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Elite Universities as Luxury Brands

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INTRODUCTION

In characterizing a recent college admissions fraud case brought by the US Attorney for the District of Massachusetts, Judge Douglas Woodlock bluntly labeled the fraud “a sneaky crime of conspicuous consumption.”¹ In this chapter, I explore the legal implications of consuming elite higher education as a luxury good. Like luxury goods companies, elite universities are regarded as owners of luxury brands under trademark law. Companies such as Louis Vuitton, Ferrari, and Hermès own brands that enjoy a high level of exclusivity and attract conspicuous consumption. So do elite universities. I propose that Harvard, Stanford, and Yale can be viewed as analogous to Louis Vuitton, Ferrari, and Hermès.

This “luxurification” of higher education, however, perpetuates class division and violates *the right to education* by favoring students from families who can pay the tuition. In this chapter, I consider how luxury brands prosper through exclusivity and conspicuous consumption. I then explore the extent to which elite universities can be compared to luxury brands and why their institutional names and logos should, primarily from a trademark protection perspective, be regarded as hyper luxury brands. Finally, I consider the legal and social implications of the luxurification of higher education.

I. THE MAKING OF A LUXURY BRAND

Ranging in price from \$40,000 to \$500,000 and with a waiting list of up to six years, the Hermès Birkin is the most coveted of handbags.² Why are luxury items such as

¹ Transcript of Sentencing at 62, *United States v. Bizzack*, No. 19-cr-10222 (D. Mass. Oct. 30, 2019).

² Jack Houston & Irene Anne Kim, *A Handbag Expert Explains Why Hermès Birkin Bags Are So Expensive*, BUSINESS INSIDER, June 13, 2019, www.businessinsider.com/hermes-birkin-bag-real-real-handbag-expert-so-expensive-2019-6.

the Hermès Birkin so appealing? Consumers are drawn to luxury goods like Birkin bags due to their exclusivity.³ This aura of exclusivity entails superior quality, enhanced creativity, and the steep price of goods or services marketed by these luxury brands.

Quality. Luxury brands are synonymous with exceptional materials, craftsmanship, and service. High-quality leather, fabrics, and rare stones are sourced by luxury companies from carefully selected supply chains,⁴ and rigorous screening processes are used to maintain premium product craftsmanship.⁵ Luxury companies are also recognized for offering high-quality in-store and post-sale services dedicated to their customers' needs.⁶

Creativity. Luxury brands also signify the high level of creativity that is embedded in their goods and services. Luxury fashion companies vigorously support innovation in product design, constantly redefining fashion trends and luxury lifestyles.⁷ Legendary designers, such as Giorgio Armani, Coco Chanel, Valentino Garavani, Gianni Versace, and Yves Saint-Laurent, created and branded their own luxury business empires with highly creative designs.⁸ Luxury conglomerates such as Compagnie Financière Richemont SA, Kering SA, and LVMH Moët Hennessy Louis Vuitton rely on gifted designers and artists.

Price. Luxury companies maintain the exclusivity of their brands through pricing strategies, with high prices normally commensurate with the quality and creativity invested in their products or services.⁹ Harry Winston and Van Cleef & Arpels sell their jewelry at a much higher price than other brands because of the high quality of their diamonds and creative designs, craftsmanship, and services.¹⁰ The same applies to other luxury brands. Normally, the better the materials, craftsmanship, and services a luxury company provides and the more it invests in creativity, the more it charges for its products.

³ See JEAN-NOËL KAPFERER & VINCENT BASTIEN, *THE LUXURY STRATEGY: BREAK THE RULES OF MARKETING TO BUILD LUXURY BRANDS* 104–05 (2012).

⁴ *Id.* at 100–01.

⁵ “According to current CEO Axel Dumas, the main strength of the Hermès brand is the love for craftsmanship”: “each and every product coming out under the brand’s name should reflect the hard work put into it by the artisan.” *Hermès—The Strategy Insights Behind the Iconic Luxury Brand*, MARTIN ROLL (Sept. 2018), <https://martinroll.com/resources/articles/strategy/hermes-the-strategy-behind-the-global-luxury-success>.

⁶ See Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 *GEO. J. INT’L L.* 783, 794 (2014).

⁷ KAPFERER & BASTIEN, *supra* note 3, at 207–08.

⁸ See e.g., UCHE OKONKWO, *LUXURY FASHION BRANDING: TRENDS, TACTICS, TECHNIQUES* 30–31 (2007).

⁹ Franck Vigneron & Lester W. Johnson, *A Review and a Conceptual Framework of Prestige-Seeking Consumer Behavior*, 1999 *ACADEMY OF MARKETING SCIENCE REV.* 1 (1999).

¹⁰ See e.g., FRED CUELLAR, *HOW TO BUY A DIAMOND: INSIDER SECRETS FOR GETTING YOUR MONEY’S WORTH* 55–56 (2018).

As price is an important indicator of the level of exclusivity, luxury brands apply marketing strategies like offering limited editions and controlling sales channels.¹¹ To safeguard these exclusivity-oriented marketing strategies, luxury companies have taken legal action against retailers who sell their products too cheaply or without a license.¹²

A. Conspicuous Consumption

Apart from quality and creativity, what else does the high price of a Birkin bag signal? And why are consumers willing to buy this extremely expensive item? The high price is a public statement of the Birkin bag as a status symbol,¹³ and many consumers purchase these bags for this reason. The exclusivity of luxury brands like the Hermès Birkin is inextricably linked with their signifying function vis-à-vis the conspicuous consumption of luxury goods or services.¹⁴

Conspicuous consumption refers to people's willingness to pay a much higher price for a functionally equivalent good for the purpose of the public display of that good as a status symbol. A person's acquisition of wealth does not necessarily level up his or her social status. Instead, this wealth must be used to publicly display certain indicators. According to Veblen, "In order to gain and to hold the esteem of men, wealth must be put in evidence, for esteem is awarded only on evidence."¹⁵ One's consumption of the bare necessities of life does not produce such evidence, but lavish spending on luxury goods and services does. Luxury goods in Veblen's time, such as precious metals and gems,¹⁶ expensive "food, drink, narcotics,"¹⁷ hand-made silver spoons,¹⁸ and fashionable dress,¹⁹ were costly and sold to a relatively small number of people because they were naturally scarce and crafted in a sophisticated manner. "Since the consumption of these more excellent goods is an evidence of wealth," Veblen observes, "it becomes honorific; and conversely, the failure to consume in due quantity and quality becomes a mark of inferiority and demerit."²⁰

¹¹ See Sun, *supra* note 6, at 791.

¹² Case C-59/08, Copad SA v. Christian Dior couture SA, 2009 E.C.R. I-3421, ¶¶ 7–8 (reporting that Dior refused its licensee to sell its products in discount stores).

¹³ Katya Foreman, *The Birkin Bag: Fashion's Ultimate Status Symbol*, BBC (Jan. 16, 2015), www.bbc.com/culture/story/20150116-the-ultimate-status-symbol.

¹⁴ Youngseon Kim, *Power Moderates the Impact of Desire for Exclusivity on Luxury Experiential Consumption*, 35 *PSYCHOLOGY MARKETING* 283, 286 (2018).

