SFFA v. Harvard: Responses by Three F.M. Kirby Foundation Grantees

The case of *Students for Fair Admissions (SFFA) v. Harvard University*, a ruling on which was just recently reached in October, is anticipated to have broad implications on higher education admissions practices and, should the case be appealed to the Supreme Court, on the future of affirmative action in all levels of education itself. Disputes over whether Harvard imposes quotas on Asian-Americans date back to at least the 1980s, and the public debate regarding affirmative action since its introduction by virtue of a series of executive orders by President John F. Kennedy beginning in 1961. Given our Board's focus on higher education this year, we've chosen to highlight this case and the subsequent response by three of our grantees: National Association for Scholars (NAS), American Enterprise Institute (AEI), and Manhattan Institute (MI).

The SFFA, representing in this case a group of anonymous Asian-American plaintiffs rejected from Harvard, is a nonprofit membership group with a mission of "restoring the original principles of our nation's civil rights movement" by eliminating the use of race in college admissions. The face of the organization, Mr. Edward Blum, is best known for his work with Abigail Fisher, a white woman who argued in a pair of Supreme Court Cases in 2013 and 2016 that she was denied a spot at the University of Texas Austin due to her race. The *SFFA v. Harvard* suit alleges that the University has violated the Civil Rights Act by "employing racially and ethnically discriminatory policies and procedures" that are biased against Asian-American applicants. (In addition to Harvard, the group is suing the University of North Carolina Chapel Hill on similar grounds.) The plaintiffs said that internal data shows Asian-American applicants are rated lower on personal metrics, despite outperforming white applicants in other areas. They argued that Harvard effectively uses a quota to cap the percentage of Asian-American admissions, and that the school engages in "racial balancing" to maintain a certain racial breakdown on campus. To address this, SFFA argued that Harvard, and ultimately all colleges, should no longer consider race in its admissions process, and that Supreme Court rulings in support of affirmative action have "been built on mistakes of fact and law." Conversely, Harvard has defended its "holistic review" process that individually assesses each applicant and considers a number of factors, including academics, extracurriculars, and personal factors, with the goal of making each class diverse. The university says that while race is one of the many factors considered for assembling a class, it is never used against an applicant, nor is it a deciding factor for any applicant, and that eliminating race as a factor would cause an unacceptable decline in diversity, which it values as part of its educational mission. This case is a departure from past challenges to race-conscious admissions, because it argues that a minority group has been unfairly penalized in favor both of whites and of other minority groups. Based on my readings, Asian-Americans are largely divided on the case, with some saying they are being unfairly used as a wedge in a bid to abolish affirmative action.

Ultimately, Federal District Court Judge Allison Burroughs ruled that Harvard's race-conscious admissions process is fair, and that it doesn't discriminate against Asian-American applicants. In her 130-page ruling document, she details that an applicant's race was 'never viewed as a negative.' The judge acknowledged that the Harvard admissions process was "not perfect," but that when the university considered race, it did so only to benefit applicants' chances, not to hurt them. She accepted Harvard's argument that 'race-neutral alternatives,' such as admitting only students at the top of their classes, are not sufficient. Moreover, while she rules that it does not discriminate against Asian-Americans, she stipulates that the current admissions process remains

flawed and could be improved. Judge Burroughs made note of implicit bias a number of times in her decision, saying that it was conceivable that the unintentional biases of admissions officers and those who write recommendations could explain some of the statistical disparities between Asian-American students and other races. However, she believes that the likely effects of unintentional bias, while regrettable, could not be eliminated in a process that requires judgments about individuals.

The plaintiffs have filed a notice of appeal to the United States Court of Appeals for the First Circuit. Previous cases of a similar nature have led to restrictions in how affirmative action can be used, but no case has effusively ended the practice in its entirety. Many believe that if the Harvard case goes to the Supreme Court, it could change this, given that the plaintiffs here are high-achieving and have academic records that are much harder to criticize than those of past suits. The trial raised complicated questions about the meaning of academic merit, and what that should mean when we think about race in college admissions. Throughout this process, a few of our education-policy-oriented grantees have been active in highly visible publications and sidelines of the judicial process. While I offer summaries of the works here, I have attached copies of the full texts for those interested in further details.

National Association for Scholars (NAS):
Total FMKF Funding: $900,000 since 1992
Most Recent Grant: $45,000

NAS is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. In Fall 2018, NAS filed an amicus brief in support of SFFA's motion to adopt race-blind admissions policies and in an effort to "sway the court toward transparency so that the public may decide if race-based admissions are for the greater good." Amicus briefs are legal documents filed in appellate court cases by non-litigants with a strong interest in the subject matter and are used to advise the court of relevant, additional information or arguments that the court might wish to consider. In this case, NAS referenced eight previous cases concerning affirmative action, as well as established statutes (Civil Rights Act) and additional readings.

Publicly, the organization's stance is that, as President Peter Wood states, "NAS supports the principle that students should be admitted to colleges on the basis of academic achievement, proven ability, ambition, and commitment to learning. Racial identity should play no role in determining who should or should not be admitted, and the same standards should be applied to all individuals. Judgments about good character may be appropriate, but not when they serve as subterfuges to favor or disfavor whole categories of students. Harvard is guilty of racially stereotyping Asian students as lacking 'positive personality,' likeability, courage, and kindness, and not being 'widely respected.' These are not true judgments of character, but ways of disguising an animus against Asian students." According to additional press releases, NAS has opposed racial preferences in admissions policies since its founding in 1987. Its members wrote the text of California Proposition 209, which made race-based admissions policies illegal in 1996. NAS previously urged legislation, not litigation, to end race-based preferences, and still desires such an outcome.

Following the decision by Judge Burroughs, Mr. Wood released a press release asserting that the court had "engaged in mental gymnastics to find Harvard's behavior legal. [She] acknowledged that Harvard considers race 'as a positive attribute' for some races but refused to admit that this results in intentionally negative outcomes for non-favored races." NAS expects the case to be appealed and plans to "continue to advocate for a fair treatment of all students."

American Enterprise Institute (AEI):
Total FMKF Funding: $740,700 since 1977
Most Recent Grant: $75,000

While NAS is involved directly in the judicial process through its filing of an amicus brief, think-tank organizations, such as AEI (a moderate, conservative think-tank which advances research and ideas rooted in government, politics, economics, and social welfare), focus on disseminating information and opinions to the general public through highly visible publications in order to influence public opinion and reach policymakers' constituents, a key tactic necessary for future policy change.

For example, Ramesh Ponnuru, a visiting fellow at AEI, a senior editor at *National Review*, and a contributor to CBS News, wrote an opinion piece for *Bloomberg News*, entitled "In Harvard's Magical Admissions Process, Nobody Gets Hurt," in which he counters Harvard's testimony "that race, when considered in admissions, can only help, not hurt, a student's chances of getting in" with the argument that "putting a thumb on the scales for certain racial minorities means putting a thumb on the scales against everyone else" and that, should the case be appealed, the Supreme Court should leverage its conservative judges to re-affirm the original wording of the Civil Rights Act.

Frederick Hess, Resident Scholar at AEI and Director of its Education Policy Studies department, endeavors to generalize the lawsuit to the culture of higher education admissions as a whole in his *Forbes* opinion article, "Three Thoughts on the Harvard Affirmative Action Verdict." Here, he avows that the "real scandal surfaced by the suit" has gone unnoticed; that is, that internal documents used in litigation appeared to reveal that preference was given to legacy students and candidates expected to fund the University at higher levels (not dissimilar to the "Operation Varsity Blues" scandal that made headlines at the start of the year). Hess argues that "if Harvard can't be trusted to resist the siren call of legacy favoritism or pay-to-play donors, …how can it be trusted to negotiate the fraught waters of racial preferences."

Manhattan Institute:
Total FMKF Funding: $1,445,000 since 1984
Most Recent Grant: $75,000

The Manhattan Institute is another think-tank with a mission to develop and disseminate new ideas that foster greater economic choice and individual responsibility. Its involvement in the *SFFA v. Harvard* case also focuses on the development of opinion articles and essays in well-known media publications. Published in *The New Criterion*, a New York-based monthly literary magazine and journal of cultural criticism, "Harvard Admits Its Preferences" accuses Harvard of hypocrisy in its denial of implicit bias in its admissions approach. In it, Heather Mac Donald, the

Thomas W. Smith Fellow at the Manhattan Institute, a contributing editor of *City Journal*, and a *New York Times* bestselling author, claims that, in all other contexts, Harvard embraces the idea that all members of society are influenced by unconscious bias but appears to deny this influence in undergraduate admissions.

