that magnet schools have a generally positive effect on their students).