¹⁵ See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 29 (Martha Banta ed., Oxford University Press 2007) (1899); see also, ROGER S. MASON, *CONSPICUOUS CONSUMPTION: A STUDY OF EXCEPTIONAL CONSUMER BEHAVIOUR* 7 (1981); Jeremy N. Sheff, *Veblen Brands*, 96 *MINN. L. REV.* 769, 795 (2012).

¹⁶ VEBLEN, *supra* note 15, at 86–87.

¹⁷ VEBLEN, *supra* note 15, at 52.

¹⁸ VEBLEN, *supra* note 15, at 85–86.

¹⁹ VEBLEN, *supra* note 15, at 111–24.

²⁰ VEBLEN, *supra* note 15, at 53.

Conspicuous consumption leads to the so-called Veblen effect, through which the demand for luxury goods increases as their price increases.²¹ Subject to this effect, a luxury good or service has a two-segment pricing scheme: the real price and conspicuous price. The former stands for the normal market price that ordinary consumers pay for the good.²² It covers the costs for design, production, and circulation. The conspicuous price refers to the extra costs the seller charges for the status-signifying function of its luxury goods. People who consume conspicuously are willing to buy luxury goods at higher conspicuous prices. This is because they care much more about the status-signifying function of conspicuous prices than other consumers, who are only willing to pay real prices.²³ The higher the conspicuous prices of luxury goods, the more elite consumers are willing to buy these goods as signifiers of status.²⁴

For a long time, the conspicuous consumption phenomenon applied to luxury goods without brand names attached. However, since the 1980s, the luxury goods sector has radically transformed its elites-oriented business model through branding. First, as more people are able to afford luxury goods, sales volume increases. Marketing luxury goods through brand names is cost-effective and impactful.²⁵ This trend has intensified since the formation of luxury brand conglomerates, making each luxury company more profit-driven.²⁶

Second, extensive advertising of luxury goods through television and social media increasingly relies upon brand names. Many luxury good advertisements contain a trademark or a combination of trademarks that represents the brand names of the good. These trademarks indicate the identity of product manufacturers and service providers and signify the quality, creativity, and price of their products or services. Luxury companies also routinely incorporate celebrities into their advertisements to show that their products or services are so distinctive and elegant that they ought to be enjoyed only by people with elite lifestyles.²⁷

²¹ See e.g., H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 *Q.J. ECON.* 183, 189 (1950).

²² *Id.* at 203.

²³ According to Veblen, a person who consumes conspicuously “makes his estimate of value of the article chiefly on the ground of the apparent expensiveness of the finish of those decorative parts and features which have no immediate relation to the intrinsic usefulness of the article; the presumption being that some sort of ill-defined proportion subsists between the substantial value of the article and the expense of adornment added in order to sell it.” VEBLEN, *supra* note 15, at 256–57.

²⁴ Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 *AM. ECON. REV.* 349 (1996).

²⁵ See MARK TUNGATE, *LUXURY WORLD: THE PAST, PRESENT AND FUTURE OF LUXURY BRANDS* 2 (2009).

²⁶ *Id.*

²⁷ See Haochen Sun, *Living Together in One Civilized World: How Luxury Companies and Consumers Can Fulfill Their Ethical Responsibilities to the Poor*, 46 *UC DAVIS L. REV.* 547, 553–54 (2013); KLAUS HEINE, *THE CONCEPT OF LUXURY BRANDS* 79–88 (2d ed. 2012).

As Jean Baudrillard famously observed, “[in order to] become an object of consumption, the object must become a sign.”²⁸ Mikimoto sells jewelry made of cultured pearls, each of which is worth a mere 10 percent of a natural pearl.²⁹ The value resides in the Mikimoto trademark; the sign, represented by its conspicuous price. With increased prevalence of trademarks, consumers increasingly associate these symbols not only with luxury goods and services but also with prestige and social status.³⁰

Trademark law has also come to recognize trademarks as symbols of prestige and social status. Courts have held that the Christian Dior mark stands for “the allure and prestigious image [with] an aura of luxury,”³¹ the Ferrari mark “reputation for rarity and quality,”³² Hermès for “scarcity” and “status,”³³ the Lexus mark for “exclusive luxury experience,”³⁴ Gucci for “luxury status,”³⁵ and the Rolex and Vacheron & Constantin-Le Coultre marks for “prestige.”³⁶ Given that luxury brands signify their users’ social positions, courts have further recognized their function in relation to conspicuous consumption. For instance, based upon the judicial recognition of Louis Vuitton’s “luxury status” and “image of exclusivity and refinery,”³⁷ a Louis Vuitton product is “something wealthy women may handle with reverent care and display to communicate a certain status.”³⁸

In a similar vein, attorneys who have argued cases for luxury brands have emphasized in their court filings that these brands function as high status signifiers. For example, attorneys asserted that Lexus “is a very prestigious luxury brand and it is an indication of an exclusive luxury experience,”³⁹ and is also well known for its “power, attraction, reputation and prestige.”⁴⁰

II. ELITE UNIVERSITIES AS LUXURY BRANDS

In the acclaimed *The Great Gatsby*, protagonist Jay Gatsby pretends to be an Oxford University graduate in order to increase his reputation and his chances of

²⁸ JEAN BAUDRILLARD, *THE SYSTEM OF OBJECTS* 200 (James Benedict trans., Verso 1996) (1968).

²⁹ Hannah Elliott, *You’re Buying Fancy Jewelry Wrong*, BLOOMBERG, Dec. 13, 2017, www.bloomberg.com/news/articles/2017-12-13/how-to-buy-jewelry-an-expert-shares-what-you-are-doing-wrong.

³⁰ Sidney J. Levy, *Symbols for Sales*, 37 *HARV. BUS. REV.* 117, 121–22 (1959).

³¹ Case C-59/08, *Copad SA v. Christian Dior couture SA*, 2009 E.C.R. I-3421, ¶ 37.

³² *Ferrari S.p.A. Esercizio Fabbriche Automobili e Corse v. McBurnie*, No. 86-1812-B(IEG), 1989 WL 298658, at *7 (S.D. Cal. June 1, 1989).

³³ *Hermès Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108–9 (2d Cir. 2000).

³⁴ *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175 (9th Cir. 2010).

³⁵ *Gucci America Inc. v. Guess? Inc.*, 868 F. Supp. 2d 207, 218 (S.D.N.Y. 2012).

³⁶ *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

³⁷ *Louis Vuitton Malletier S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 435 (S.D.N.Y. 2016).

³⁸ *Id.* at 435.

³⁹ *Toyota*, 610 F.3d at 1175.

⁴⁰ *Toyota Jidosha Kabushiki Kaisha v. Munchy Food Indus.* [2014], *Opposition to Trademark Application No. 30117999*, ¶ 32.

winning over the woman he loves.⁴¹ How can a university's name carry so much allure and prestige? What is the relevance of this amid the recent college admissions scandals?

In this section, I argue that elite university names also represent exclusivity and serve conspicuous consumption and, thus, such names should be regarded as luxury brands. Moreover, mainly from the trademark protection perspective, I further contend that elite universities should be regarded as owners of *hyper* luxury brands.

Elite universities achieve exclusivity through bolstering their quality of education, creativity of research, competitiveness of the admissions process, and rates of tuition.

