

WHY DIVERSITY FAILS:
SOCIAL DOMINANCE THEORY AND THE ENTRENCHMENT OF
RACIAL INEQUALITY

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INTRODUCTION

In 1978 the United States Supreme Court held in *Bakke v. Regents of the University of California*¹ that diversity is a compelling state interest that justifies the use of race conscious college admissions programs. In the aftermath of that decision, mainstream American institutions began inscribing diversity² as a core value critical to their success. Corporations

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¹ 438 U.S. 265 (1978).

² I use the term diversity here to mean characteristics such as race, ethnicity, gender, age, ability and sexual orientation with a focus specifically on diversity in the sense of including persons with the aforementioned characteristics who have traditionally been marginalized or

now frequently extoll the virtues of employing a diverse workforce.³ Colleges and universities point to a diverse student body as necessary to providing their students with a well-rounded and thorough education.⁴ Even the United States military⁵ proclaims that diversity within their ranks is critical to their efforts to keep the nation secure. Diversity is so deeply encapsulated into the social discourse of American society that institutions that lack diversity garner questions about both their validity and ability to appropriately meet the needs and interests of the diverse American population.⁶ Indeed, diversity arguably now plays a legitimization role for institutions.⁷ In a testament to the legitimization role that diversity plays, it is not uncommon for institutions lacking in diversity to fabricate the amount of diversity they have, some going as far as to Photoshop people of color into brochures or advertisements.⁸

excluded from mainstream American institutions.

³ See, e.g., Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 1, *Grutter v. Bollinger* 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger* 539 U.S. 244 (2003) (No. 02-516) [hereinafter American Businesses Brief] (“The existence of racial and ethnic diversity in institutions of higher education is vital to amici’s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment.”).

⁴ See, e.g., Brief for Amicus Curiae University of North Carolina at Chapel Hill in support of Respondents at 1–2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (“A diverse student body helps foster vibrant environments within classrooms and residence halls, on performing arts stages and athletic fields, and in study lounges and cafes that encourage and enable the exchange of ideas and the pursuit of solutions from many different perspectives and grounded in many different life experiences.”); Brief for Amicus Curiae Harvard University in support of Respondents at 1–2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (“Harvard’s commitment to diversity stems from its effort to create an educational environment that is rigorous, stimulating, and enriching.”).

⁵ See, e.g., Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondent at 1, *Gratz v. Bollinger*, 539 U.S. 244 (2003); Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondent at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (“Based on decades of experience, amici have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse enlisted ranks is essential to the military’s ability to fulfill its principal mission to provide national security.”).

⁶ Research has shown that a diversity increases innovation and for business leads to increased profits because of the ability of a diverse workforce to come up with ideas that appeal to the diverse populace. See Katherine W. Phillips, *How Diversity Makes Us Smarter*, *Sci. Am.* (Oct. 1, 2014), <http://www.scientificamerican.com/article/how-diversity-makes-us-smarter>.

⁷ See generally, Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 *N.C. L. REV.* 1017, 1019 (2011) (describing the ways in which diversity is used to signal certain positive characteristics about corporations).

⁸ See, e.g., Nancy Leong, *Faking Diversity and Racial Capitalism*, *MEDIUM* (Nov. 23, 2014), <http://medium.com/@nancyleong/racial-photoshop-and-faking-diversity-b880e7bc5e7a>.

Nevertheless, despite what appears to be a widespread embrace of diversity by American institutions, many institutions, particularly elite⁹ institutions, struggle mightily to actually attain any semblance of meaningful diversity. In the tech industry for example, Facebook issued a well-publicized statement in which it claimed that “[d]iversity is central to Facebook’s mission of creating a more open and connected world: it’s good for our products and for our business.”¹⁰ Yet when Facebook released demographic data for its staff, the numbers betrayed its stated commitment to diversity—only 2 percent of its employees identified as Black, 4 percent as Hispanic, and 33 percent as women.¹¹ Amongst the leadership ranks the numbers were even more incriminatory—71 percent of the senior leadership identified as white.¹² Facebook is by no means an anomaly. Similar incongruities between the stated commitment to diversity and the actual demographics amongst elite law firms,¹³ elite universities,¹⁴ and other fortune five hundred corporations.¹⁵

The wide dichotomy between the celebratory rhetoric surrounding diversity, and the reality of institutions struggling to obtain diversity, begs the question: why is diversity heavily extolled but so rarely achieved in these institutions? Some answer this questions by pointing

⁹ I use the term elite institutions throughout this Article to refer to institutions that have exacting standards for admissions such as fortune 500 companies, law firms ranked among the best in the nation by rating services, and colleges and universities with highly selective admissions requirements.

¹⁰ Maxine Williams, *Driving Diversity at Facebook*, FACEBOOK NEWSROOM (June 12, 2015), <http://newsroom.fb.com/news/2015/06/driving-diversity-at-facebook>.

¹¹ See Maxine Williams, *Facebook Diversity Update: Positive Hiring Trends Show Progress*, FACEBOOK NEWSROOM (July 14, 2016), <http://newsroom.fb.com/news/2016/07/facebook-diversity-update-positive-hiring-trends-show-progress>.

¹² *Id.*

¹³ See, e.g., MP McQueen, *Diversity Scorecard: Minorities Make Small Gains in Big Law*, AM. LAWYER (May 23, 2016), <http://www.americanlawyer.com/id=1202757858000/Diversity-Scorecard-Minorities-Make-Small-Gains-in-Big-Law?slreturn=20170517214627> (chronicling the limited number of minority lawyers at so-called elite big law firms, despite increasing demand from big law corporate and government clients for law firms to field diverse teams working on their matters).

¹⁴ See, e.g., Laura Krantz, *Diverse Campuses, But Still Few Black Students*, BOS. GLOBE, (Apr. 25, 2015), <http://www.bostonglobe.com/metro/2015/04/24/boston-area-colleges-struggle-attract-african-americans-campus/ULApCGSF8aIn74RKnZGgUK/story.html> (noting that at Boston University, MIT, Northeastern, and Tufts, only three percent of students are black despite the calls for increased diversity),

¹⁵ See, e.g., Gregory Wallace, *Only 5 Black CEOs at 500 Biggest Companies*, CNN (Jan. 29, 2015), <http://money.cnn.com/2015/01/29/news/economy/mcdonalds-ceo-diversity>.

to a so-called “pipeline problem.” The “pipeline problem”¹⁶ suggests that there are simply not enough candidates who would add to the diversity of an institution who also meet the qualifications for entrance into these institutions, particularly elite institutions with stringent requirements for admission. This is an argument often made by elite institutions in justification of their limited diversity.¹⁷ Yet recent research is beginning to call into question the validity of the pipeline problem as an impermeable justification for the mismatch between the celebratory diversity rhetoric and dismal diversity reality. In the case of Facebook for example, despite Facebook’s proclamation of a pipeline problem, a study revealed that Black and Latino students with computer science degrees graduated from top universities at twice the rate that leading tech companies like Facebook were hiring them.¹⁸

Importantly, attributing the lack of diversity in institutions solely to the “pipeline problem” fails to account for very real biases that also play a prominent role in the failure of institutions to diversify.¹⁹ To that end, implicit bias²⁰ is increasingly being put forth as an alternative explanation to explain the mismatch between the celebratory rhetoric of diversity within elite institutions and the reality of very limited diversity within these same intuitions Implicit bias posits that unconscious stereotypes or

¹⁶ See, e.g., Sarah E. Redfield, *The Educational Pipeline to Law School-Too Broken and Too Narrow to Provide Diversity*, 8 PIERCE L. REV. 347, 350 n.11 (2010) (describing the pipeline as the pathway through various points of the education system to the credentialing necessary to enter a profession).