Another *Wall Street Journal* piece, "Harvard's Asian Quotas Repeat an Ugly History" by Jason Riley, senior fellow at the MI, columnist for the *Wall Street Journal*, and a commentator for Fox News, juxtaposes Harvard's "holistic admissions approach" to reasoning used by Ivy League universities in the 1920s "for the express purpose of excluding Jews." According to Riley, the only thing that's changed over the past century is the group being targeted for exclusion and the courts are indulging this reasoning. He leaves the reader with this final consideration: "Do we want preferences for favored groups, or equal treatment of individuals? We can't have both."

Harvard University's official stance on the ruling was summarized in its press release published on the day of the ruling by William Lee, Senior Fellow of the Harvard Corporation, the governing board of Harvard University: "[Judge Burroughs' decision] represents a significant victory not merely for Harvard, but also for all schools and students, for diversity, and for the rule of law. As the court has recognized, now is not the time to turn back the clock on diversity and opportunity." As the case is anticipated to be appealed to the Supreme Court, additional opinion pieces continue to be published. For example, the op-ed "That Affirmative Action Ruling Was Good. Its Rationale, Terrible." published in the *New York Times* by Melissa Murray, a Professor of Law at New York University asserts that, while "the ruling is a victory for both the rule of law and evermore endangered affirmative action policies," the court's decision focused on diversity as the sole grounds on which the use of race in admissions may be justified. She argues that the judge could have engaged more directly with the question of whether affirmative action is "now merely a tool to promote pluralism or remains an appropriate remedy for longtime systemic, state-sanctioned oppression," adding that it was a missed opportunity to question whether our defense of affirmative action "should hinge entirely on a vision of inclusion in which all future changes must benefit everyone — even as we compensate for past offenses that were strictly visited upon a few."

All things considered, regardless of level of agreement with Judge Burroughs' ruling, it's incontestable that the closely-watched case of *SFFA v. Harvard* has presented one of the biggest legal challenges to affirmative action in years, and with near-guaranteed, impending involvement by the highest court in the nation, the suit could have resounding effects on the future of admissions for all levels of education.

Erin Clifford
December 2, 2019

ATTACHMENTS

1. National Association for Scholars: Amicus Brief
2. "In Harvard's Magical Admissions Process, Nobody Gets Hurt," Ramesh Ponnuru, *Bloomberg News*
3. "Three Thoughts on the Harvard Affirmative Action Verdict," Frederick Hess, *Forbes*
4. "Harvard Admits Its Preferences," Heather Mac Donald, *The New Criterion*
5. "Harvard's Asian Quotas Repeat an Ugly History," Jason Riley, *Wall Street Journal*
6. "That Affirmative Action Ruling Was Good. Its Rationale, Terrible." Melissa Murray, *The New York Times*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

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STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

- against -

Civil Action No. 1:14-cv-14176-ADB

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant.

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MEMORANDUM OF AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae National Association of Scholars ("NAS") is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the concerns relevant to this case. It is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. NAS joined an *amicus* brief to the United States Supreme Court supporting this position in *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013). More recently, NAS member Althea Nagai, Ph.D., published *Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions* (Center for Equal Opportunity, 2018)[1], documenting discrimination by the defendant and other prestigious colleges and universities against Asian applicants.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

The Supreme Court has held, in two of its leading cases concerning racial preferences, that in applying the narrow tailoring test of the strict scrutiny requirement applicable to such a case, a reviewing court must be assured that "the means chosen 'fit' th[e] compelling goal so closely that **there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype**." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *City of Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion)) (emphasis added). The rule that summary judgment is only appropriate when "there is no genuine dispute

[1] http://www. ceousa.org/attachments/article/1209/AN.Too%20Many%20AsianAms.Final.pdf

as to any material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Garcia-Garcia v. Costco Wholesale Corp.*, 878 F.3d 411, 417 (1st Cir. 2017); Fed. R. Civ. P. 56(a), must be read together with this substantive rule defining what the material issue is in this case. That issue is not whether the record establishes **conclusively** that Harvard's admission policies are motivated by prejudice or stereotyping, but whether it establishes that there is **little or no possibility** that they are.

The public record alone in this case, even without regard to the sealed evidence unavailable to NAS, leaves no genuine dispute that the plaintiff has more than met this standard. This record is replete with evidence of a de facto Asian quota startlingly similar to the one that Harvard once imposed on Jews; of impermissible racial proportionality, or "balancing," in admissions; and of biased views about the personal characteristics of Asian applicants. This evidence is corroborated by other statistical studies and anecdotal accounts strongly suggesting that admissions officials at Harvard and other elite colleges are consciously or unconsciously prejudiced against Asian applicants based on a stereotypical view of Asian students as uninteresting, uncreative and one-dimensional. It is further corroborated by the indisputable historical evidence that the "holistic" admissions system which Harvard defends here was originally instituted to exclude Jewish students who were stereotyped in much the same way that Asian-Americans are today.

In light of all this, no reasonable observer could conclude that "there is little or no possibility" that "the means chosen" by Harvard to achieve its purported educational goal of racial diversity were in fact motivated at least in part by "prejudice or stereotype" about one racial group. Therefore, under *Grutter* Harvard's admissions policies are not narrowly tailored to "closely fit" its goal, and plaintiff is entitled to judgment as a matter of law.

ARGUMENT

A. Statistical Evidence Establishes a Significant Possibility That Harvard's Admissions Policies are Motivated by Prejudice or Stereotype, Thus Entitling Plaintiff to Summary Judgment Under *Grutter*

Both the publicly available evidence in this case, and other statistical studies of the admissions records of Harvard and similar colleges and universities vis-a-vis Asian-Americans, strongly suggests that Harvard either intentionally discriminates against Asian applicants and/or engages in prohibited racial balancing that disparately burdens Asian students. Regardless of whether this evidence proves, at this stage, that Harvard has in fact discriminated against Asian-Americans, it clearly establishes beyond any genuine dispute that there is more than a small possibility that it has. Thus, under the *Grutter* strict scrutiny standard requiring that there be "little or no possibility" that a policy disproportionately burdening and benefitting different racial groups was motivated by "illegitimate racial prejudice or stereotype," plaintiff is entitled to summary judgment.[2]

Further, as discussed in Sections B and C *infra*, this conclusion is buttressed by anecdotal evidence of prejudicial and stereotyped views of Asian-American students held by admissions officials and other administrators at Harvard and similar schools, and by the striking historical parallels between Harvard's treatment of Asians today and of Jews in the 1920's through the 1940's.

[2] The cases in which the Court articulated this standard, *Grutter* and *City of Richmond v. J. A. Croson Co.*, *supra*, of course involved challenges to racial preferences and set-asides by white plaintiffs, thus establishing that even in such cases strict scrutiny requires that there be no significant chance that the racial preference was motivated by prejudice towards or stereotyping about the white majority. This rule should be applied even more stringently where, as here, and as is becoming increasingly common in our increasingly multi-racial society, the brunt of ostensibly benign racial favoritism falls on a group that is itself a racial minority that has historically faced discrimination. *Cf, Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting) ("Orientals" an example of a "discrete and insular minority" subject to heightened protection under Court's equal protection jurisprudence).

1. Studies by Both the Plaintiff and Harvard Itself Document This

As plaintiff recounts in detail in its memorandum in support of its motion, both its expert consultant, Professor Peter Arcidiacono of Duke University, and, notably, Harvard's own internal investigation, document clear statistical patterns of discrimination against Asian applicants.

Asian-Americans consistently receive the lowest "personal rating"[3] of any racial group from admissions officials in Cambridge, who have not met them, even though the local alumni interviewers who actually do interact with them face-to-face rank them similarly to whites and somewhat higher than African-Americans and Hispanics. Pl's Mem at 7-9, 30; Pl's Statement of Undisputed Material Facts ("Pl's SMF") ¶¶ 606-616 & Tables 4.1R and 5.6R. A similar discrepancy is found in the "overall rating" of applicants, which is not merely a formulaic compilation of the personal rating and the more objective academic rankings, but rather is itself a purely subjective measure. Pl's SMF ¶ 99. Among the most academically competitive applicants, Asians receive significantly lower overall ratings from admissions officials than do whites, African-Americans and Hispanics, but alumni interviewers rank them similarly to those in other racial groups, Pl's Mem. at 9; Pl's SMF ¶¶ 624-628 & Table 5.7R.