Quality. With large endowment funds plus high tuition fees,⁴² elite universities are financially capable of offering excellent software for teaching and learning. These universities top the relevant educational rankings and have the largest endowments. Thirteen have individual endowments valued at \$10 billion or more.⁴³ Elite universities endeavor to recruit talented scholars through rigorous hiring processes and further provide training programs to improve the quality of teaching. They also dedicate resources to innovating curricula that will equip students with cutting-edge knowledge for postgraduate and professional pursuits. Moreover, elite universities generously capitalize on their endowments, creating an excellent peer learning atmosphere by enrolling high-caliber students. Meanwhile, elite universities are well known for their excellent hardware, such as libraries, classrooms, and dormitories. For example, Harvard University has the largest university library in the US and the largest private library in the world.⁴⁴

Creativity. With vibrant academic traditions, culture, and capabilities, elite universities excel in research performance, producing impactful findings. The top positions in ranking lists are mostly occupied by elite universities. These universities have a vital role to play in fostering innovation and inventing new technologies.⁴⁵ Stanford, the Massachusetts Institute of Technology (MIT), and Harvard have been ranked as the top three most innovative universities in the world for five straight years since 2015,⁴⁶

⁴¹ Michael Dirda, *A New Look at Gatsby – as an Oxford Man*, WASH. POST, May 8, 2019, www.washingtonpost.com/entertainment/books/a-new-look-at-gatsby-as-an-oxford-man/2019/05/08/51c1ff50-7023-11e9-8be0-ca575670e91c_story.html.

⁴² Not all universities that could be characterized as “elite” charge high tuition across the board. For example, UC Berkeley charges lower tuition fees for in-state undergraduate students, but still charges high tuition fees for out-of-state undergraduate students. See Cost, U.C. BERKELEY, <https://admissions.berkeley.edu/cost> (last visited Sept. 15, 2020).

⁴³ *Which Colleges Have the Largest Endowments?*, CHRON. OF HIGHER EDUC., Jan. 31, 2019, www.chronicle.com/article/Which-Colleges-Have-the/245587.

⁴⁴ Benjamin Elisha Sawe, *Largest Libraries in the United States*, WORLDATLAS, Apr. 25, 2017, www.worldatlas.com/articles/largest-libraries-in-the-united-states.html.

⁴⁵ Farnam Jahanian, *4 Ways Universities Are Driving Innovation*, WORLD ECON. F., Jan. 17, 2018, www.weforum.org/agenda/2018/01/4-ways-universities-are-driving-innovation.

⁴⁶ David M. Ewalt, *Reuters Top 100: The World's Most Innovative Universities 2019*, REUTERS, Oct. 23, 2019, www.reuters.com/innovative-universities-2019.

and all ten universities with the highest number of Nobel Prize winners between 2000 and 2017 are elite universities.⁴⁷

Competitiveness. The highly competitive admissions process is another factor contributing to the exclusivity of elite universities. Every year, the number of applications to elite universities far exceeds the number of students they can admit. It is estimated that only 6.4 percent of 368,806 applicants were admitted by the top ten US universities as ranked by the *U.S. News & World Report* for the fall 2019 entering class.⁴⁸ There has been a tendency for elite universities to raise admissions standards, making enrollment even more competitive.

The acceptance rates of Ivy League universities and other top colleges have dropped to record lows in recent years. Harvard's acceptance rate fell from 4.6 percent in 2018 to 4.5 percent in 2019, resulting in only 1,950 students accepted out of 43,330 applicants.⁴⁹ Duke University cut its acceptance rate from 8.6 percent in 2018 to 7.4 percent in 2019, the biggest drop among the top ten US universities.⁵⁰ Other elite colleges also operate with extremely low acceptance rates, including Columbia (5.1 percent), Yale (5.9 percent), the University of Chicago (5.9 percent), MIT (6.6 percent), and the University of Pennsylvania (7.4 percent).⁵¹

Price. Exceptionally high tuition is another force driving the exclusivity of elite university education. Price reinforces the luxury aura of such educational services as it creates a financial barrier to entry, separating those who can afford education as a luxury good from those who cannot. In fact, if elite universities charged lower tuition, their quality and status could be questioned.⁵²

Current tuition and fees for full-time undergraduate students at all of the top ten US universities exceed \$50,000 per year, while the average cost for in-state students at public universities is \$10,440.⁵³ Columbia University charges the highest tuition among the top ten at \$64,380.⁵⁴ Over the last forty years, the tuition and fees of US

⁴⁷ Ellie Bothwell, *Top 10 Universities for Producing Nobel Prizewinners 2017*, TIMES HIGHER EDUC., Oct. 13, 2017, www.timeshighereducation.com/news/top-10-universities-producing-nobel-prizewinners-2017. This list excludes the winners of literature and peace prizes.

⁴⁸ See Kevin J. Delaney, *New Data Show How Hard It Was to Get into an Elite US College This Year*, QUARTZ, Mar. 31, 2019, <https://qz.com/1584304/acceptances-rates-at-top-us-colleges-dropped-further-for-the-class-of-2023>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Alia Wong, *Six-Figure Price Tags Are Coming to Colleges*, THE ATLANTIC, Nov. 8, 2019, www.theatlantic.com/education/archive/2019/11/some-colleges-could-soon-cost-100000-year/601648: "Being expensive is seen as being good – if one [elite] college is 20 percent cheaper than another [elite] college, students are going to wonder what's wrong with it."

⁵³ COLL. BD. TRENDS IN COLLEGE PRICING 2019, 9 (2019), <https://research.collegeboard.org/pdf/trends-college-pricing-2019-full-report.pdf> (last visited Sept. 26, 2020).

⁵⁴ 2021 *Best National University Rankings*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Sept. 21, 2020).

elite universities have risen faster than US inflation rates and household income, deterring middle- and low-income students from applying.⁵⁵

The high costs of elite university education are justified not only by the quality of education, creative output, and competitive admissions process, but also by access to highly compensated jobs upon graduation. Most Wall Street bankers are recruited from the Ivy League and other elite universities such as MIT and Stanford.⁵⁶ Four-fifths of US law firm partners earning \$5 million in profits per partner are graduates of the top five law schools.⁵⁷ A recent survey of Harvard, Princeton, and Yale alumni shows that three-quarters of them live in zip codes ranking in the top 20 percent on an index of income, half in zip codes in the top 5 percent, and a quarter live in zip codes in the top 1 percent.⁵⁸

Duke is an elite university located in Durham, North Carolina, charging undergraduate students approximately \$60,000 in tuition and fees.⁵⁹ Located only about ten miles away, the University of North Carolina at Chapel Hill (UNC) is a public university, charging in-state undergraduate students approximately \$9,000 in tuition and fees.⁶⁰ However, many students and their parents may still choose Duke over UNC. This is because they may attach more importance to Duke's exclusivity accrued from its quality of education, creativity, and admissions process. The acquisition of prestige and social status through conspicuous consumption of education is another reason why families might make such a decision.⁶¹ Elite universities facilitate conspicuous consumption of education in the following two ways.