¹⁷ See, e.g., Georgia Wells, *Facebook Blames Lack of Talent for Diversity Problem*, WALL STREET J. (July 14, 2016), <http://www.wsj.com/articles/facebook-blames-lack-of-available-talent-for-diversity-problem-1468526303>; Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 381 (2013) (arguing that the underrepresentation of minority lawyers is created by impediments in the educational and licensing pipelines that produces lawyers).

¹⁸ Elizabeth Wise & Jessica Guynn, *Tech Jobs: Minorities Have Degrees But Don’t Get Hired*, USA TODAY (Oct. 12, 2014), <http://www.usatoday.com/story/tech/2014/10/12/silicon-valley-diversity-tech-hiring-computer-science-graduates-african-american-hispanic/14684211>.

¹⁹ See, e.g., Alina Selyukh, *Why Some Diversity Thinkers Aren’t Buying the Tech Industry’s Excuses*, NPR (July 19, 2016), <http://www.npr.org/sections/alltechconsidered/2016/07/19/486511816/why-some-diversity-thinkers-arent-buying-the-tech-industrys-excuses> (critiquing the pipeline justification given for tech companies lack of diversity and instead pointing to the culture of companies and unconscious bias as a possible justification for the lack of diversity).

²⁰ *Id.*; see also Nicole E. Negowetti, *Implicit Bias and the Legal Professions “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015) (highlighting the significance of implicit biases in creating inequities and lack of diversity in elite institutions).

shortcuts embedded in the human mind related to characteristics such as race, ethnicity, age, and even appearance, cause individuals to evaluate some groups more harshly and disparately than other groups.²¹ Implicit bias is now being used to explain lack of diversity in a broad swath of institutions.²²

This Article suggests that while recognizing the ways in which implicit bias hinders diversity efforts is important, an exclusive focus on implicit bias is incomplete. Implicit bias with its' predominate focus on the unconscious behavior of individual actors, obscures the complexity of racial exclusion today. It does so by failing to account for the institutionalized and systemic nature of modern-day racism and racial exclusion.²³ Indeed, modern day racial exclusion is often the product of systemic oppression that involves domination by one group which results in the subordination of other groups, not just the aggregate of individual biases.²⁴

In order to develop a more complete understanding of why so many institutions continue to struggle to achieve diversity, despite the seemingly normative elevation of diversity, one needs to also examine other theoretical lenses outside of implicit bias. In particular, it is worthwhile to examine theoretical lenses that can better account for the systemic nature of bias and exclusion in America. One such theory that offers promise is Social Dominance Theory.

Social Dominance Theory is a theory of intergroup relations that seeks to explain the existence of group based hierarchies and

²¹ See generally, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT HIDDEN BIASES OF GOOD PEOPLE* (2013) (chronicling the ways in which implicit bias impacts people and institutions).

²² See Negowetti, *supra* note 21, at 941 (“[I]mplicit bias plays a role in the racial and gender disparities regarding wages and position of authority in the workforce.”).

²³ See, e.g., Darren Lenard Hutchinson, “*Continually Reminded of Their Inferior Position*”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 *Wash. U.J.L. & POL’Y* 23, 45–46 (2014) (noting that a significant weakness in implicit bias as an explanation for modern day exclusion on the basis of race is that implicit bias fails to analyze racism as a system of subjugation and instead analyzes it on the basis of individual behavior caused by ostensibly unconscious racial stereotypes).

²⁴ See John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 *U.S.F. L. REV.* 889, 910 (1995) ([R]acial discrimination and economic deprivation are not only oppressive, but they are also structural and institutional. Without characterizing oppression as structural, and without developing an agenda that is oriented toward destabilizing and disturbing this structure, any formal or individual progress will be largely rendered impotent by the greater institutional mechanisms.”).

inequalities.²⁵ It contends that groups are constructed along the lines of three dimensions: (i) age, (ii) gender, and (iii) arbitrary socially constructed characteristics (e.g., race, ethnicity, or class).²⁶ It further contends that such a groupings inevitably results in the creation of dominant and subordinate groups.²⁷ Put another way, it suggests that “all forms of group . . . oppression can be manifested as different manifestations of the same basic human predisposition to form group-based social hierarchies.”²⁸

The key contribution that Social Dominance Theory makes is that it provides a framework for understanding how group membership can determine allocation of goods—for purposes of this Article for example, entrance into elite institutions. Importantly, it suggests that group based hierarchies are endemic to *all* human societies, even ones that espouse egalitarian principles. Social Dominance Theory may therefore offer valuable insights as to why elite institutions continue to struggle in obtaining diversity despite having a stated commitment to diversity.²⁹ Using elite law firms as a framework, this Article takes on the task of examining racial exclusion from elite institutions through the lens of Social Dominance Theory. The Article proceeds as follows:

Part I briefly examines the rise in the normative desire for increased diversity within American institutions. Using law firms as an example, it highlights the reasons why institutions have seemingly embraced diversity. Part II examines explanations for the failure of institutions to achieve diversity including the so-called pipeline problem and implicit bias. It also provides a critique of those explanations. Part III introduces Social Dominance Theory. It then analyzes how Social Dominance Theory might be used to account for the failure of elite institutions to obtain

²⁵ See generally JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION (1999) [hereinafter SIDANIUS, SOCIAL DOMINANCE] (outlining the tenets of social dominance theory).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 38.

²⁹ Other legal scholars have examined Social Dominance Theory as an explanation for racial subordination and exclusion in more specific contexts such as crime, policing, and judicial decision making for example. See e.g., Hutchinson, *supra* note 24; Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?* 51 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 159, 175–179 (2016); David Benjamin Oppenheimer, *McDonnell Douglas Corp. v. Green Revisited: Why Non-Violent Civil Disobedience Should Be Protected from Retaliation by Title VII*, 34 COLUM. HUM. RTS. L. REV. 635, 637 (2002).

diversity despite their stated desire to have diversity, again using elite law firms as an example. Part IV concludes.