This discrimination is reflected in the admission rates for those in different racial groups. Analyzing Harvard's own data obtained in discovery, Professor Arcidiacono found that the Asian-American admission rate was below the total admission rate, and below the admission

[3] As discussed by the plaintiff, the personal rating is a completely subjective and vague measure variously described by different Harvard officials as potentially including such impressions as whether a student has good "human qualities," a "positive personality," and character traits such as "likability," "helpfulness," "courage" and "kindness," and is generally an "attractive person to be with," "widely respected" and a "good person" who "others like to be around." Pl's Mem. at 7-8; Pl's SMF ¶ 90.

rates for whites and African-Americans, for every year from the Class of 2000 through the Class of 2019, and was below the Hispanic admission rate for eighteen of those twenty years – even though Asians had higher SAT scores than applicants from any other group in each of those years. Pl's SMF ¶¶ 629-633 & Figures 1.1 and 1.2; *see also id.* ¶¶ 638-640 & Table 5.2R (admission rates by race and academic index decile). Harvard's own internal investigation, by its Office of Institutional Research ("OIR"), similarly found that the admission rate for Asians was significantly below that for every other group for the ten years from the Class of 2007 through the Class of 2016. *Id.* ¶¶ 400, 419. Even more strikingly, OIR found that if admissions had been based solely on academic ratings the Asian admission rate would have more than doubled, from less than 8% to more than 17%, and would have been far higher than that of any other racial group. *Id.* ¶ 419.[4]

Given the clear statistical disparity in acceptance rates, it is not surprising that while Asian-Americans make up some 28% of the applicants to Harvard (*see id.* ¶ 634 Table 5.1R) – and over 50% of the applicants with the top academic records (*id.*) – they account for only about 19% of those admitted, *id.* ¶¶ 402, 699-701. By contrast, Professor Arcidiacono found that they would comprise over 50% of admitted students if admission were based on academic accomplishments alone, *id.* ¶ 637. And Harvard's OIR investigation essentially confirmed this finding, determining that Asians would represent 43% of admissions under an "academics only" model.

[4] The admission figures for all groups were somewhat lower in Professor Arcidiacono's data than in the OIR data. That is because Prof. Arcidiacono used detailed admissions data disclosed by Harvard for the Classes of 2014 through 2019, Pl's SMF ¶ 582, while OIR analyzed data for the classes of 2007 through 2016, *id.* ¶ 400, and the admissions rates for all groups have declined as applications have increased. This decline is reflected in Prof. Arcidiacono's chart cited above, *id.* ¶ 630 Figure 1.1, which is based on aggregate data disclosed by Harvard for the Classes of 2000 through 2019 (*see id.* ¶ 630). In any event, whether one focuses on the Class 2014-Class 2019 data, the Class 2007-Class 2016 data, or the Class 2000-Class 2019 aggregate data, they all show one consistent pattern of apparent discrimination against Asian-American applicants.

Pl's Mem. at 11-12; Pl's SMF ¶ 402. Moreover, OIR found that even adding to this model preferences for recruited athletes, "legacy" preferences for the children of alumni, extracurricular activity ratings – and even the biased personal rating – Asians should still constitute 26% rather than 19% of admitted students. *Id.* ¶¶ 402, 406-413. Thus there is an extremely strong inference of an institutional bias against Asian applicants that is even greater than the bias reflected in the personal rating scores.

This inference is further supported by the striking consistency over time of the Asian-American share of students admitted to Harvard, even while the Asian proportion of the high school age applicant pool was growing substantially. Data obtained from Harvard in discovery shows that the Asian share of the Classes of 2009 through 2018 has remained constantly in the 18% to 21% range. *Id.* ¶¶ 699-701. This stagnancy has occurred at the same time that the Asian population was experiencing "the fastest growth rate of any major racial or ethnic group" in the country. Gustavo López *et al.*, Pew Research Center, *Key Facts About Asian Americans, a Diverse and Growing Population* (2017), http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/.

Indeed, according to Census data, during almost the exact same period between the selection of the Class of 2009 and the selection of the Class of 2018, when Asian admissions remained essentially flat, the Asian high school age cohort (14-to-17-year-old) grew by 27% even though the total national 14-to-17-year-old cohort actually declined by 0.5%. National Center for Education Statistics, *Youth Indicators 2011* Table 2 (2012), https://nces.ed.gov/pubs2012/2012026/tables/table_02.asp.[5] *See also* Nagai, *supra*, at 6-7 Figures 1 & 2 (expo-

[5] The Census data are for the period 2005 to 2015. The Classes of 2009 and 2018 were admitted in 2005 and 2014 respectively.

nential growth of Asian population and Asian undergraduate population). It is hard to believe that this flatlining of the admission rate of the most academically talented group in Harvard's applicant pool, at the same time that its share of that pool was vastly expanding both absolutely and relative to other groups, does not reflect intentional discrimination.

At the very least it reflects an attempt at "outright racial balancing," which the Supreme Court has declared to be "patently unconstitutional." *Fisher v. Univ. of Texas at Austin*, *supra*, 570 U.S. at 311 ("*Fisher I*") (quoting *Grutter*, 539 U.S. at 330). The percentages of other racial minority groups in Harvard's admitted classes have also remained remarkably constant from year to year, with African-Americans and Hispanics each accounting for between 10% and 12% of the Classes of 2014 through 2017. Pl's SMF ¶ 699. These percentages track almost exactly their proportion of total applicants during this timeframe (African-Americans 11.0%, Hispanics 12.6%). *See id.* ¶ 634 Table 5.1R. The First Circuit rejected just such "a scheme of proportional representation" based on the racial breakdown of the applicant pool in *Wessmann v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998), deeming it "less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing." *Id.* Harvard's apparently similar scheme, though tacit rather than explicit as in *Wessmann*, must be rejected here as well.

2. Other Statistical Studies Also Support This Conclusion

Various scholarly studies of the role of race in the admissions process at Harvard and other elite colleges have reached the same finding as did Professor Arcidiacono and Harvard's own research office – *viz.*, that Asian-Americans are admitted at significantly lower rates than are other racial groups. These corroborating studies reinforce the conclusion that there is more than a "little possibility" that this is motivated by prejudice or stereotyping.

In one of the most well-known studies, two Princeton researchers found that, controlling

for other variables such as academic credentials, Asian students applying to highly selective private colleges faced odds three times as high as similar whites, six times as high as similar Hispanics, and sixteen times as high as similar African-Americans. Thomas Espenshade & Alexandra Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 84-85 (2009). Asians need SAT scores 140 points higher than whites, 270 points higher than Hispanics and some 450 points higher than blacks (out of 1600 points) to be admitted to these schools. *Id.* at 92-93. In other words, an Asian applicant with an SAT score of 1500 has only the same chance of being accepted as a white student with a 1360, a Latino with a 1230 or an African-American with a 1050. Among candidates in the highest 1400-1600 SAT range, 77% of blacks, 48% of Hispanics, and 40% of whites but only 30% of Asians are admitted. *Id.* at 81.

The Espenshade-Radford book is often cited for its statistics on the rather startling gaps between the admissions odds of Asian and white students on the one hand and of similarly situated African-American and Hispanic students on the other. However, the more important disparity for present purposes is the still sizeable one **between** Asians and whites. As seen, Asian-American applicants are at a significant disadvantage compared to white as well as to other minority applicants. The clear import is that race-conscious admissions policies such as those used at all of these selective institutions are not benign to all racial minorities but actually privilege whites over Asians. Another study by Professor Espenshade confronted this question directly and reached the staggering conclusion that racial preferences for blacks and Latinos at elite colleges come almost entirely at the expense of Asian-Americans rather than whites. He and a colleague found that if affirmative action were eliminated "[n]early four out of every five places . . . not taken by African-American and Hispanic students would be filled by Asians."

Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Social Science Q. 293, 298 (2005).