First, elite universities' efforts to boost their exclusivity produce an inevitable corollary to the Veblen effect. As discussed in Section I, above, the Veblen effect reverses the classic relationship between price and demand by increasing the demand for luxury goods despite (or as a result of) their rise in price. This effect is observable in elite higher education.⁶² Each year, more students apply to increasingly expensive elite colleges. Research shows that after adjusting for inflation,

⁵⁵ Jon Marcus, *New Data Show Some Colleges Are Definitely Unaffordable for Many*, HECHINGER REPORT, Oct. 18, 2018, <https://hechingerreport.org/new-data-show-some-colleges-are-definitively-unaffordable-for-many>.

⁵⁶ KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* 11 (2009).

⁵⁷ DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 11 (2019).

⁵⁸ *Id.* at 48–49.

⁵⁹ *Compare Duke University vs. University of North Carolina – Chapel Hill*, U.S. NEWS AND WORLD REP., www.usnews.com/best-colleges/compare/2920-2974/duke-university-vs-unc?xwalk_id=198419&xwalk_id=199120 (last visited Sep. 26, 2020).

⁶⁰ *Id.*

⁶¹ See Richard H. McAdams, *Relative Preferences*, 102 *YALE L. J.* 1, 90 n.330 (1992): "Education has been noted as being a positional good because people often seek simply to be more educated or at least more credentialed, than others," citing FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 48–51 (1976); see also Siva Vaidhyanathan, *A Study in Total Depravity*, THE BAFFLER, July 2015, <https://thebaffler.com/salvos/study-total-depravity>.

⁶² GEOFFREY SCHNEIDER, *MICROECONOMIC PRINCIPLES AND PROBLEMS: A PLURALIST INTRODUCTION* 225 (2019).

tuition and fees charged by private colleges rose by 140 percent between 1985 and 2016.⁶³ The Ivy League and other top colleges like Duke, MIT, and Stanford increased tuition and fees roughly 3–4 percent every year from 2013 to 2018.⁶⁴ Nonetheless, every year these elite universities have received more applications, driving acceptance rates lower.⁶⁵ In fact, rising tuition and fees in elite universities boost applications.⁶⁶ For instance, it was found that for elite colleges, an additional \$1,000 increase in tuition and fees contributed to a 3.6-point increase in SAT scores, a 1.2 percent reduction in acceptance rates, and a 0.5 percent increase in the number of admitted students who enrolled.⁶⁷

Elite universities treat low acceptance rates as a means of enhancing prestige.⁶⁸ They have an incentive to reject more applicants because lowering acceptance rates could improve their university ranking performance, which in turn encourages more students to apply.⁶⁹ Students and their parents become more anxious when they realize that gaining admission to an elite college is becoming more difficult, and this pushes them to apply to more schools to maximize their chances of acceptance.⁷⁰ The globalization of higher education is another factor driving down acceptance rates. The past two decades have witnessed a rapidly increasing number of international applicants who can easily afford the high tuition and fees at elite universities.⁷¹

Second, the Veblen effect shows that the impetus for conspicuous consumption of elite education is the prestige and social status conferred by these elite universities. Given their exclusivity, elite universities confer prestige on their students and

⁶³ ROBERT KELCHEN, HIGHER EDUCATION ACCOUNTABILITY 3 (2018).

⁶⁴ See JinAh Kim, *Ivy League Tuition Has Been Rising Almost the Same Amount Every Year: Is This Just Coincidence?*, DAILY PENNSYLVANIAN, Apr. 19, 2017, www.thedp.com/article/2017/04/tuition-increase-across-ivies.

⁶⁵ See e.g., Vaidhyathan, *supra* note 61: “Elite higher education in America has long been a Veblen good – a commodity that obeys few, if any, conventional laws of economic activity. In some cases . . . the higher the sticker price of a particular college or university, the more attractive it is.”

⁶⁶ Terence Kealey, *Free the Market: Take the Cap Off Tuition Fees*, TIMES, Mar. 29, 2011, www.thetimes.co.uk/article/free-the-market-take-the-cap-off-tuition-fees-bzowz3z3kpk.

⁶⁷ Nicholas A. Bowman & Michael N. Bastedo, *Getting on the Front Page: Organizational Reputation, Status Signals, and the Impact of U.S. News and World Report on Student Decisions*, 50 RSCH. HIGHER EDUC. 415, 430 (2009).

⁶⁸ See MITCHELL L. STEVENS, CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES 16 (2007): “The measure of an institution’s prestige has come to be defined, in part, by the proportion of each year’s applicants it turns away.”

⁶⁹ See Michelle Lou & Brandon Griggs, *Acceptance Rates at Top Colleges Are Dropping, Raising Pressure on High School Students*, CNN, Apr. 4, 2019, <https://edition.cnn.com/2019/04/03/us/ivy-league-college-admissions-trnd/index.html>.

⁷⁰ Anemona Hartocollis, *Greater Competition for College Places Means Higher Anxiety, Too*, N.Y. TIMES, Apr. 21, 2016, www.nytimes.com/2016/04/21/us/greater-competition-for-college-places-means-higher-anxiety-too.html.

⁷¹ See FRANK BRUNI, WHERE YOU GO IS NOT WHO YOU’LL BE: AN ANTIDOTE TO THE COLLEGE ADMISSIONS MANIA 35 (2015).

graduates through their admissions and educational programs.⁷² Limited numbers and restrictive entrance requirements mean that only a very small portion of students can be admitted and complete their studies at these universities. The amount of status elite universities can confer on students and graduates depends on the status they themselves enjoy, measured to a certain extent by rankings. The higher a university ranks, the more prestige its students and graduates enjoy. The status of an alumnus also has an impact on the status of his or her alma mater. Elite universities tout their networks of distinguished alumni, such as leading government officials and accomplished entrepreneurs, to raise their national and international profiles.

The Veblen effect explains why some parents are keen to foot the bill for their children's expensive, elite education. While they care about the academic benefits of elite universities,⁷³ they also value the prestige and social status that they impart. Parents may treat the payment of high tuition and fees as an opportunity to show off their wealth and enjoy the prestige and social status that are associated with these universities.⁷⁴ From this perspective, the high tuition and fees become the conspicuous price of the status-signifying function of elite higher education.⁷⁵ Moreover, many parents see their children's achievements as a reflection and extension of their own.⁷⁶

As revealed earlier, conspicuous consumption of luxury goods has evolved into a focus on brands that signify exclusivity and prestige. So has conspicuous consumption of elite education. Elite universities have increasingly relied upon their institutional names and logos as brands, and parents and students increasingly care about these brands.

Elite universities adopt luxury branding strategies to strengthen the exclusivity and prestige of their educational services. Given their long history, incumbent universities such as those in the Ivy League have already gained the status of luxury educational brands.⁷⁷ Their management teams endeavour to maintain and

⁷² See Mitchell L. Stevens & Josipa Roksa, *The Diversity Imperative in Elite Admissions, in* DIVERSITY IN AMERICAN HIGHER EDUCATION: TOWARD A MORE COMPREHENSIVE APPROACH 64 (Lisa M. Stulberg & Sharon Lawner Weinberg eds., 2011).

⁷³ Some believe that rich parents actually know very little about the quality of education offered by elite universities. See Michael Martin, *Veblen Saw It Coming*, INSIDE HIGHER EDUC., July 3, 2019, www.insidehighered.com/views/2019/07/03/thorstein-veblens-writings-about-rich-are-relevant-ongoing-admission-scandal.