I. THE NORMATIVE EMBRACE OF DIVERSITY

In a previous work I argued that, “racial diversity (or increasing the presence of nonwhite persons) gained widespread societal value as a result of the U.S. Supreme Court’s Fourteenth Amendment affirmative action equal protection jurisprudence.”³⁰ In particular, I argued that the U.S. Supreme Court’s decision in *Bakke* upholding diversity in lieu of remedying past societal discrimination as the compelling state interest that allows colleges and universities to implement race conscious admissions programs, spearheaded an ever increasing interest in diversifying institutions.³¹ In the wake of *Bakke*, diversity is no longer a nicety, it is instead an imperative. Corporations, universities, and government agencies to name a few institutions often advertise themselves as diverse entities; purposely position themselves as embracing of diversity and move to distance themselves from any innuendo that would suggest that they do not embrace diversity.³² Why does this occur? This Article highlights two possible reasons: (i) for purposes of establishing goodwill and demonstrating appropriate principles of social responsibility and (ii) for purposes of reaping economic benefits.

With respect to the good will function, institutions arguably have a social obligation to reify principles of inclusion such that all members of society are reflected within the institutions that govern a society.³³ Under

³⁰ Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 289 (2017).

³¹ *Id.*; see also Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013) (“In part as a result of judicial action, nonwhiteness has acquired a new sort of value. We have internalized the idea that racial diversity is a social good, and as a result, we assign value to the inclusion of nonwhite individuals in our social milieu, our educational institutions, and our workplaces.”).

³² A good example of this is the backlash that flowed after the North Carolina State legislature enacted House Bill 2, an ordinance that eliminated anti-discrimination protections and affirmatively discriminated against the LGBT community. Many major corporations indicated their displeasure, refusing to do business in North Carolina while proclaiming themselves to be open and tolerant of all forms of diversity. See Edward Helmore, *North Carolina Reels from Business Backlash to Anti LGBT Law*, GUARDIAN, (Apr. 15, 2016), <http://www.theguardian.com/world/2016/apr/15/north-carolina-lgbt-law-business-backlash>.

³³ See generally, ANDREW REHFELD, *THE CONCEPT OF CONSTITUENCY, POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* (2005) (emphasizing the importance of inclusion of diverse constituencies for purposes of legitimizing the American democracy).

this rationale, diversity is important because it allows institutions to engender goodwill by demonstrating to all citizens that they are a part of society's key institution such as a corporation, university, or government entity. The desire to establish good will and demonstrate appropriate social responsibility may in turn lead to what Professor Patrick Shin and Mitu Gulati describe as signaling. Professor Shin and Gulati state that:

One of the explanations given by corporate board members themselves is that diversity efforts send a positive message about their institutions—for example, that their companies are headed in the right direction, are socially responsible, or care about egalitarian norms and social justice. Diversity is, according to this rationale, desirable as a signal of a socially upstanding corporation.³⁴

Signaling for purposes of establishing goodwill often results in institutions adopting at least a stated commitment to diversity. To be sure, the goodwill function served by diversity is a moralistic one. To the extent that institutions within a society are supposed to reflect all the individuals who make up the society, embracing diversity is intrinsic to establishing societal goodwill. This is particularly true in the United States where the citizenry is becoming increasingly more diverse and citizens who were previously excluded from institutions by law and social mores are demanding more access to these institutions.³⁵

In addition to the moralistic signaling function that diversity serves, institutions more commonly promote diversity on purely economic grounds. Many institutions, particularly for profit ones, adopt what is known as the “business case” for diversity. Simply stated, the business case for diversity eschews the moralistic arguments for diversity seen in the good will function. It instead casts the pro-diversity argument strictly in economic terms, contending that diversity is necessary to compete in our current global economy.³⁶ Put another way, the business case for diversity argues that because of the increasingly global reach of American businesses and the heterogeneity of the customers in the markets American businesses now serve, a diverse workforce is needed to produce products and ideas that will appeal to a diverse

³⁴ Shin & Gulati, *supra* note 8, at 1019.

³⁵ See D’Vera Cohn and Andrea Caumont, *10 Demographic Trends That Are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> (noting that “[b]y 2055, the U.S. will not have a single racial or ethnic majority.”).

³⁶ See American Businesses Brief, *supra* note 3, at 1.

range of customers.³⁷ As such, corporations seek to hire a diverse crop of employees. To do so, they rely on universities, particularly elite universities, producing a diverse crop of graduates whom they can employ.³⁸ Consequently, the business case for diversity impacts not just for profit corporations, but universities as well.

Elite law firms³⁹ provide a good case study example of how institutions promote diversity both for purposes of ostensibly establishing good will and because of the business case for diversity. With respect to goodwill, law firms often promote their efforts to diversity on grounds that center around principles of inclusion and the desire to signal a message to those outside the law firm that they are socially responsible and in tune with the modern heterogeneity of America.⁴⁰ For example, elite law firms have given the following reasons for hiring and retaining a diverse crop of attorneys: the desire to ameliorate past practice of exclusion and promote inclusion⁴¹; because it is “the right”⁴² thing to

³⁷ *Id.* at 5 (arguing in favor of race conscious affirmative action programs, reasoning that “because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints . . .”).

³⁸ *Id.* at 9 (“What is critical to *amici* is that the leading colleges, universities and graduate schools from which they recruit and hire their employees be diverse, and consist of the most qualified and talented diverse students as is possible. Universities historically have been responsive to the needs of business and other professions, developing an extraordinary talent pool upon which *amici* and others may draw.”).

³⁹ I use the term “elite law firms” herein to refer to multinational corporate law firms considered to be amongst the best in the country by ranking services such as vault.com.

⁴⁰ See generally David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004) (describing the business case for diversity from the perspective of corporate lawyers).

⁴¹ See, e.g., Bonnie Marcus, *How One Law Firm Is Tackling Diversity*, FORBES MAGAZINE, (Oct. 24, 2016), <http://www.forbes.com/sites/bonniemarcus/2016/10/24/how-one-law-firm-is-tackling-diversity/#64518490758d> (describing how past hiring practices led to exclusion and stating that at Nixon Peabody they “focused [their] priorities to attract, retain, and promote diverse individuals by creating more opportunities, both for lawyers and all of our colleagues . . . [w]e want them to be from all different backgrounds, races, genders, and religions.”).

⁴² Barbara E. Hermansen, *The Importance of Being Diverse*, THE AM. BAR ASSOC BRIEF (1995) (explaining why diversity in law firms is important and noting because it is right. Although it is a complicated equation, at least part of the reason that large law firms are still predominately white male institutions is because of the persistence of at least the remnants of attitudes expressed in *Bradwell v. Illinois* and in *Dred Scott*, *Plessy v. Ferguson*, and their progeny. There simply is no place in today’s world for hiring and advancement decisions that are based in any degree on unfair stereotypes and generalizations.”).

do; and for purposes of fulfilling corporate social responsibility obligations.⁴³ While these are but a sampling of the diversity related statements elite law firms have made, they demonstrate at least some connection between diversity efforts and a desire to acquire good will.