While the Espenshade studies were published in 2005 and 2009 they relied on data from the 1980's and 1990's. *Id.* at 293; Espenshade & Radford, *supra*, at 10. Research incorporating more recent statistics reaches the same results however. As noted earlier, NAS member Althea Nagai recently published *Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions*, *supra*, examining admission of Asian applicants to Harvard and other prestigious institutions. Nagai analyzed data from the National Center for Education Statistics ("NCES") on admissions to Harvard, the California Institute of Technology ("Caltech") and the Massachusetts Institute of Technology ("MIT") for the period from 1980 through 2016. *See* Nagai, *supra*, at 8-9 & n. 15. She found that the Asian percentage of the student body at Harvard actually reached its high point 25 years ago, in 1993, at 21%, then declined and, as reflected in Harvard's own figures noted in Section A(1) above, has essentially stagnated over the last ten to fifteen years. *Id.* at 13 & Figure 5.[6]

In an exhaustive 2012 study of the same NCES data, author Ron Unz looked at the racial composition of Ivy League and other elite schools since 1980 and found a similar pattern. Ron Unz, *The Myth of American Meritocracy: How corrupt are Ivy League admissions?*, The Amer-

[6] One notable finding of Nagai's offers an extreme variant of Prof. Espenshade's findings that racial preferences come almost entirely at the expense of Asians and thus benefit whites compared to them. Nagai compared the racial composition of Caltech and MIT, two extremely similar elite institutions, neither of which provides legacy preferences or recruits athletes. However, MIT does take race into account in admissions decisions, while Caltech is the only top school that rejects the use of racial preferences and instead selects students based almost entirely on academic merit. Thus one can get a fairly good idea of the racial impact of preferences by comparing the populations of the two schools. Strikingly, this comparison suggests that such preferences come **entirely** at the expense of Asian-Americans, who are 43% of the student body at Caltech but only 26% at MIT. Equally striking, the racial group that benefits the most is not African-Americans or Hispanics but **whites**, whose numbers actually **increase** from 29% at Caltech to 35% at MIT. *Id.* at 10 Table 1.

ican Conservative, Dec. 2012, at 14.[7] Asian enrollment at Harvard increased from about four percent to ten percent during the early and mid-1980's. *Id.* at 17-18 & App. C.[8] It then spiked after the Department of Education Office for Civil Rights ("OCR") began an investigation in 1988 into an earlier complaint of discrimination against Asians by Harvard, peaking at 21% in 1993 as noted by Nagai. *Id.* at 18 & App. C. However, beginning in 1994, the first year in which all students were admitted after the close of the investigation in October, 1990, "the Asian numbers went into reverse, generally stagnating or declining during the two decades which followed." *Id.* at 18; *see id.* App. C. Unz found that the striking consistency in the Asian numbers from year to year, reflected in the Harvard figures above for the classes of 2009 through 2018 (*see supra* p. 6), actually dates to this point in the mid-1990's: "Even more surprising has been the sheer constancy of these percentages, with almost every year from 1995–2011 showing an Asian enrollment within a single point of the 16.5 percent average." *Id.* at 18; *see id.* App. C.

Moreover, Unz pointed out that these figures actually understate the decline in Asian representation at Harvard, as they do not take into account that, as noted above, Asians have been the fastest-growing racial group in the United States. The Asian share of the college-age (18-21 year-old) cohort quadrupled from 1.3% to 5.1% between 1976 and 2011. *Id.* at 18-19 &. App. B. Factoring this in, Unz calculated that "the percentage of college-age Asian-Americans attending Harvard . . . has . . . dropped by over 50 percent" since peaking in 1993. *Id.* at 19.

Unz found strikingly similar patterns at other Ivy League schools. Not only were the

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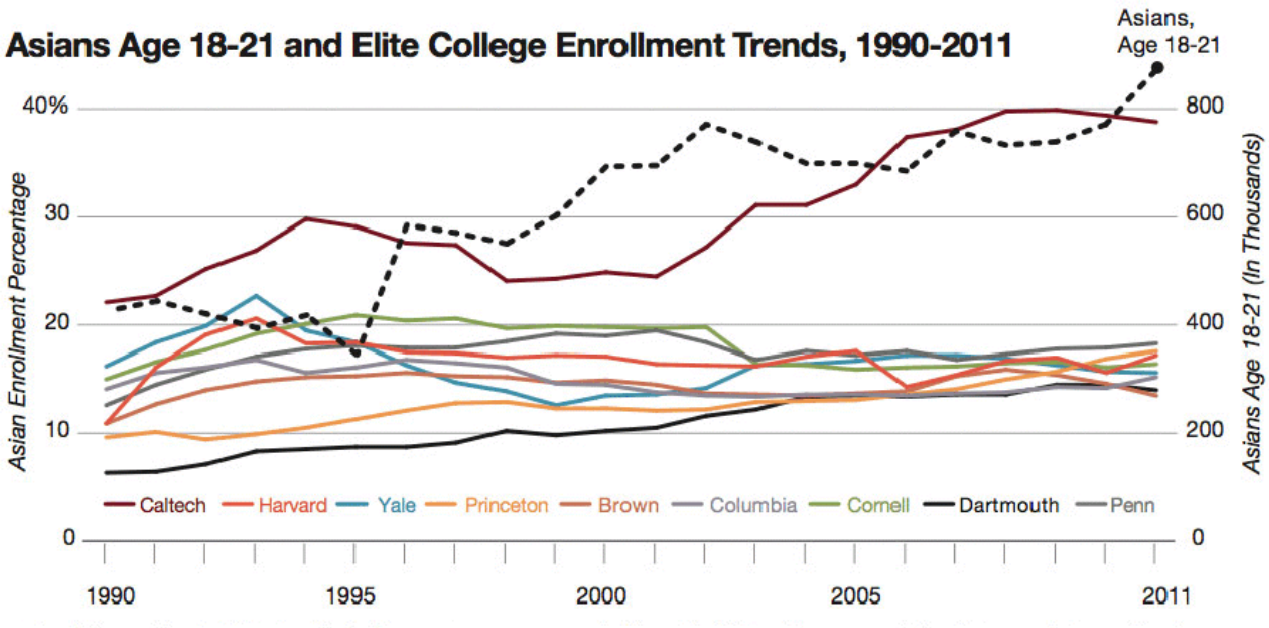
[7] http://theamericanconservative.com/pdf/The%20Myth%20of%20American%20Meritocracy-Unz.pdf (pdf of print ed.); http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/ (html)

[8] The Appendices are available online at http://www.theamericanconservative.com/articles/meritocracy-appendices/

Asian admission numbers remarkably stable from year to year, but from college to college as well. After the closing of the OCR Harvard investigation "Asian enrollments across all those universities rapidly converged to the same level of approximately 16 percent, and remained roughly static thereafter." *Id.* at 18. This convergence (and its striking contrast with the pattern at Caltech which, as noted above, does not take race into account in admission, as well as with the ballooning of the Asian college-age population) is starkly depicted in Unz's chart below.



Id. at 18. This apparent conscious parallelism in Ivy League Asian admissions further supports the strong inference that there is more than a "little possibility" that it is motivated by prejudice or stereotyping.

B. Historical Evidence That Harvard's "Holistic" Admissions Policies Were Instituted to Exclude Jews, and are Now Applied to Asians in the Same Way and for the Same Reasons, Buttresses the Conclusion That These Policies are Motivated by Prejudice or Stereotype

There is indisputable historical evidence that the "holistic" admissions system which Harvard defends here was originally instituted to exclude Jewish students who were stereotyped

in much the same way that Asian-Americans are today. And there are uncanny parallels between the imposition of a de facto Jewish quota under this system in the 1920's and the Asian admission experience since the 1990's. This historical background further bolsters the conclusion from the statistical record of a significant possibility that Harvard's policies are motivated by prejudice or stereotype,

As Unz summarizes this history:

> During the 1920s, the established Northeastern Anglo-Saxon elites who then dominated the Ivy League wished to sharply curtail the rapidly growing numbers of Jewish students, but their initial attempts to impose simple numerical quotas provoked enormous controversy and faculty opposition. Therefore, the approach subsequently taken by Harvard President A. Lawrence Lowell and his peers was to transform the admissions process from a simple objective test of academic merit into a complex and holistic consideration of all aspects of each individual applicant; the resulting opacity permitted the admission or rejection of any given applicant, allowing the ethnicity of the student body to be shaped as desired. As a consequence, university leaders could honestly deny the existence of any racial or religious quotas, while still managing to reduce Jewish enrollment to a much lower level, and thereafter hold it almost constant during the decades which followed. For example, the Jewish portion of Harvard's entering class dropped from nearly 30 percent in 1925 to 15 percent the following year and remained roughly static until the period of the Second World War.

Id. at 16 (footnotes omitted).

The anti-Semitism that gave rise to Harvard's holistic system is eye-popping, and worth recounting at some length. Professor Alan Dershowitz has termed the origin of the holistic plan "one of the most shameful episodes in the history of American higher education in general, and of Harvard College in particular." Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379, 385 (1979). The following discussion draws heavily on this article and on Berkeley Professor Jerome Karabel's 2005 book, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* 1-109 to set out this history. *See also* Pl's SMF ¶¶ 21-46.