⁷⁴ See id.: "very high tuition is a marketing advantage rather than a barrier for 'conspicuously consuming' parents with the means to easily cover it. And bidding for the opportunity to pay that high tuition fully demonstrates the special status of these parents."

⁷⁵ See Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 SETON HALL L. REV. 167, 179 (2017).

⁷⁶ Emilie Beecher, *The College Admissions Scandal Was All About Bragging Rights*, MEDIUM, Mar. 25, 2019, <https://medium.com/age-of-awareness/the-college-admissions-scandal-was-all-about-bragging-rights-4229f689e221>.

⁷⁷ See TUNGATE, *supra* note 25, at 203 (statement of Stanley Katz): "There isn't any doubt that brand matters and Harvard is the prestige brand . . . It's the Gucci of higher education, and the most selective place."

improve their top rankings by strengthening their exclusivity and soliciting donations for further institutional development.⁷⁸

On the other hand, some universities adopt luxury branding strategies in order to rebrand themselves as elite. For example, several universities have implemented the so-called Absolut Rolex Plan to boost the quality and reputation of their educational services.⁷⁹ Quoting from George Washington University's former president Stephen Trachtenberg, who initiated the plan:

“College is like vodka. Vodka is by definition a flavorless beverage. It all tastes the same. But people will spend \$30 for a bottle of Absolut vodka because of the brand. A Timex watch costs \$20, a Rolex \$10,000. They both tell the same time.”⁸⁰

This Absolut Rolex Plan paid off⁸¹ for George Washington University, which has since significantly increased the exclusivity and reputation of its educational services, as have other universities that implemented this luxury branding strategy.⁸²

Wealthy parents are often consumers of luxury educational brands.⁸³ For example, affluent families in China are increasingly sending their children to US universities. Soon after they become wealthy, they regard university degrees, especially those conferred by elite universities, as status symbols for themselves and their children.⁸⁴ These status symbols are built around the high cost, scarcity of seats, high proportion of the best and brightest students, first-class campuses and facilities, high-quality education, and better graduate career prospects. Increasingly, affluent families in China are sending their children to US universities.⁸⁵ In 2014–15 alone, more than 300,000 Chinese students attended university in the United States.⁸⁶ These families sometimes spend heavily on admissions counselling, private tutoring, and extracurricular activities for their children, and

⁷⁸ See *id.* at 203, pointing out that Ivy League schools are in “the luxury brand management business.”

⁷⁹ See KEVIN CAREY, *THE END OF COLLEGE: CREATING THE FUTURE OF LEARNING AND THE UNIVERSITY OF EVERYWHERE* 63 (2015).

⁸⁰ *Id.*

⁸¹ *Id.*; Kevin Carey, *How to Raise a University's Profile: Pricing and Packaging*, NY TIMES, Feb. 6, 2015, www.nytimes.com/2015/02/08/education/edlife/how-to-raise-a-universitys-profile-pricing-and-packaging.html.

⁸² CAREY, *supra* note 79, at 64.

⁸³ See Vaidhyanathan, *supra* note 61: “Parents might boast of a child attending [an elite university] (and their own ability to foot the bill) with stickers on their Audis.”

⁸⁴ See WILLIAM J. BENNETT & DAVID WILEZOL, *IS COLLEGE WORTH IT?: A FORMER UNITED STATES SECRETARY OF EDUCATION AND A LIBERAL ARTS GRADUATE EXPOSE THE BROKEN PROMISE OF HIGHER EDUCATION* xi (2013); Joyce Lau, *Can Job Training Trump a Degree?*, NY TIMES BLOGS, June 5, 2013, <https://rendezvous.blogs.nytimes.com/2013/06/05/can-job-training-trump-a-degree>.

⁸⁵ See Lia Zhu, *Rich Chinese Parents Also Caught Up in College Admissions Scandal*, CHINA DAILY, May 9, 2019, www.chinadailyhk.com/articles/8/118/57/1557382867918.html.

⁸⁶ See CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 48–49 (2018).

even make donations to universities in order to increase the chances of their childrens' admission.⁸⁷

The tremendous popularity of university rankings evinces the effectiveness of elite universities' luxury branding strategies. Oftentimes, university rankings simply highlight elite universities' institutional names and/or logos encapsulating many university achievements. Therefore, these names and logos are perceived as brands symbolizing exclusivity, prestige, and social status. The higher a university is ranked, the more exclusive and prestigious its name and logo are in the minds of students and parents.⁸⁸

Guided by the symbolic ramifications of ranked names and logos, students and parents rely increasingly upon university rankings to make their selections.⁸⁹ For instance, Monks and Ehrenberg's research found that a university's drop in rankings led to a greater acceptance rate, a smaller percentage of admitted students, and an entering class of lower academic quality.⁹⁰ Among prospective international students, 32 percent have been found to consider ranking an important factor when choosing their university.⁹¹ Chinese students cited the *U.S. News & World Report* rankings as the most influential factor.⁹²

III. ELITE UNIVERSITIES AS HYPER LUXURY BRANDS

I have demonstrated that, like a luxury good, the exclusivity of elite higher education makes it a target for conspicuous consumption. It follows, then, that elite university names and logos can be regarded as luxury brands in the educational services marketplace. While elite universities and luxury companies both apply luxury branding strategies, the names and logos of universities are more exclusive and prestigious. In this section, I consider from a trademark protection perspective why elite university names and logos should be regarded as *hyper* luxury brands.

Luxury companies rely heavily on trademark law to protect the exclusivity and prestige of their brands, which in turn drive conspicuous consumption. Trademark

⁸⁷ See Alexis Lai, *Hong Kong in Hot Pursuit of Ivy League Education*, CNN, Dec. 3, 2012, <https://edition.cnn.com/2012/12/02/world/asia/hong-kong-ivy-league-admission/index.html>.

⁸⁸ See ELLEN HAZELKORN, *RANKINGS AND THE RESHAPING OF HIGHER EDUCATION: THE BATTLE FOR WORLD-CLASS EXCELLENCE* 92 (2d ed. 2015): "Rankings can provide branding and advertising value."

⁸⁹ See Mahsood Shah et al., *Do High Ranked Universities Have Better Graduate Employment Outcomes?*, in *WORLD UNIVERSITY RANKINGS AND THE FUTURE OF HIGHER EDUCATION* 217 (Kevin Downing & Fraide A. Ganotice, Jr. eds., 2017).

⁹⁰ See James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admissions Outcomes and Pricing Policies at Selective Private Institutions* 9 (NBER Working Paper No. 7227, 1999), www.nber.org/papers/w7227.pdf.

⁹¹ QS, *INTERNATIONAL STUDENT SURVEY 2019*, 10 (2019), http://info.qs.com/rs/335-VIN-535/images/QS_ISS19_Global.pdf.

⁹² See Madeline A. Rafi, *Influential Factors in the College Decision-Making Process for Chinese Students Studying in the U.S.*, 8 *J. INT'L STUDENTS* 1681, 1685 (2018).

law confers upon business owners, such as luxury companies, an exclusive right to a trademark that is capable of indicating the source of a product or service in the marketplace.⁹³ If trademark protection were to be suspended or eliminated in a country or across the globe, the pervasiveness of counterfeit goods or services would cause a crisis of survival for the entire luxury industry.