Featured more prominently than the good will justification for diversity is the business justification for diversity which is heavily promoted by elite law firms. Elite law firms consistently list diversity as a strategic and purposeful part of their business plan.⁴⁴ This is due in large part to pressure that law firms receive from their corporate counsel. Per legal scholars, in the late 1980's an in-house lawyer for General Motors (GM) named Harry Pearce drafted a letter to 900 law firms that served as outside counsel for GM in some capacity.⁴⁵ The letter requested that they employ more diversity in the lawyers who handled GM's legal work.⁴⁶ It became known as the "Harry Pearce" letter and is largely credited for inspiring other corporations to make the same demand of greater diversity to their outside counsel law firms.⁴⁷ Today, a wide swath of corporations make diversity a factor when they are selecting a law firm to hire.⁴⁸

Using elite law firms as an example, this Part argues that American institutions have normatively embraced diversity as a desirable good largely because of both the intangible goodwill benefits they receive from diversity and the more tangible economic benefits they ostensibly receive. Though the analysis focused on elite law firms, similar extrapolations regarding the normative embrace of diversity might be made about other institutions, including corporations and the government.⁴⁹

⁴³ *Diversity & Inclusion*, BAKER MCKENZIE, [http://www.bakermckenzie.com/en/aboutus/corporate-social-responsibility/#diversity inclusion](http://www.bakermckenzie.com/en/aboutus/corporate-social-responsibility/#diversity%20inclusion) (last visited June 22, 2017).

⁴⁴ See generally, Brian Mahoney, *Diversity a Business Necessity for Law Firms Experts Say*, LAW360 (Aug 2, 2013, 9:04 PM), <http://www.law360.com/articles/462401/diversity-a-business-necessity-for-law-firms-expert-says> (suggesting that law firm diversity makes economic business sense and is critical to retaining client business).

⁴⁵ See John Nussbaumer & Chris Johnson, *The Door To Law School*, 6 U. MASS L. REV. 1, 13 (2011).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See INST. FOR THE INCLUSION IN THE LEGAL PROF., *THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING* 18 (2011) (detailing the results of a survey that was given to fifty two fortune five hundred companies and finding that as among corporate respondents, 69.4 percent (34 of 49) indicated they use diversity as a criterion in selecting outside counsel.).

⁴⁹ See, e.g., Sapna Maheshwari, *Brands to Ad Agencies, Diversify or Else*, N.Y. TIMES (Sep. 30, 2016), <http://www.nytimes.com/2016/10/01/business/media/>

Yet, as discussed in the Part that follows, the celebratory rhetoric and rationale that institutions give regarding diversity often does match up the diversity reality.

II. THE FAILURE OF DIVERSITY EFFORTS

Despite the ostensible welcoming of diversity as a positive good, many elite institutions including elite law firms struggle to actually attain meaningful diversity. I use the term meaningful diversity here to mean a sufficient number of individuals to ensure that members of minority groups do not feel isolated or like the sole spokespersons for their groups. I also use the term meaningful diversity to mean a sufficient number of members of minority groups that allows for the kinds of robust and rich exchanges that occur in a truly diverse environment. Put another way, the term meaningful diversity is used within this essay means a “critical mass” of members of minority groups.⁵⁰ The struggles of elite law firms to achieve meaningful diversity are well documented.⁵¹ Again, using elite law firms as a case study, the Part that follows briefly outlines the failures of diversity efforts within elite institutions. It then analyzes two of the most commonly stated reasons for the failures: the pipeline problem and implicit bias.

A. *The Struggle to Diversify*

Diversity in elite institutions, particularly law firms, is much ballyhooed. For example, the very elite of law firms as measured by the vault

brands-to-ad-agencies-diversify-or-else.html?_r=0 (describing the pressure that corporations are placing on their advertisement agencies to add diversity and describing the importance of diversity to corporations).

⁵⁰ See, e.g., Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 148 (2007) (examining the concept of critical mass and concluding that “in relation to affirmative action, the size and nature of the entire entering class, the institutional framework within which students are meant to interact, the nature of the group that is supposed to constitute the ‘meaningful number,’ as well as the nature of the public good that is to be produced or achieved by the admission of members of minority groups will all play a role in defining what the critical mass will be in a given circumstance.”).

⁵¹ See generally, David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996); J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have A Black Lawyer Sit at Our Table”*, 71 FORDHAM L. REV. 1257 (2003); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014) (chronicling the historic struggles of the legal profession at large and corporate law firms specifically to diversify).

top law firms guide often have some statement regarding the importance of diversity and efforts the firm is undertaking to achieve diversity.⁵² Yet the demographic reality of those law firms, does not match with the rhetoric of their prominently featured diversity statements. Case in point, as of 2016, one such law firm employs over seven hundred lawyers in its offices nationwide, yet only nineteen of them are African-American.⁵³ Similarly, another has nearly five hundred lawyers in its offices nationwide, only seven of which are identified as Hispanic, none of whom are a partner.⁵⁴ Lastly, a third such law firm, has two hundred and forty lawyers in its offices nationwide, eighty four of whom are partners; yet not one of the partners is African-American.⁵⁵ The story at these three elite law firms is for the most part similar to the story at elite law firms across the country—a lot of talk about diversity but the firm make-ups do not reflect the celebratory rhetoric regarding diversity.⁵⁶

⁵² See *Diversity Statement*, CRAVATH, SWAIN & MOORE, <http://www.cravath.com/diversity/> (last visited June 26, 2017) Diversity Statement, <http://www.cravath.com/diversity/>; (claiming that “[a]t Cravath, we believe that excellence and diversity go hand in hand. Our Firm is made up of individuals with different backgrounds, perspectives and experiences, enabling us to provide the highest level of legal representation to our client.”); *Diversity Statement*, WACHTELL, LIPTON, ROSEN & KATZ, <http://www.wlrk.com/Diversity> (last visited June 26, 2017) Diversity Statement, <http://www.wlrk.com/Diversity/> (noting that “[t]he Firm is committed to recruiting a diverse and talented body of lawyers considering diversity in its broadest form. We were one of the first New York City law firms to offer health benefits to domestic partners and to offer benefits to transgender individuals.”); *Diversity Statement*, SULLIVAN & CROMWELL, Diversity Statement, <http://sullcrom.com/diversity-and-inclusion> <http://sullcrom.com/diversity-and-inclusion> (last visited June 26, 2017) (stating that it is “committed to fostering a diverse and inclusive work environment .[and that] diversity is vital to the Firm’s ability to provide our clients with the highest level of service.”).

⁵³ See Sullivan & Cromwell, NALP Directory of Legal Employers, http://www.nalp-directory.com/employer_profile?FormID=7840&QuestionTabID=34&SearchCondJSON=%7B%22SearchOrgTypeID%22%3A%22%22%2C%22SearchEmployerName%22%3A%22sullivan%20%26%20cromwell%22%7D (last visited June 26, 2017).