Prior to the early 1920's admission to Harvard and other Ivy League schools was based almost entirely on grades and an entrance examination. Essays and personal interviews were not required, and there was relatively little consideration of extracurricular activities or of the kind of subjective "character" traits included in today's amorphous "personal rating" (*see supra* p. 4 & n.3). While the admission criteria were objective, until about the turn of the century they were not particularly demanding, in keeping with the Ivy League reputation as a place for the social rather than the intellectual elite. Beginning in the 1890's, however, Harvard began to make its requirements more academically rigorous, just as increasing numbers of Jewish immigrants whose culture emphasized academics were arriving in America, and Jews began to comprise a growing share of the student population. Harvard was already 7 percent Jewish by 1900, a figure which increased to 10% in 1909, 15% in 1914 and 21.5% in 1922.

This trend did not sit well with many of Harvard's officials and alumni. As early as 1907 the dean of financial aid expressed his preference for "sons of families that have been American for generations" rather than the "increasing class [of] foreigners, and especially the Russian Jews." Some twenty years later, as Jewish enrollment reached its peak, a member of the Class of 1901 wrote to President Lowell after attending the Harvard-Yale game that "to find that one's University had become so Hebrewized was a fearful shock. There were Jews to the right of me, Jews to the left of me." Bemoaning that "[t]he Jew is undoubtedly of high mental order" and that therefore raising academic standards only increases their number, the anguished alum beseeched Lowell to "devise a way to bring Harvard back to the position it always held as a 'white man's' college."

These concerns found a sympathetic ear in Lowell, who responded that he "had foreseen the peril of having too large of a number of an alien race and had tried to prevent it." Indeed he

had. Lowell first warned of the "Jewish problem" in a 1920 letter expressing fear that the rising tide of Jews would "ruin the college" and suggesting a 15% cap on their enrollment. In 1922 he formally proposed such a quota to the faculty, which rejected it but instead adopted a geographic diversity plan in an attempt to limit the enrollment of students from Jewish areas.

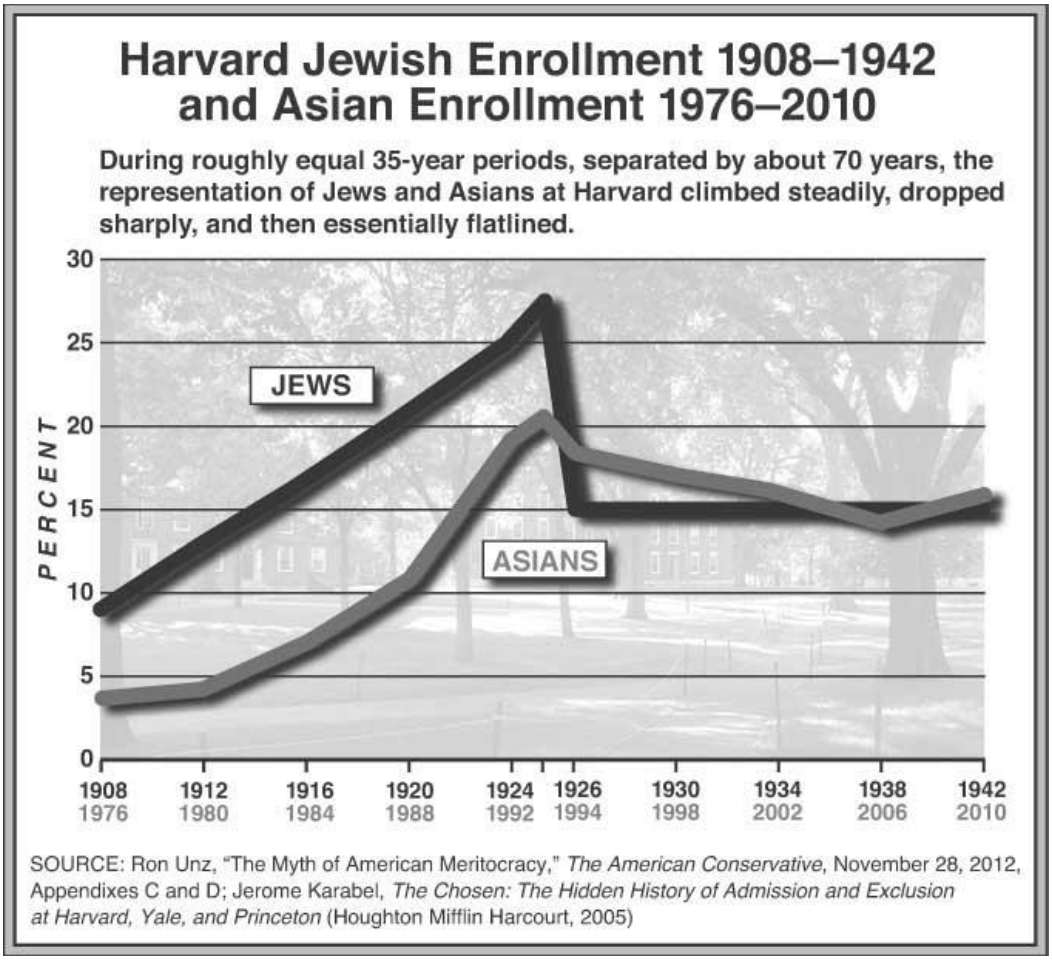
The geographic diversity effort did not work and the Jewish numbers continued to increase, reaching 27.6% in 1925. At that point Lowell, rather than renewing the battle for an express Jewish quota, proposed the imposition of a de facto one by the institution of highly discretionary admissions criteria emphasizing subjective measures of "aptitude and character" rather than exam scores. "To prevent a dangerous increase in the proportion of Jews," he wrote to the Admissions Committee, "I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character." Lowell was quite candid that "a very large proportion of the less desirable, upon this basis, are . . . the Jews." The faculty not only adopted the new holistic admissions plan but made the process even more subjective, directing the admissions committee to personally interview as many applicants as possible to gather additional information on "character and fitness."

The Supreme Court has ruled that the "historical background" of a challenged action is an important consideration in a civil rights case, even when examining a policy such as a zoning code that is racially "neutral on its face," and that the "administrative history may be highly relevant, **especially where there are contemporary statements by members of the decision-making body**" indicating invidious intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 266, 268 (1977) (emphasis added). The present case involves not a facially neutral policy like the zoning ordinance in *Arlington Heights*, but an expressly race conscious one, and thus the substantive standard is that articulated in *Grutter* and

City of Richmond v. J. A. Croson Co., *supra*: that to survive strict scrutiny there must be "little or no possibility" that the policy was motivated by prejudice or stereotyping. Here the contemporary statements of President Lowell and other Harvard officials in devising and instituting the holistic admissions policy provide damning proof that it was.

The impact of the holistic policy was immediate and drastic. The percentage of Jews in Harvard's freshman class plummeted from over 27% in 1925 to just 15% in 1926, and remained virtually unchanged at about that level until the 1940's. During this time Harvard buttressed this quota by reinforcing the holistic elements of its admissions system, for the first time requiring candidates to submit personal essays and descriptions of their extracurricular activities in an attempt to further emphasize "leadership" skills and "character." Jewish numbers at Harvard did not begin to rebound until after World War II, but even as late as 1952 an Admissions Committee report expressed concern that the impression that Harvard was "dominated by Jews" might cause a loss of "students from upper-income, business backgrounds."

Comparing the experience of Jewish students of that era and Asian students over the last several decades under Harvard's holistic admissions plan, Unz observes that the Asian experience "exactly replicates the historical pattern . . . in which Jewish enrollment rose very rapidly, leading to imposition of an informal quota system, after which the number of Jews fell substantially, and thereafter remained roughly constant for decades." Unz, *supra*, at 18. This is starkly illustrated in the chart below comparing Harvard's Jewish enrollment for the period from 1908 to 1942 with its Asian enrollment for the corresponding period from 1976 to 2010:



Dennis Saffran, *Fewer Asians Need Apply*, City J., Winter 2016 at 38, 43, https://www.city-journal.org/html/fewer-asians-need-apply-14180.html.

This stunning parallel and the consistently low "personal ratings" given to Asian-American applicants (*supra* p. 4) make clear that, just as it did with the Jews eighty years ago, Harvard now deems another upstart, achievement-oriented minority that has been too successful under the old academic standards to be deficient in the highly subjective and discretionary "personal estimate of character" favored by President Lowell.