On the one hand, the absence of trademark protection would embolden counterfeiters to flood the market with fake goods without any legal liability, which would significantly impair the exclusiveness and prestige of luxury brands.⁹⁴ On the other hand, other forms of intellectual property such as copyright and design patents have proven to be ineffective in protecting luxury companies in warding off free-riding activities.⁹⁵ Therefore, courts have attached great importance to trademark law's function in weeding out counterfeits by holding that it is legal to sell knockoffs *only* if they do not bear a counterfeit trademark.⁹⁶

Trademark law protects luxury brands as status symbols in four primary ways. First, it guards against the use of marks that are confusingly similar, which helps luxury companies preserve the exclusivity of their trademarks. Normally, courts apply a multi-factor test⁹⁷ to decide whether the party sued by the luxury company has used its mark in such a way as to mislead consumers into believing that the goods in question were manufactured by the luxury company. By prohibiting the use of confusingly similar marks, the test's "competitive proximity" and "bridging the gap" factors also entitle luxury companies to control not only their existing market channels⁹⁸ but also the potential market sectors they legitimately intend to expand into.⁹⁹ The more famous and distinctive a luxury mark is, the stronger the legal protection the anti-confusion test would afford.¹⁰⁰

Second, the post-sale confusion doctrine prevents knockoffs from causing harm to luxury brands' quality reputation and prestige.¹⁰¹ In *Rolex Watch U.S.A., Inc.*

⁹³ See generally Haochen Sun, *The Distinctiveness of a Fashion Monopoly*, 3 *NYU J. INTELL. PROP. & ENT. L.* 142, 150 (2013).

⁹⁴ See *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000).

⁹⁵ See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147, 1176 (2009); Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 115 (PETER K. YU ED., 2006).

⁹⁶ See *People v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174, at *1 (N.Y. Crim. Ct. Mar. 4, 2003).

⁹⁷ See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.1961), setting forth eight factors to be considered in determining the likelihood of confusion.

⁹⁸ *Polaroid Corp.*, 287 F.2d at 495; see generally *Nabisco, Inc.*, 220 F.3d 43.

⁹⁹ See *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *22 (S.D.N.Y., March 22, 2012), quoting *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 504 (2d. Cir. 1996).

¹⁰⁰ See *Kenner Parker Toys Inc. v. Rose Art Indus.*, 963 F.2d 350, 353 (Fed. Cir. 1992). But see *Barton Beebe & C. Scott Hemphill, The Scope of Strong Marks: Should Trademark Law Protect the Strong More than the Weak?*, 92 *NYU L. REV.* 1339, 1342 (2017), calling for reconsideration of the *Kenner* doctrine.

¹⁰¹ See *Jeremy N. Sheff, Veblen Brands*, 96 *MINN. L. REV.* 769, 791 (2012).

*v. Canner*¹⁰² and *Ferrari S.P.A. v. Roberts*,¹⁰³ the courts ruled that the public circulation of knockoff watches that bore the “Rolex” trademark and cars that looked very similar to Ferrari’s had led consumers to question the quality, reputation and prestige of Rolex and Ferrari.¹⁰⁴

Third, the anti-dilution doctrine guards against blurring the distinctiveness of a famous trademark and tarnishing its reputation. The anti-blurring doctrine¹⁰⁵ “functions to prevent the prestigious images of luxury brands from being diluted into brands accessible to the mass public, an effect that would gradually whittle away the prestige of luxury brands.”¹⁰⁶ Tarnishment may occur when a trademark is linked to “products of shoddy quality, or is portrayed in an unwholesome or unsavory context.”¹⁰⁷ In this context, the harm caused by dilutive use is “that the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods.”¹⁰⁸

Fourth, trademark law has widened the scope of the registrability of marks, enabling non-traditional luxury marks to receive legal protection against confusing and dilutive uses. These trademarks differ from those that are traditionally registered as word or logo marks. Famous examples are single-color marks such as the Tiffany blue¹⁰⁹ and Christian Louboutin red-sole marks,¹¹⁰ and motion marks such as the vertical opening mechanism of a Lamborghini door.¹¹¹

There is a key difference between brands owned by elite universities and those of luxury companies. Elite universities can be elevated to the status of *hyper* luxury brands,¹¹² due to their extremely low admission rates, enrolling just 5 percent of

¹⁰² *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 495, 490 (S.D. Fla. 1986).

¹⁰³ *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1244 (6th Cir. 1991).

¹⁰⁴ See Sheff, *supra* note 15, at 795.

¹⁰⁵ 15 U.S.C. § 1125(c)(2)(B) (2012).

¹⁰⁶ Sun, *supra* note 6, at 789.

¹⁰⁷ *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir.1996), quoting *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 43 (2d Cir.1994).

¹⁰⁸ *Id.* See also Case C-408/01, *Adidas-Salomon AG v. Fitnessworld Trading Ltd.*, [2003] E.C.R. I-12537, ¶ 38.

¹⁰⁹ See *Color Branding & Trademark Rights*, COLOR MATTERS, www.colormatters.com/color-and-marketing/color-branding-legal-rights.

¹¹⁰ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

¹¹¹ See *Image Trademark with Serial Number 75883661*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/758/83/n-75883661.html>.

¹¹² See José Amorim, *Luxury is Dead, Hyper-Luxury is the New Black*, LUXURY ACTIVIST, Sept. 9, 2015, <https://luxuryactivist.com/blog/friday-chronicle-16-luxury-is-dead-hyper-luxury-is-the-new-black>: “Consumers looking for premium products and services get more demanding and a real segmentation has happened. Some of them are looking for hyper exclusive products and services . . . Hyper luxury represents products that are rare, exclusive, extremely high quality, often handmade and unapologetically expensive.”

applicants every year.¹¹³ Luxury companies generally open their stores and services to the general public, selling goods or services to anyone who can afford them. Elite education goes beyond the purchase of luxury goods because money is not generally enough to gain admission to an elite university.

Another major factor determining the hyper luxury brand status of elite universities is their very limited recourse to trademark protection. For a number of reasons, elite universities do not need to rely on strong trademark protection in the same way that luxury companies do.

First, elite university brands rely very little on anti-confusion protection.¹¹⁴ For instance, Hotel Stanford is a three-star hotel located near Pennsylvania Station in New York City.¹¹⁵ It is highly unlikely that anyone would believe Stanford University has any affiliation with it because, according to the test set out in *Polaroid Corp. v. Polaroid Elecs. Corp.*¹¹⁶ for assessing the likelihood of confusion, there is no “competitive proximity” between a hotel and a university, nor would Stanford extend its business activities to hotel services. However, if a secondary school were to name itself Stanford High School, its position in the educational domain suggests an affiliation with the university that might cause confusion among the target consumers.¹¹⁷ Yet any journalist or curious parent could quickly and easily defeat the validity of this suggestion by fact-checking with Stanford University. Therefore, few schools would attempt such a false affiliation.