⁵⁴ See *Cravath, Swaine & Moore*, NALP Directory of Legal Employers, http://www.nalp-directory.com/content/OrganizationalSnapshots/OrgSnapshot_5264.pdf (last visited June 26, 2017).

⁵⁵ See *Wachtell, Lipton, Rosen & Kratz*, NALP DIRECTORY OF LEGAL EMPLOYERS, http://nalpdirectory.com/employer_profile?FormID=7958 (last visited June 26, 2017).

⁵⁶ See INST. FOR INCLUSION IN THE LEGAL PRACTICE, *supra* note 49, at 81 (conducting an empirical analysis regarding the business case for diversity and concluding “[t]hese diversity efforts by law firms, however, regardless how successful, do not track with a corresponding increase or decrease in business from clients committed to diversity.”).

B. *The Pipeline Problem*

When asked to account for the mismatch between the stated commitment to diversity and the demographic reality, many elite institutions, including law firms contend that they are unable to achieve diversity because of the pipeline problem. Stated simply, they suggest there just are not enough qualified candidates who would add to the diversity of the law firm that meet their criteria for being hired.

Yet in some ways, the so-called pipeline problem is overstated. Let's examine for instance the alleged pipeline problem in the context of elite law firms, particularly with respect to African-Americans, a group that has traditionally been absent in large numbers from elite law firms. From 1971 to 2010, enrollment for African-American students in law schools increased significantly. Total law school enrollment for African-American law students in 1971 was 3,744 but increased to 10,173 by 2010.⁵⁷ Given that the pipeline thesis is predicated on increasing the number of candidates, one would expect that the representation of Black attorneys entering elite law firms would have seen an increase corresponding with their increase in enrollment. Nonetheless, that did not happen. As acknowledged by practitioners and scholars alike, while the overall whole numbers of Black lawyers attending elite law schools has increased over the years, the percentage remains extraordinarily small.⁵⁸

Elite law firms might suggest that the issue lies not with the overall number of Black lawyers, but with the number of Black candidates who enter the pool to work at an elite firm and have the credentials the firms require.⁵⁹ Indeed, research by UCLA law professor Richard

⁵⁷ See INSTITUTE FOR INCLUSION IN THE LEGAL PRACTICE, *supra* note 49 at 81 (conducting an empirical analysis regarding the business case for diversity and concluding that “diversity efforts by law firms, however, regardless how successful, do not track with a corresponding increase or decrease in business from clients committed to diversity.”).

⁵⁸ See, e.g., Wilkins & Gulati, *supra* note 52, at 502 (noting that in 1996, Black lawyers accounted for just 2.4 percent of the lawyers in [elite] firms, and, more importantly, just over one percent of the partners. In 2017, the percentages of Black lawyers in elite law firms remains small.).

⁵⁹ See, e.g., Elizabeth Olson, *Many Black Lawyers Navigate A Rocky, Lonely Road To Partner*, N.Y. TIMES (, Aug. 17, 2015), http://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html?_r=0 (summarizing the results of a study of elite law firms and noting that some law firm partners indicated that an inadequate pool of minority candidates was the reason firms lack sufficient minority lawyers.), http://www.nytimes.com/2015/08/18/business/dealbook/many-black-lawyers-navigate-a-rocky-lonely-road-to-partner.html?_r=0. ; Richard Sander, *A Systemic Analysis of Affirmative Action In American Law Schools*, 57 STANFORD STAN. LAW L. REV. 367, 426 (2004) (discussing a Black

Sander known as the “Mismatch theory,” suggests that minority law students, particularly at elite law schools from which elite law firms typically recruit students, are mismatched for the law schools which they are admitted due to race conscious admissions policies.⁶⁰ As a result, the mismatch theory contends, that minority students end up with lower grades and other indicia’s of academic success in law school because they do not have the necessary credentials to excel at an elite law school.⁶¹ Proponents of the pipeline problem are likely to point to the purported mismatch theory as the reason elite law firms have a hard time diversifying their ranks.

However the mismatch theory only offers an adequate explanation for the lack of diversity within law firms to the extent that law firms embrace law school grades as the sole measuring stick for determining which law students are capable of excelling in an elite law firm. Given the celebratory rhetoric around diversity, one might assume that law firms might engaged in a more nuanced analysis in order to obtain diversity. Indeed, as discussed in further detail in Part III.B *infra*, there is often a attenuated connection between the qualifications that many elite firms require—namely grades that place one in the tier percentage one’s class and/or participation in law review—and a candidate’s ability to practice law at a high level.⁶² Indeed, law school grades often do not capture intangible characteristics such as interpersonal skills necessary for networking, perseverance, or attention to detail many of which are critical skills for successful lawyers to possess.⁶³

For students of color, particularly Black students, the heavy reliance on grade point average as a barometer of potential success as a lawyer

white score gap amongst law students and claiming that “the median black student got the same first-year grades as the fifth- or sixth-percentile white student. Only 8% of the black students placed in the top half of their classes.”).

⁶⁰ See generally, *Id.*

⁶¹ *Id.*; but see Stacy L. Hawkins, *Mismatched or Counted Out? What’s Missing from Mismatch Theory and Why It Matters*, 17 U. PA. J. CONST. L. 855, 871 (2015) (critiquing the validity of the mismatch theory, noting that mismatch theory “fails to account for the impact of environmental, in addition to individual, factors in influencing the academic performance of [underrepresented minority students].”).

⁶² See Daniel L. Keating, *Ten Myths About Law School Grading*, 17 WASH. U. LAW QUARTERLY 171, 172 (1998) (arguing that the connection between law school grades and becoming a successful lawyer is tenuous, noting that law school grades measure the ability to spot legal issues and analyzes, the time students have to do so is very truncated and that in real practice lawyers have more time).

⁶³ *Id.*

is also problematic because of the possible impact of stereotype threat on their grade point average.⁶⁴ Stereotype threat is the phenomenon in which groups that are the subject of negative stereotypes about their intellectual ability experience high levels of anxiety centered on the fear that their performance will confirm the negative stereotypes.⁶⁵ Researchers have found a correlation between stereotype threat and negative exam performance by groups suffer from negative stereotypes and stigmas regarding their intellectual abilities.⁶⁶ As other scholars have noted, stereotype serves as a very real obstacle for many students of color, particularly Black students, and may undoubtedly impact their performance on exams.⁶⁷ For these reasons, the argument often advanced regarding a lack of qualified candidates of color is subject to contestation.