C. Anecdotal Evidence of Biased and Stereotypical Views About Asian Students Reinforces This Conclusion

This statistical and historical evidence that there is far more than a "little possibility" that

the holistic admissions policy is motivated by prejudice or stereotype is supported by anecdotal accounts strongly suggesting that officials at Harvard and other elite colleges are consciously or unconsciously biased against Asian applicants based on a stereotypical view of Asian students as uninteresting, uncreative and one-dimensional.

Wall Street Journal reporter Daniel Golden summarized this stereotypical view in his 2006 book, *The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges—and Who Gets Left Outside the Gates*: "Asians are typecast in college admissions offices as quasi-robots programmed by their parents to ace math and science tests." *Id.* 201. He chronicled example after example of this prejudiced thinking. MIT's Dean of Admissions (engaging in the kind of racial stereotyping which, as Golden notes, would be unimaginable in the case of a black applicant) said of one rejected applicant with stellar credentials that he "looked like a thousand other Korean kids with the exact same profile," was "yet another textureless math grind" and "just wasn't . . . interesting." *Id.* A former Vanderbilt administrator said that Asians are good students but don't provide a stimulating intellectual environment. *Id.*

Most notably, Golden described "stereotyping by Harvard admissions evaluators" unearthed in the earlier federal investigation (*see supra* p. 10). Then as now "Harvard evaluators ranked Asian American candidates on average below whites in 'personal qualities'." And, "[i]n comments written in applicants' files":

> Harvard admissions staff repeatedly described Asian Americans as "being quiet/shy, science/math oriented, and hard workers," ....One reader summed up an Asian applicant this way: "He's quiet and, of course, wants to be a doctor." Another wrote that an applicant's "scores and application seem so typical of other Asian applications I've read: extraordinarily gifted in math with the opposite extreme in English."

Id. 202.

There are similar indications of prejudice on the part of Harvard officials in the present record, even as redacted. Perhaps the most telling is the response of then President Drew Faust to a 2012 letter from an alumnus reminiscent of the 1920's "Jews to the right of me, Jews to the left of me" letter to President Lowell (*supra* p. 13). Urging Faust to adopt "informal quotas" on Asians, the alum wrote: "The last time I was in Cambridge it seemed to me that there were a large number of oriental students. … I think they probably should be limited to 5%." Pl's SMF ¶ 341. Faust's office asked Director of Admissions Marlyn E. McGrath to respond "on behalf of the president" "[g]iven the nature of his suggestions." Pl's Ex. 132, Doc. No. 421-132. McGrath's response on Faust's behalf to this blatantly racist letter, though not as enthusiastic as Lowell's to the earlier letter, was nonetheless startlingly respectful for the present era. She lauded his "many thoughtful observations about Harvard College students and the results of the admissions process," thanked him for his "efforts to help us continually to improve the quality of our student body," and reiterated in conclusion that "[a]ll of us at Harvard appreciate your thoughtful letter, as well as your loyalty over the years." *Id.*; Pl's SMF ¶ 342. McGrath offered only the most subtle and obscure hints of any disagreement with the tenor of the letter (noting, for example, that there were several international students on the squash team – a particular interest of his apparently). Pl's Ex. 132. But nowhere did she take issue with his proposal to establish quotas on "oriental students." Pl's SMF ¶ 342.

Even more startling was President Faust's defiant defense of this "polite and respectful" response at her deposition. *Id.* ¶ 343. Noting that the alum was 90 years old, had "probably … fought in World War II" and had "given some kind of support to scholarships," she unrepentantly stated that "there's just no reason to tell him his letter is preposterous." *Id.* She refused to say if she would have sent the same polite response to a letter calling for quotas on African-

American students, and when asked how Asian-American students might feel about the response she replied that "Asian-American students have not seen" it. *Id.* ¶ 344. (McGrath similarly testified that she had "no regrets" about the response, and first refused to "speculate" but then asserted that she "might have" sent the same response to a letter arguing that "that there were too many black students on campus." *Id.*; McGrath Dep. 381:5-13; 382:25-383:2 (Pl's Ex. 17, Doc. No. 421-17).

President Faust may well be correct that no purpose would have been served by a more confrontational response (*see also* McGrath Dep. 380:3-11 [would not have been "productive" or fruitful"]), and that the man's age, service and financial contributions should give him a pass. But amicus respectfully submits that it is inconceivable that Harvard, which has long trumpeted its commitment to confronting racism and providing a welcoming environment for students of color, *see e.g.*, Colleen Walsh, *Faust Issues Clarion Call to Fight Racism*, The Harvard Gazette (Aug. 30, 2017);[9] Tania deLuzuriaga, *Report Issued on Inclusion, Belonging*, The Harvard Gazette (Mar. 27, 2018),[10] would have sent a similar response to a letter calling for the imposition of quotas on black, Latino or other minority students, or would have responded so cavalierly to their potential feelings about such a letter. This patently unfair double standard provides further support for the inference that the holistic admissions policy which underrepresents Asian applicants is motivated by bias against them. *See also* Pl's Mem. at 21; Pl's SMF ¶¶ 345, 346 (recounting prompt responses by Faust and other Harvard officials to allegations of discrimination against other groups).

[9] https://news.harvard.edu/gazette/story/2017/08/harvard-president-issues-clarion-call-to-fight-racism/

[10] https://news.harvard.edu/gazette/story/2018/03/harvard-issues-task-force-report-on-inclusion-belonging/

In contrast to Harvard's polite and respectful personal response to the anti-Asian alumnus, when an Asian-American high school student sent Faust an "extraordinarily well-written" letter in 2014 expressing concern about media reports of discrimination against Asians by Harvard, a university she had "always admired," she received a "generic response ... saying that the President's Office is not involved in admissions, and [she] should contact the Admissions Office." In discussions between the President's office and the Admissions Office about this response, Admissions Director McGrath joked that "we are always happy to give our own dumb answer if she contacts us." Pl's SMF ¶¶ 335, 336; Pl's Ex. 118, Doc. No. 421-118.

Another example suggesting bias on the part of Harvard officials is their stonewalling reaction to Harvard's own OIR internal investigation documenting discrimination against Asian-Americans (*see supra* p. 5). As plaintiff recounts, when briefed on OIR's reports Dean of Admissions William Fitzsimmons and Dean of the College Rakesh Khurana sat silently, asked no questions, did not request any additional information or study, did not report the OIR findings to anyone or take any action on them, and did not express any concern about the unfairness to Asian-American applicants revealed in the reports. *See* Pl's Mem. at 15-16 and portions of Pl's SMF cited there. Dean Fitzsimmons nonetheless testified at his deposition that "we would always be vigilant about any suggestion of discrimination" but that he believed that his response to the OIR reports had been vigilant. Pl's SMF ¶¶ 566-572; Fitzsimmons Dep. 442:25-445:7, Pl's Ex. 9, Doc. No. 421-9. It is unimaginable that Harvard officials would have responded to findings of discrimination against any other racial minority group in this fashion.

Finally, Harvard's very posture in this litigation reflects stereotyping of Asian-Americans as it relies on an expert report purporting to find that they are less "likely to be multi-dimensional" than are whites. Pl's SMF ¶ 761; Card Rep. 35, Def's Ex. 33, Doc. No. 419-33. It is also

noteworthy in this regard that plaintiff's expert included the biased "personal rating" in his statistical models – merely taking Dean Fitzsimmons's word for it that race was not a factor in the personal rating scores. Pl's SMF ¶¶ 759, 772.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Court grant plaintiff's motion for summary judgment and deny defendant's motion for summary judgment.

Dated: July 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants by August 3, 2018.

/s/ Dwight Duncan
Dwight Duncan BBO #553845

Politics & Policy

In Harvard's Magical Admissions Process, Nobody Gets Hurt

The university said using race can only help, and never hurt, applicants. Can you believe a judge bought it?

By Ramesh Ponnuru
October 6, 2019, 10:00 AM EDT

Affirmative reaction. *Photographer: Adam Glanzman/Bloomberg*

If parts of Judge Allison Burroughs's decision in the Harvard affirmative-action case don't seem to make sense, it's not entirely her fault. She was bound by the Supreme Court's precedents on the subject, and the justices have been refining absurdity ever since they took up the issue in 1978.

The question this time was whether Harvard was unlawfully discriminating against Asian-American applicants. Harvard "testified that race, when considered in admissions, can only help, not hurt, a student's chances of getting in" – as the New York Times reported with a straight

face. Judge Burroughs bought it, writing that race "is never viewed as a negative attribute" by Harvard's admissions department.