Second, elite university brands are impervious to post-sale confusion. Trademark law prevents circulation of counterfeit goods that damage the reputation and prestige of luxury brands.¹¹⁸ However, wearing a poor-quality counterfeit Harvard-branded hat, for example, does not necessarily harm Harvard’s brand reputation or prestige because they are related to the quality of educational services, not hats.¹¹⁹

Third, elite university brands can defeat dilutive uses largely because there is moral backlash against such uses. Suppose a company registered the “Princeton”

¹¹³ See John Fabian Witt, *Elite Colleges Don't Understand Which Business They're In*, THE ATLANTIC, Mar. 15, 2019, www.theatlantic.com/ideas/archive/2019/03/admissions-scandal-shows-real-goal-elite-colleges/584968.

¹¹⁴ See James Boyle & Jennifer Jenkins, *Mark of the Devil: The University as Brand Bully*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391 (2021), showing that the top ten US universities are inactive in filing trademark oppositions, except Duke University.

¹¹⁵ A short walk from Pennsylvania Station, Hotel Stanford has a convenient setting, making it an ideal place to stay when in New York City. It is close to the Empire State Building, eateries, and shops, See *Hotel Stanford*, HOTELS COMBINED, www.hotelscombined.com/Hotel/Search?fileName=Hotel_Stanford&date=SundayFortnight&gclid=EAlaIqObChMI952UvZfT5wIvWVaSWCh2_YAVmEAAyAiAAEgKs6PD_BwE.

¹¹⁶ See *Polaroid Corp.*, 287 F.2d at 495.

¹¹⁷ See Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 119 (2013): “when a court perceives that the merchandiser intended to profit from the university’s brand goodwill, the university will typically succeed in its infringement claim.”

¹¹⁸ See *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000).

¹¹⁹ See Boyle & Jenkins, *supra* note 114: “When most people buy a T-shirt with Duke on it, they are not saying ‘wow, Duke makes such high-quality T-shirts.’”

mark for its toilet plungers. This mark, however, would blur the distinctiveness of the Princeton mark, because it would now be associated with products other than educational services.¹²⁰ Moreover, the reputation of the mark might be tarnished as it is “portrayed in an unwholesome or unsavory context.”¹²¹ However, universities are highly regarded by the public. Therefore, the public would treat such dilutive uses of educational marks as an offense to the moral mission of a university and it would be unlikely to be attracted to any toilet plungers bearing the Princeton mark.¹²² For these reasons, it is unlikely that a manufacturer would make such dilutive use of an educational mark.

Fourth, due to the importance they attach to history and tradition, elite university brands tend to use only conventional words and logos as trademarks. Unlike luxury goods companies, they have not (yet) used or sought to protect non-traditional marks such as color, smell, and motion marks.

IV. SOCIAL JUSTICE AND THE RIGHT TO HIGHER EDUCATION

The luxurification and conspicuous consumption of elite education are phenomena that do not only involve elite universities and wealthy families. In this section, I examine their implications for the protection of every human being’s right to higher education as a means of promoting social justice.

Since its inception within the framework of the United Nations, the right to higher education has paved the way for the enjoyment of higher-education equality: The 1948 Universal Declaration of Human Rights¹²³ states that “Everyone has the right to education” and “higher education shall be equally accessible to all on the basis of merit.”¹²⁴ And the ICESCR¹²⁵ states that to protect the right to education, states should ensure “higher education shall be made equally accessible to all, on the basis of capacity.”¹²⁶ The shift from “merit” to “capacity” broadens the coverage of the right to education to benefit students from disadvantaged backgrounds,¹²⁷ who may not have benefited from a strong primary and secondary education but

¹²⁰ 15 U.S.C. § 1125(c)(2)(B) (2012).

¹²¹ See *Hormel Foods Corp. v. Jim Henson Prods. Inc.*, 73 F.3d 497, 507 (2d Cir. 1996), quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

¹²² See *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 422 (S.D.N.Y. 2002), ruling that tarnishment harms a famous mark because it “ceases to serve as a *wholesome* identifier of the owner’s products” (emphasis added), quoting *Deere & Co. v. MTD Prods., Inc.* 41 F.3d at 43.

¹²³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

¹²⁴ *Id.*

¹²⁵ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966.

¹²⁶ ICESCR, *id.*, art. 13.; KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 95 (2006), arguing that the term “capacity” is intended to include those who come from disadvantaged backgrounds.

¹²⁷ *Id.*, at 97.

nonetheless have the capacity for further study. The scope of the right to education is not clearly defined in the ICESCR because the cost of education is very high; states are only required to have higher education that is “equally accessible.”¹²⁸

Although the right to education is not a fundamental right provided for under the US Constitution,¹²⁹ US courts have attached importance to its protection as a civil right. In *Brown v. Board of Education*,¹³⁰ the Supreme Court relied upon “the importance of education to our democratic society” and the right to education to resoundingly invalidate racial segregation in the public school system.¹³¹ In *Grutter v. Bollinger*,¹³² the Supreme Court recognized the value of equality in higher education, ruling that the Equal Protection Clause of the US Constitution did not prohibit the University of Michigan Law School’s narrowly tailored use of race in its admissions decision to “further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”¹³³ This ruling was made because access to legal education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”¹³⁴ Moreover, the Court stressed the importance of equal access in public school to all segments of American society, and that “Nowhere is the importance of such openness more acute than in the context of higher education.”¹³⁵ Although *Grutter* deals with the Fourteenth Amendment as it applies to a public school, as a state actor, Congress has established the importance of equality in private educational institutions receiving federal financial assistance in Title VI of the Civil Rights Act of 1964.¹³⁶

What does the luxurification of higher education mean for access to it? In modern societies, higher status is as important as seeking more political and economic power

¹²⁸ ICESCR, *supra* note 126, art. 13(2)(c). See also, The UNESCO Convention against Discrimination in Education, art. 4.

¹²⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 30–39 (1973), ruling that education is not a constitutionally protected fundamental right that would trigger strict scrutiny of its infringement. Cf. *Gary B. v. Whitmer*, 2020 WL 1951894, at *32: “When combined with the historical analysis discussed above, this means that access to such a basic minimum education is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.”

¹³⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³¹ *Id.* at 493: “education is perhaps the most important function of state and local governments . . . the opportunity of an education . . . where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms” (emphasis added).

¹³² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹³³ *Id.* at 343.

¹³⁴ *Id.* at 333.

¹³⁵ *Id.* at 331–32.

¹³⁶ See 42 U.S.C. § 2000d (2018): “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

because people care about how they are perceived by others.¹³⁷ Against this backdrop, the luxurification of higher education reinforces how the receipt of education confers social status.¹³⁸

People attain higher status with increasing, highly differentiated levels of educational attainment. A functionalist theory of education argues that the bestowal of different statuses by reason of educational attainment is beneficial to society, as people need to occupy a variety of social positions in order for society to function well. Education can help sort people into appropriate social positions by equipping them with the job skills needed for specialized occupations. The educational system reinforces social stratification and preserves social class inequalities from one generation to the next by sorting students according to social class and transmitting class-oriented norms, values, beliefs, and behaviors.

The luxurification of higher education drives social class division and inequality in education. This is because universities are stratified, just like people in society, and differentiated by students' social class background and academic accomplishments. Highly ranked universities tend to draw students with higher socioeconomic status, and students from more privileged backgrounds are more likely to attend high-quality, prestigious universities.¹³⁹ Receiving education at an elite university is a means of accruing, maintaining, and signaling economic power and prestige.