Lastly, even the metaphoric use of a pipeline to describe the problems associated with increasing diversity in institutions is in some ways problematic. The pipeline metaphor is problematic because it assumes that there is only one method of potentially increasing the diversity within elite institutions: increasing the number of candidates who ostensibly meet the conditions for admittance to elite institutions. Yet that supposition makes two faulty assumptions. First it assumes that the criteria being used to determine admission into elite institutions are a neutral and accurate gauge of a candidate's talent or ability to excel within the institution. For the reasons noted in the preceding paragraph regarding the nexus between law school grades and lawyering ability, this is a faulty assumption. Second it assumes that only increasing the number of persons who meet the ostensibly valid admission criteria will organically result in elite institutions like law firms becoming more diverse. But such a focus fails to interrogate cultural issues within institutions that may make them an inhospitable or undesirable place for persons who would add to the diversity of the institution.⁶⁸ Thus, the pipeline problem both

⁶⁴ See Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, THE ATLANTIC MONTHLY, (Aug. 1999), <http://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663>, at 44, 46.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See generally, Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379 (2002); Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016).

⁶⁸ See, e.g., Liane Jackson, *Minority Women Are Disappearing from Big Law and Here's Why*, ABA J. (Mar. 1, 2016), <http://www.abajournal.com/magazine/article/>

literally and metaphorically offers an incomplete explanation for the failure of elite institutions to obtain meaningful diversity, despite their often stated commitment to doing so. Instead, as discussed in the Parts that follow, bias both of the implicit and explicit variety, are factors outside of the so-called pipeline problem that may also account for the lack of diversity in elite institutions.

C. *Implicit Bias*

In addition to the pipeline problem, a phenomenon called implicit bias is also increasingly being used to explain the lack of diversity within elite institutions. Generally stated, implicit bias refers to the unconscious distinctions people make about different groups that are based on deeply embedded (usually negative) stereotypes.⁶⁹ Implicit biases are especially prevalent when it comes to issues of race.⁷⁰ In a seminal work on implicit bias, Professor Jerry Kang demonstrated the ways in which “race alters interpersonal interactions.”⁷¹ He noted that racial schemas exist that take on both explicit and implicit meanings.⁷² Consequently, “when presented with an image triggering the conception of a particular race, people are likely both (i) to categorize the image as belonging to that racial category, and (ii) to assign to that image the characteristics the brain already has associated with the category.”⁷³ This unconscious method of categorization has harmful consequences for members of racial minority groups, particularly African-Americans. African-Americans are likely to be harmed by implicit biases because whites (and other racial minority groups as well) are likely to make unconscious associations between Blackness and negative things like criminality.⁷⁴ Implicit

minority_women_are_disappearing_from_biglaw_and_heres_why.

⁶⁹ See generally, BANAJI & GREENWALD, *supra* note 22.

⁷⁰ See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005) (noting that “most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”).

⁷¹ *Id.* at 1497.

⁷² *Id.* at 1499 (“Once a person is assigned to a racial category, implicit and explicit racial meanings associated with that category are triggered.”).

⁷³ Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1, 10 (2016).

⁷⁴ See, e.g., Charles Blow, *Crime, Bias, and Statistics*, N.Y. TIMES (Sep. 7, 2014), <http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html> (citing the results of a report on crime that showed “[w]hite Americans overestimate the proportion of crime committed by people of color and associate people of color with criminality. For example, white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug

bias also infects employment opportunities. Recent research has shown that implicit bias causes employers to reject applicants with names associated with Black individuals.⁷⁵

With respect to the effect of implicit bias on elite institutions, law firms again provide an apt case study. Two recent studies demonstrate both the existence of implicit bias within the law firms and the devastating effects on the ability of elite law firms to maintain and sustain diversity. First, research shows that many elite firms evidenced a decided preference in favor of hiring persons from wealthy families.⁷⁶ Researchers Lauren Rivera and Andras Tilcsik examined the hiring processes utilized by elite law firms, investment banking firms, consulting firms and found the following:

at each stage of the hiring process—from the decision about where to post job advertisements and hold recruitment events to the final selections made by hiring committees—employers use an array of sorting criteria (“screens”) and ways of measuring candidates’ potential (“evaluative metrics”) that are highly correlated with parental income and education. Taken together, these seemingly economically neutral decisions result in a hiring process that filters students based on their parents’ socioeconomic status.

Thus, a preference for individuals with high socioeconomic status exists generally within many elite firms. Yet with respect to law firms specifically, a second study by Lauren Rivera and Andras Tilcsik revealed that elite law firms evidenced a preference not for high level socioeconomic pedigree generally, but high level socioeconomic pedigree in men only.⁷⁷ The results of their researched showed that elite firms preferred men from wealthy backgrounds because employers demonstrated an

sales and juvenile crime committed by African-Americans by 20 percent to 30 percent.”).

⁷⁵ See, e.g., Sendhill Mullainathan, *Racial Bias Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html>.

⁷⁶ See generally, LAUREN RIVERA & ANDRAS TILCSIK, *PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 2* (2015) (demonstrating that at every level of the hiring process of elite institutions, including law firms, put in place filters that effectively screen based on parental education and income).

⁷⁷ Lauren Rivera and & Andras Tilcsik, *Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals In An Elite Labor Market*, 81 81 AMERICAN SOCIOLOGICAL SOC. REV. 1097, 1097 Vol. 6 (Oct. 12, 2016) (describing the results of a research study in which they “sent applications from fictitious students at selective but non-elite law schools to 316 law firm offices in 14 cities, randomly assigning signals of social class background and gender to otherwise identical résumés.”).

implicit bias which suggested that women from wealthy families would be less committed to the job.⁷⁸ To the extent that racial minorities, particularly African-Americans,⁷⁹ are less likely to come from wealthy families, the kind of implicit bias found in the study may be useful in explaining why people of color have a difficult time getting hired by elite law firms. This kind of implicit bias may also be useful in explaining why law firms not only lack racial and ethnic diversity, but consistently lag behind in gender diversity, particularly at the partnership level, as well.

Second, another study made regarding elite law firms and implicit bias made the connection between race and the elite law firm partners' perceptions of the work quality of African-American associates.⁸⁰ The study found that when presented with the same memo from a fictitious associate name Thomas Meyer, white partners who were asked to evaluate the memo were likely to give harsher criticism on the memo when they thought Thomas Meyer was African-American than when they thought he was white.⁸¹ The import of their findings suggest that African-American lawyers both once they are hired permanently and when they are being evaluated for hire as summer associates are likely to be judged more harshly and disparately than their white counterparts.⁸² This kind of implicit bias most certainly might explain why African-Americans have both a harder time getting hired by elite firms and a more difficult time advancing or remaining at the firm even if they are hired.

Thus, implicit bias offers a legitimate explanation for why elite institutions, particularly law firms, continue to lag behind in diversity notwithstanding their stated commitments to diversity. Nevertheless, implicit bias still fails to tell the entire story. While implicit bias does explain how individual biases might contribute to the limited diversity we see in elite institutions, discrimination and exclusion is likely to be a structural issue, not just a case of individual bias. As such, we need additional theories that might account for the structural elements of discrimination in order

⁷⁸ *Id.* at 1098.

⁷⁹ See generally, Tanzina Vega, *Blacks still far behind whites in wealth and income*, CNN (June 27, 2016), <http://money.cnn.com/2016/06/27/news/economy/racial-wealth-gap-blacks-whites/index.html>.