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Think about that for a moment. Logically, if a particular racial or ethnic background is a plus, then another background must be a "minus." Harvard has a finite number of places to offer. Putting a thumb on the scales for certain racial minorities means putting a thumb on the scales against everyone else.

Burroughs's tortured reasoning traces back to that 1978 case, University of California v. Bakke. As complex as some of the issues surrounding affirmative action can be, the legal question at that time should have been easy. The Civil Rights Act of 1964 says, "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."

It doesn't say "unless that person is white or Asian-American," or "except to remedy the lingering effects of past discrimination," or "but universities can engineer the racial makeup of their campus if they think there are educational benefits to it."

Justice Lewis Powell nonetheless decided for the court that the law permits the use of race as a "plus" to attain racial diversity so long as it is not "decisive." His argument went like this: The Civil Rights Act was an attempt by Congress to implement the Fourteenth Amendment's

guarantee that all persons get equal protection of the law; the meaning of that guarantee is for the court to determine; therefore the act permitted whatever the court thought it should.

The courts have struggled ever since to wrest some sense from the ruling. Following Powell, Burroughs wrote that Harvard was in the clear because it treated race as "an important consideration" that "never becomes the defining feature" of an applicant. One problem: If being black or Hispanic or Native American is a plus for the admissions office, it has to be decisive in some cases. If it is never decisive, it isn't really a plus.

It is a testament to the contrived nature of the Supreme Court's rulings that toward the end of her opinion, Burroughs drops the pretense: "Race-conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population." Besides, she adds, the burden on Asian-Americans, the focus of the lawsuit, is light. This line, though, creates another unacknowledged problem: The burden on Asian-Americans is too small to give them a legal injury, but absolutely vital to maintaining the benefits of a racially engineered student body?

Even some fans of affirmative action have criticized the reasoning of the decision. New York University School of Law professor Melissa Murray laments that it rested on the asserted educational benefits of racial diversity rather than the need to remedy past discrimination. But changing rationales in that way would not only flout the Supreme Court's precedents, but require colleges to change their admissions practices. If remedying past discrimination in our country is the point of race-conscious admissions, admitting nonwhites from abroad, or with recent roots in the U.S., won't help that cause.

The better course is an unlikely one: The Supreme Court should take the Harvard case on appeal and use it to re-affirm the actual words of America's landmark civil-rights law.

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3 Thoughts On The Harvard Affirmative Action Verdict

Frederick Hess Contributor ⓘ
Education
I write about policy and practice in K-12 and higher education.

A federal judge on Tuesday ruled that Harvard University's admissions policies do not discriminate against Asian Americans. Judge Allison Burroughs' verdict in the closely watched affirmative action case held that Harvard's approach, which considers race as a factor in acceptance decisions, "passes constitutional muster."

Burroughs rejected the claim by Students for Fair Admissions (SFFA) that Harvard's process entails illegal "racial balancing" and unconstitutionally burdens Asian-American applicants. The judge wrote that the plaintiffs did not provide "a single admissions file that reflected discriminatory animus." She concluded, "Ensuring diversity at Harvard relies, in part, on race conscious admissions."

The entrance to Harvard Yard at Harvard University. A federal judge on Tuesday ruled that Harvard ... [+] GETTY IMAGES

There's a lot to be said about this verdict, and plenty will be said in the coming days. For now, I'll just offer three thoughts. First off, this decision is only a way station. While the verdict closes this stage of a lawsuit that was filed back in 2014, most observers expect that the plaintiffs will appeal the decision and that the high-profile case could ultimately be resolved by the U.S. Supreme Court.

Today In: Leadership

Second, while I fully respect the judge's decision, and understand how she could kinda, sorta squint and square it with Supreme Court precedent, I still find myself surprised at her depiction of Harvard's practices. After all, internal documents revealed that Harvard's interviewers and admissions staff consistently ranked Asian Americans lower on personality—with significant consequences on admissions. That seemed like pretty damning evidence of manipulation or bias. And I found Harvard's response on this score remarkably incoherent. It was along the lines of: "We don't penalize Asian Americans. Well, we do 'tip' things for some applicants, but that has no impact on other applicants. And ignore those personality scores, well, because."

Third, it seems to me that the real scandal surfaced by the suit has pretty much flown under the radar. This has nothing specifically to do with the race-based question but instead with how internal documents cast a harsh spotlight on the shakedowns and pay-offs that seem to be a routine part of the Harvard admissions process. To pluck one example from many, in a 2013 email with the subject line "My Hero," the former dean of the Harvard Kennedy School of Government thanked a colleague for "once again" helping to admit students with very "special" qualifications. The dean wrote, "I am simply thrilled about the folks you were able to admit. . . . [Redacted] has already committed to a building." As the *Harvard Crimson* drily noted, "The public has long suspected that Harvard favors those who fund it. But blatant examples like those presented Wednesday . . . rarely if ever become public knowledge."

If Harvard can't be trusted to resist the siren call of legacy favoritism or pay-to-play donors, I have trouble seeing how it can be trusted to negotiate the fraught waters of racial preferences. The whole affair leaves me not only skeptical of Harvard's ability to incorporate race in a constitutionally defensible manner, but of the propriety of Harvard's whole expansive, expensive admissions operation.

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The New Criterion

Features November 2019

Harvard admits its preferences

by Heather Mac Donald

On Students for Fair Admissions v. Harvard College & racial preferences in college admissions.

On September 30, a federal district court judge in Boston upheld Harvard's use of racial preferences in undergraduate admissions against the challenge that they discriminate against Asian-Americans. The case—*Students for Fair Admissions v. Harvard College*—will likely be appealed to the Supreme Court, the fifth time since 1978 that the Court has been asked to rule on racial admissions preferences. The Court should accept the appeal and, for the sake of its own institutional integrity, throw out its entire jurisprudence regarding college admissions. Pro-preference jurisprudence is an abomination, filled with patent fictions, logical contradictions, and vast gusts of rhetorical vapidity that should make any self-respecting jurist weep with despair. Its only purpose has been to paper over the vast academic skills gap between black students, on the one hand, and white and Asian students, on the other. In so doing, court doctrine has perpetuated the very problems it purports to solve.

Students for Fair Admissions's suit against Harvard presented a new twist on anti-preference litigation: rather than arguing that Harvard's preferences discriminate against whites in favor of blacks, SFFA argued that Harvard discriminates against Asians in favor of whites. This shift reflected both reality and legal strategy. Asian students everywhere are the most penalized when meritocratic admissions are scrapped for a race-based system, since their academic qualifications surpass those of all other racial and ethnic groups.

But litigation calculus also influenced the changed focus. *SFFA v. Harvard* was filed in 2014, when Justice Anthony Kennedy was still on the Supreme Court. Kennedy had been a pivotal vote for upholding racial preferences. If SFFA's attorneys could convince him that his pro-preference jurisprudence was now harming Asians—themselves a minority and thus part of the student "diversity" that preferences were supposed to enable—they would have a better chance of persuading him to reverse that jurisprudence, their thinking went. And using whites, rather than blacks, as the benchmark for anti-Asian discrimination avoided the appearance of pitting one minority group against another, a charge which left-wing preference supporters routinely make.

This calculation may have backfired. Regardless, winning any anti-preference challenge under current precedent has become virtually impossible.

That line of precedent began in 1978 with *University of California v. Bakke*. Allan Bakke had been rejected from the University of California Davis medical school, which set aside sixteen places in its first-year class of one hundred for so-called underrepresented minorities. Justice Lewis Powell, writing the controlling opinion in an otherwise divided court, introduced the concepts that would tarnish all subsequent legal analysis in the area. UC Davis's explicit set-asides violated Bakke's right to be free from racial discrimination, Powell held. If a school left its desired level of minority enrollment officially unquantified, however, the Court would accept a series of cascading fictions on the way to upholding that school's racial preferences. Those fictions clustered under the umbrella of "holistic review." An admissions office that practices holistic review allegedly evaluates each applicant as a unique individual and not simply as the representative of a race; it treats an applicant's race as just one smallish "plus" factor among many helping him get admitted; racial preferences are a plus for the preferred group but not a negative for the unpreferred group; even if a school has "minimum goals" for minority enrollment, those minimum goals are different from numerical quotas.