Such luxurification is completely at odds with equal access as the ethical basis for the right to higher education recognized by international human rights treaties, Congress, and the Supreme Court. US elite universities date back to colonial times when religious groups sponsored the college education of their clergy.¹⁴⁰ Later, upper-class men established colleges to nurture children of their own class.¹⁴¹ Until the 1950s, elite universities and colleges reserved admission for students "fortunate enough to have been born into the right family or to have attended a particular . . . high school."¹⁴²

According to the 1947 Truman Commission on Higher Education, "the social role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or weaken their liberties."¹⁴³ From an individual standpoint, higher education is linked to an important array of benefits ranging from better personal

¹³⁷ See Stevens, *supra* note 68, at 32.

¹³⁸ *Id.* at 33.

¹³⁹ *Id.* at 215; RACHEL BROOKS, *EDUCATION AND SOCIETY: PLACES, POLICIES, PROCESSES* 70 (2019).

¹⁴⁰ See JEANNE H. BALLANTINE ET AL., *THE SOCIOLOGY OF EDUCATION: A SYSTEMATIC ANALYSIS* 415 (8th ed., 2017).

¹⁴¹ *Id.*

¹⁴² JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* xiii (2002).

¹⁴³ GEORGE F. ZOOK ET AL., *HIGHER EDUCATION FOR AMERICAN DEMOCRACY: A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION* 5 (Harper & Bros.) (VOL. 1 1947).

and spousal outcomes, children's educational gains, greater longevity, and even lifelong happiness.¹⁴⁴ From a societal standpoint, higher education is the key to social mobility and creativity and a catalyst for free speech and democracy.¹⁴⁵

Elite universities have been utilizing diversity programs to admit students from different races through affirmative action and from low-income families through financial aid awards. In *Fisher v. University of Texas*,¹⁴⁶ the Supreme Court upheld the legality of race-based diversity programs provided that they can pass the strict scrutiny test.¹⁴⁷ Similarly, in *Students for Fair Admissions v. Harvard*,¹⁴⁸ the District Court for the District of Massachusetts upheld the legality of race-based diversity programs on the same grounds.¹⁴⁹

While elite universities promote equal access to higher education through affirmative action and financial aid, these schemes have had little effect on the luxurification of higher education. It is estimated that only 9 percent of freshmen attending elite universities are from families in the bottom half of the socioeconomic distribution,¹⁵⁰ and just 5 percent of American students at prestigious law schools come from families in the bottom half.¹⁵¹ Financial aid schemes also have limited impact. A study has shown that most elite universities, including five in the Ivy League, have more students from the top 1 percent of the US national income scale than from the entire bottom 60 percent.¹⁵² Scholars have pointed out that Americans have become accustomed to the reality that higher education comes at a phenomenal cost, requiring most middle-class families to save throughout a lifetime for their children's education at elite universities.¹⁵³

A recent proposal to shift the responsibility solely to the public educational sector has proven too politically controversial and is thus very unlikely to be accepted

¹⁴⁴ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923): "The American people have always regarded education and acquisition of knowledge as matters of supreme importance"; Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 *ARIZ. ST. L.J.* 231, 260 (2014).

¹⁴⁵ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), ruling that education is "the very foundation of good citizenship"; Martha Minow, *Education and Democracy*, Oct. 17, 2017, <https://blog.harvardlawreview.org/education-and-democracy>: "Civics education ... leads to greater political engagement, voting, and higher degrees of acceptance toward people of different backgrounds."

¹⁴⁶ 133 S.Ct. 2411 (2013).

¹⁴⁷ *Id.* at 2421.

¹⁴⁸ 397 F.Supp.3d 126 (D. Mass. 2019).

¹⁴⁹ *Id.* at 191.

¹⁵⁰ MCKINSEY & CO., *THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS* 9 (2009).

¹⁵¹ Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 632–33 (2011); Richard H. Sander, *Are Law Schools Engines of Inequality?*, 48 *J. L. & EDU.* 243 (2019).

¹⁵² See Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60*, *NY TIMES*, Jan. 18, 2017, www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html.

¹⁵³ See e.g., Heidi R. Gilchrist, *Higher Education Is a Human Right*, 17 *WASH. U. GLOBAL STUD. L. REV.* 645, 663 (2018).

nationally. In his failed bid for the 2020 presidency, Senator Bernie Sanders argued that “It is time to build on the progressive movement of the past and make public colleges and universities tuition-free in the United States – a development that will be the driver of a new era of American prosperity.”¹⁵⁴

Given the deep-seated problems caused by the luxurification of higher education and the ineffectiveness of federal government intervention, I propose that elite US universities should devote more of their resources to promoting equal access to higher education. One means of doing so is promoting equal access to knowledge. Intellectual properties include original expression of ideas in the form of textbooks, research papers, and literary books, and inventions with novel solutions to existing technological problems. Therefore, intellectual properties embody a rich repertoire of knowledge.¹⁵⁵ Moreover, the enjoyment of intellectual properties is non-rivalrous,¹⁵⁶ meaning that a person’s use of a work or an invention does not hamper others’ simultaneous use of the expression or technical features embodied in the work or invention. Therefore, the responsible exercise of rights over intellectual properties by IP owners has an enormous impact on the public’s access to knowledge.¹⁵⁷

Elite universities’ socially responsible use of intellectual properties can help promote the right to higher education through providing equal access to knowledge. First, they should take advantage of their copyrights over staff publications to participate actively in open access knowledge sharing and dissemination. Second, they should prudently exercise the fair use doctrine, a user right under copyright law, to make available the tens of millions of books housed in their libraries through an e-lending program.

Through fulfilling such responsibilities, elite universities will help bring protection of the right to higher education into a new era of social justice, so that students from all walks of life can benefit from the democratization of knowledge. The beauty of this democratization is that while at present only some students are able

¹⁵⁴ Bernie Sanders, *Make College Free for All*, WASH. POST, Oct. 22, 2015, www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69_story.html.

¹⁵⁵ See MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 4 (2012): “Intellectual property [bears] considerably on central features of human flourishing, from the developing world’s access to food, textbooks, and essential medicines; to the ability of citizens everywhere to participate democratically in political and cultural discourse; to the capacity to earn a livelihood from one’s intellectual contributions to our global culture.”

¹⁵⁶ See e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199 (2004); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 3 (2008).

¹⁵⁷ See e.g., Haochen Sun, *Copyright and Responsibility*, 4 *HARV. J. SPORTS & ENT. L.* 263, 317 (2013), concluding that “the law’s embracement of copyright holders’ responsibilities with their rights would serve as the path through which people can act in concert and then make wonders for the continuity of human civilization.”

to physically receive their education on elite university campuses, all students (whether nationally or globally, financially well placed or challenged, and of all ethnicities and genders) might benefit from the knowledge these universities and others commit to disseminating as widely and openly as possible.

CONCLUSION

The conspicuous consumption of elite higher education, as this chapter has revealed, is a phenomenon that treats elite universities as owners of luxury brands. The more surprising reality is that elite universities have actually become hyper luxury brands. Due to their extremely low admission rates, elite university brands are more exclusive than most luxury brands. This luxurification of higher education, however, runs counter to the ethos of education in general and the right to education in particular. As both international human rights treaties and the US Supreme Court have emphasized, the right to education entitles everyone to equal access to higher education. The luxurification of higher education stands in the way of this equality.