⁸⁰ See generally, ARIN N. REEVES, *NEXTIONS, WRITTEN IN BLACK & WHITE EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS* (2014).

⁸¹ *Id.* at 4–5.

⁸² *Id.* at 6 (describing work done at an elite law firm and noting that “we found that minority summer associates were consistently being evaluated more negatively than their majority counterparts.”).

to tell the complete story. The Part that follows introduces one possible theory to explain the ways in which structural discrimination contributes to the mismatch between the rhetoric of diversity and the reality of diversity.

III. SOCIAL DOMINANCE THEORY AND RACIAL EXCLUSION FROM ELITE INSTITUTIONS

In a seminal work called Social Dominance Theory (SDT) two psychologists argued that all “human societies tend to be structured as group-based social hierarchies.”⁸³ SDT provides a framework through which we can examine the dynamics that create and maintain group based hierarchies and inequality. Unlike implicit bias, it situates discrimination and subordination through the lens of group hierarchy rather than individual biases. When extrapolated out to the issue of the lack of diversity within elite institutions, SDT offers promise in helping us to understand why elite institutions across the board consistently fall short of their diversity goals, despite seeming to normatively embrace the concept of diversity. For the purposes of the analysis in this Article, SDT relies on three important assumptions with respect to human group based hierarchies that are worth highlighting.

A. *Basic Tenets of Social Dominance Theory*

First, SDT posits that in any society humans tend to form three kinds of group based hierarchies: age-based; gender-based and a third category called arbitrary-set systems.⁸⁴ The arbitrary-set system category consists of socially constructed categories such as race, ethnicity or any other socially constructed group distinction.⁸⁵ In all of the categories, but particularly in the third category of socially constructed group distinctions—arbitrary-set systems—dominant groups and subordinate groups emerge.⁸⁶ The dominant groups hoard a disproportionate share of items that have positive social value, items like political authority and power, nice homes, good health care, wealth and high social status.⁸⁷ The subordinate groups on the other hand absorb a disproportionate share of

⁸³ SIDANIUS, SOCIAL DOMINANCE, *supra* note 26, at 31.

⁸⁴ *Id.* at 38.

⁸⁵ Jim Sidanius & Felicia Pratto, *Social Dominance Theory*, in HANDBOOK THEORIES OF SOC. PSYCHOL. VOL. 2 419 (2011).

⁸⁶ SIDANIUS, SOCIAL DOMINANCE, *supra* note 26, at 31.

⁸⁷ *Id.*

items that have negative social value, things like high risk and low status occupations, poor health care, modest or miserable homes.⁸⁸ The end result is a hierarchical arrangement in which the dominant group is on top and the subordinate group at the bottom.

Second, SDT suggests that human group based hierarchies are dynamic; they will continue to reorganize themselves and adapt based on the contours of the dominant group for purposes of reifying the position of the dominant group.⁸⁹ Group based hierarchies maintain themselves through a combination of “aggregated institutional discrimination, aggregated individual discrimination and behavioral asymmetry.”⁹⁰

Aggregated individual discrimination refers to individual acts of discrimination—sometimes unconscious and impacted by implicit bias—against another individual.⁹¹ An example of this might be the bias that partners exhibited against African-American associates discussed in Part II.B *supra* when they believed that they were reviewing work product written by African-American associates. Aggregated institutional discrimination occurs when institutions adopt rules or practices that “result in the disproportionate allocation of positive and negative social value across the social status hierarchy.”⁹² This form of institutional discrimination can be conscious or overt, or unconscious. An example of this might be elite law firms that recruit only at law schools ranked in the top 10 of the U.S. News and World report, the effect of which might be to perpetuate the cycle of hiring attorneys who come from privileged or wealthy backgrounds.⁹³

Finally, behavioral asymmetry suggests that the dominant and subordinate groups work in concert to maintain the status quo arrangement in which the dominant group remains on top and the subordinate group is on the bottom.⁹⁴ Put another way, behavioral asymmetry posits

⁸⁸ *Id.*

⁸⁹ Sidanius & Pratto, *supra* note 88, at 420.

⁹⁰ SIDANIUS, SOCIAL DOMINANCE, *supra* note 26, at 39.

⁹¹ *Id.* at 41.

⁹² *Id.*

⁹³ See, e.g., Lauren Rivera, *Ivies, extracurriculars, and exclusion: Elite employers' use of educational credentials*, 20 RES. IN STRATIFICATION & MOBILITY 71, 76 (2011) (describing the way in which elite law firms use rankings of U.S. News and World report and only hire from top ranked schools in that report).

⁹⁴ SIDANIUS, SOCIAL DOMINANCE Sidanius & Pratto, *supra* note 26,4 at at 43–44 (“[W]ithin relatively stable group-based hierarchies, most of the activities of subordinates can be characterized as cooperative of, rather than subversive to, the system of group-based domination.”).

that members of the subordinate group do not behave in ways that are self-serving but instead act in ways that help maintain the status quo because of their limited power position. An example of this might be the reluctance of minority law attorneys to vouch for a minority law student who does not meet the law firms' exact stated requirements for fear that the law student will not perform well and their poor performance will harm their own tenuous position within the firm.⁹⁵

Lastly, the architects of SDT claim that discrimination across the three aforementioned levels—individual, institutional, and behavior asymmetry—“is coordinated to favor dominant groups over subordinate groups [through] *legitimizing myths* or societal, consensually shared social ideologies.”⁹⁶ Legitimizing myths are defined as “consensually shared ideologies (including stereotypes, attributions, cosmologies, predominant values or discourses, shared representations, etc.) that organize and justify social relationships.”⁹⁷ Legitimizing myths essentially govern how people within the society should behave and what is considered as having social value.⁹⁸

Importantly, there are two different types of legitimizing myths: hierarchy enhancing legitimizing myths (HELMS) and Hierarchy attenuating legitimizing myths (“HAMS”).⁹⁹ HELMS maintain the status quo and maintain the group-based hierarchy.¹⁰⁰ HALMS on the other hand deconstruct/delegitimize the status quo and attempt to dismantle the group-based hierarchy. Very generally stated, SDT suggests that many members of the dominant group are likely to have a very high commitment to perpetuating HELMS that help maintain unequal status for members of the subordinate group. Indeed SDT suggest that even when there are laws or policies that mandate forms of egalitarianism that would dismantle the hierarchy (e.g., antidiscrimination law or policies aimed at increasing racial/ethnic diversity), members of group-based

⁹⁵ Wilkins & Gulati, *supra* note 52, at 571–572 (describing the high visibility of Black lawyers in corporate law firms and the fears associated with poor performance of one Black associate leading to negative associations about all Black associates).

⁹⁶ Felicia Pratto et al., *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 EUROPEAN REV. OF PSYCHOL. 271, 272 (2006) (emphasis added).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 275.

¹⁰⁰ *Id.*

societies—led by the dominant group—will engage in “legitimizing myths” that sustain hierarchy-enhancing ideologies.

B. Applying Social Dominance Theory to Calls for Diversity: A Reason for Caution

In answering the question as to why elite institutions continue to struggle to obtain diversity, SDT offers a complimentary theory in addition to implicit bias to explain why elite institutions continue to struggle in obtaining diversity. The greatest import that SDT has to offer is that it offers an explanation for how group based hierarchies might be reinforced by legitimizing myths that help to protect that status quo, a status quo that often results in the exclusion of subordinated groups such as racial minorities.

Indeed, in the context of elite institutions, hierarchy enhancing legitimizing myths or HELMS are frequently used in order to justify the incongruence between an elite institutions’ stated desire for diversity and lack of actual diversity. An example of a HELM might be that the law school grades are a fair, race neutral predictor of an individual’s likelihood of succeeding an elite law firm. This HELM is often utilized by elite firms to inoculate themselves from criticism regarding their homogenous composition. Further, in line with the behavior asymmetry that SDT predicts, members of subordinated groups rarely challenge HELMS. In the context of elite law firms for example, the response to the HELM regarding law school grades from members of subordinated groups is to typically suggest that better preparing students to excel in law school might solve the problem.¹⁰¹

In order to combat the entrenchment of group based hierarchy, SDT elite institutions must minimize or abandon policies that might be considered hierarchy attenuating legitimizing myths or HALMS. An example of a HALM might be that the law school grades do not account for stereotype threat and therefore are not a fair and race neutral predictor of an individual’s likelihood of succeeding as an attorney at an elite law firm.¹⁰² Institutions might spend their efforts on creating alternative screening devices other than a strict reliance on grades that might do a better job of predicting success as an attorney at an elite law firm. For

¹⁰¹ See Olson, *supra* note 60 (explaining efforts being made to increase diversity in elite law firms and noting that those efforts include programs aimed at helping Black students to be better prepared for law school).

¹⁰² See *supra* Part II.B and discussion of stereotype threat.

example, some colleges have eliminated standardized tests as a screening method in recognition of the attenuated connection between those exams and a student's potential for success.¹⁰³ Elite law firms might consider a similar tact; relying less on grades and more on more concrete criteria—using for example writing samples, performance in moot court or mock trial competition.

In addition to supplementing our understanding of why many institutions may not be achieving racial and ethnic diversity, despite the ostensibly high normative value of diversity, SDT also provides us with some insights that should make us cautious about how institutions in calls for increased diversity. As a starting point, it is important to understand diversity is generally ambiguously defined. The concept of diversity includes traits that are protected by law (e.g., race, national origin, gender) and those that are not (e.g., view point diversity, geographic diversity, etc.). The average elite institution's understanding of what diversity means runs the gamut.¹⁰⁴ Thus even the stated embrace of diversity may be a HELM insofar as institutions may manipulate what constitutes diversity in order to obtain the legitimization function that diversity serves.

People define diversity in broad terms to encapsulate a wide range of demographics, including gender, age, sexual orientation, political views, geographical orientation and of course race and ethnicity, to name a few. It is not always the case that race and ethnicity are by default included in people's perceived meaning of diversity. But when race and ethnicity are included, people can often disagree about which particular racial and ethnic groups should be included within the definition/conception of diversity.

Diversity is therefore in many instances arguably poorly defined and used to refer to a wide range of shifting demographic dimensions,

¹⁰³ See, e.g., Corey Turner, *Why Colleges Are Really Going Test Optional*, NPR (Sept. 3, 2015), <http://www.npr.org/sections/ed/2015/09/03/436584244/why-are-colleges-really-going-test-optional> (discussing the possibilities of increasing enrollment by underrepresented minorities by allowing admission without standardized test scores).

¹⁰⁴ See, e.g., Paul Sullivan, *Defining Diversity in Silicon Valley and on Wall Street*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/business/dealbook/defining-diversity-in-silicon-valley-and-on-wall-street.html?mcubz=0> (describing the varied ways in which diversity is defined by companies on Wall Street and in Silicon Valley); Anna Holmes, *Has 'Diversity' Lost Its Meaning?*, N.Y. TIMES MAG. (Oct. 27, 2015), <http://www.nytimes.com/2015/11/01/magazine/has-diversity-lost-its-meaning.html?mcubz=0> (noting that diversity changes meaning depending on context).

some protected by law, some not. Yet how one defines diversity is critically important. Viewing the root causes of bias that leads to racial exclusion not just through the lens of individually centered implicit bias, but also through the more group based systemic lens of social dominance theory, suggests that perceptions of what diversity means can serve hierarchy-enhancing or hierarchy-attenuating functions.

In fact, because of diversity's ambiguous meaning, people may strategically construe this concept in a manner consistent with their desire to either preserve or reduce inequality along socially important dimensions, such as race. If diversity's meaning can shift in accordance with perceivers' social motivations, then the present research calls into question the wisdom of "pursuing diversity" as a rationale for attaining racial equality within organizations. A broad call for pursuing diversity may inadvertently open the door for people to turn diversity into whatever they want it to be and to perpetuate hierarchy enhancing ideologies all while hiding under the "call for diversity cover." In order to minimize the possibility of this happening, institutions should set precise diversity goals and clearly articulate the areas in which they are seeking to diversify.

Important takeaway points to be gleaned from SDT are that policy approaches such as recognition of implicit biases, or even training on implicit biases, are great but not enough. Elite institutions must also wherever possible be precise in naming what we mean by diversity and ensuring that it contains some clear and indisputable metrics for racial and ethnic diversity. They must also be alert to legitimizing myths that do the work of sustaining hierarchy enhancing ideologies and prepared to do the work of breaking them down through hierarchy attenuating ideologies. Ways in which they might do that work include interrogating the neutrality and legitimacy of the hiring criteria that they use and scrutinizing the cultural issues that exists in their environments that may be off-putting or inhibiting to workers of color.

CONCLUSION

This Article explores the incongruence between the seeming embrace of diversity by mainstream American institutions and their failure to actually achieve diversity. It posits that while theories such as the pipeline problem may explain some of the incongruence, those explanations fail to capture the systemic nature of discrimination and subordination. The Article instead looks to Social Dominance Theory for a

broader more systemic explanation as to why mainstream institutions continue to struggle in attaining diversity. It demonstrates how hierarchy enhancing legitimizing myths function to maintain the group based status quo in which whites remain the dominant group in elite institutions and people of color remain the subordinated group in elite institutions. It suggests that more efforts need to be made to promote hierarchy attenuating policies for purposes of deconstructing the current group based hierarchal model. It also cautions against allowing calls for diversity to in and of themselves serve the same functions as hierarchy enhancing legitimizing myths. By situating the problems institutions have in achieving diversity within the framework of Social Dominance Theory, this Article offers a useful framework through which to attempt to ensure that the celebratory diversity rhetoric matches the actual diversity reality in elite institutions.