Powell never explained why an individual who is penalized because he is of the wrong race suffers a constitutional harm if that discrimination occurs in the name of an explicit quota, but not if the discrimination is in the service of a putatively less numerical racial "goal." The other fictions were equally strained. A preference-practicing school is always

going to have a target of minority enrollment, regardless of whether it states that target publicly; otherwise it would not need preferences in the first place. Preferences are by definition zero-sum; they catapult members of favored groups into finite college seats at the expense of disfavored groups.

Powell's legacy did not end there. He also introduced the concept that would define the academic mission for the next four decades: diversity. The Davis medical school had defended its quota system on three grounds: as compensation for past discrimination; as a means of providing more doctors to underserved neighborhoods; and as a tool for creating "diversity" in its student population. Powell rejected the first two grounds. Universities were unqualified to make the policy judgments supporting a compensatory mission, he wrote. There was no guarantee that minority medical school graduates would practice in minority neighborhoods. But educational "diversity"—that was a goal Powell could get behind! As long as a university justified its preferences in the name of the supposed educational benefits of racial diversity, it will have stated a constitutionally legitimate purpose that withstands judicial scrutiny. Diversity benefits accrue above all to non-preferred white students who would learn from the different worldview of preferred minority students. Powell thus institutionalized the core premise of today's identity politics: that a person's race is reliably linked to his outlook and life experience.

Preferential admissions schemes would be challenged four times over the ensuing forty years; the Court, in upholding them, responded with ever more fantastical distinctions. Racial preferences are litigated under the Equal Protection clause of the Constitution's Fourteenth Amendment. (Federally funded private universities are covered by Title VI of the Civil Rights Act of 1964, which embodies the same constitutional principles, the Court has held. It is that receipt of federal funding that subjects private universities to federal anti-discrimination law; they could avoid those legal strictures by foregoing federal funding.) Equal Protection doctrine requires that any government scheme using racial classifications be "narrowly tailored" to meet a "compelling" government purpose. In order for a court to determine whether a racial scheme is narrowly tailored, it needs to know the scheme's specifics. This requirement created an impossible dilemma: if a university claimed that it needed a certain percentage of minority students in order to reap the educational benefits of diversity, it would have

erected an illegal quota. But if a university left its goals for minority enrollment unspecified, a court would be unable to determine whether those enrollment goals were no broader than necessary to fulfill the mission of diversity.

The Court responded by embracing the contradiction, rather than resolving it. As Justice Kennedy wrote in the 2016 iteration of *Fisher v. University of Texas* (upholding racial preferences at the University of Texas),

> since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

> On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

How those goals can be measurable without being roughly numerical was a mystery. Enter the concept of "critical mass," entailing a non sequitur of stunning proportions. It turns out if you call your quota for minority students a "critical mass," you will sidestep the specification problem. The jurist in the Harvard case, U.S. District Judge Allison Burroughs, recapitulated the sleight of hand in her September 2019 opinion. In *Grutter v. Bollinger*, a 2003 Supreme Court decision upholding racial preferences at the University of Michigan's law school, the "Supreme Court found that the law school's goal of 'enroll[ing] a critical-mass of minority students' did not run afoul of the requirement that a school not attempt to attain 'some specified percentage of a particular group merely because of its race or ethnic origin,' " Burroughs wrote. Instead, as distinct from a quota, the "concept of 'critical mass [was] defined by reference to the educational benefits that diversity is designed to produce,' including racial understanding, breaking down stereotypes, advancing learning outcomes, and preparing students for a diverse workforce and society."

But an explicit racial quota could also be "defined by reference to the educational benefits that diversity is designed to produce." A school's hidden target for minority enrollment does not become less of a target simply by calling it a critical mass and invoking the goal of diversity.

Plaintiffs challenging preferential admissions have had two options: they can try to work within the fictions of existing jurisprudence or they can ask a court to overturn the entire rotten infrastructure. SFFA's 2014 opening salvo in the Harvard case did both. Judge Burroughs rightly threw out those counts in SFFA's original complaint that sought to reverse the Bakke-Grutter-Fisher line of precedent, since a lower court does not have the authority to overrule Supreme Court precedent. SFFA will be able to resurrect those counts on appeal. For the remainder of the trial litigation, SFFA accepted the prevailing fictions, and in so doing demonstrated their hollowness once again.

SFFA argued that while Harvard could in theory use race just as a "plus" or "tip" within the context of "holistic review," it was not doing so. Instead, it made race the "defining feature" of applications. While Harvard could in theory treat race simply as a plus for preferred groups, SFFA argued, it was instead making race a negative for unpreferred Asians. While Harvard could in theory evaluate each application on its individual merits despite employing racial preferences, Harvard in fact operated a de facto quota or "racial balancing" system, because the racial proportions of its admitted student body remained stable from year to year. The Asian-American share of the student body would be much bigger without these violations of existing racial preference doctrine, SFFA claimed, since by all objective measures, Asians were the most qualified of all applicant groups.

Harvard, for example, rates its applicants academically on a six-point scale. An academic rating of one indicates summa cum laude potential, as Harvard put it, a "genuine scholar," and near-perfect scores and grades "combined with unusual creativity and possible evidence of original scholarship." An academic rating of two indicates magna cum laude potential, superb grades, and mid- to high-700 SAT scores. More than 60 percent of Asian applicants to Harvard for the classes of 2014 to 2019 were rated 1 or 2, compared to 46 percent of whites, 17 percent of Hispanics, and 9 percent of blacks. An academic rating of four indicates adequate preparation, respectable grades, and low- to

mid-600 SAT scores. Over 50 percent of black applicants were rated 4 or less, compared to 8 percent of Asians, 10 percent of whites, and 35 percent of Hispanics. If Harvard admitted students based on their academic qualifications alone, Harvard would be 43 percent Asian, 38.4 percent white, 0.7 percent black, and 2.4 percent Hispanic, according to a 2013 study by Harvard's Office of Institutional Research. Instead, Harvard's undergraduates in 2013 were 43.2 percent white, 18.7 percent Asian, 10.5 percent black, and 9.5 percent Hispanic.

Asians' extracurricular accomplishments were just as lop-sided, and they receive better recommendations from alumni interviewers than other groups. Yet whites are admitted at higher rates than Asians in every academic tier, and blacks and Hispanics are admitted at much higher rates than Asians. According to SFFA's expert witness, Duke economist Peter Arcidiacono, an Asian male applicant from a middle-class family with a 25 percent chance of admission would have a 36 percent chance of admission if he were white, a 77 percent chance if he were Hispanic, and a 95 percent chance if he were African-American.

Students for Fair Admissions attributed these imbalances to Harvard's monkeying with the most subjective, opaque element of its admissions criteria: the personal rating. Besides the academic rating, Harvard scores its applicants on a six-point personal rating, a six-point athletics rating, and a six-point extracurricular one. Harvard's admissions officers testified at trial that the personal rating entails such judgments as an applicant's "likability," "integrity," "helpfulness," "courage," and "kindness." An admissions officer may ask himself if an applicant is "a good person" or has strong "human qualities." Harvard's website uses even more condescending language towards its desperate seventeen-year-old supplicants. "What choices have you made for yourself?" the admissions committee will ask about student suitors. "What about your maturity, character, leadership, self-confidence, warmth of personality, sense of humor, energy, concern for others, and grace under pressure?" How Harvard's administrators and faculty would measure up under these probing questions was left unexplored.

Asian applicants receive lower personal ratings than whites with otherwise similar rankings on the other three scales. To analyze these disparities more precisely, SFFA divided Harvard's applicants over six years into ten academic deciles; each decile

contained the same number of members—a tenth of all applicants—but the racial composition of each decile varied enormously. Blacks get higher personal ratings than everyone else, no matter their academic or extracurricular qualifications. Blacks in the seventh (i.e., third lowest) academic decile—meaning that 60 percent of applicants have better academic qualifications—have more than double the chance of receiving the two top personal ratings—one or two—than Asians in the top academic decile.

The battle over the significance of the personal rating in explaining Harvard's admissions outcomes was the locus of the trial's thorniest statistical wrangling. Arcidiacono created several complicated statistical models to show what Harvard's admissions outcomes would look like absent impermissible racial balancing. Those models excluded applicants' personal ratings because, SFFA argued, those ratings were influenced by applicants' race. They should be excluded, therefore, from a statistical model showing what admissions outcomes would look like without illegitimate racial considerations. SFFA was determined to keep the personal rating out of its models because without it, the disparity between white and Asian admission rates becomes statistically significant, with whites admitted at a higher rate than Asians despite possessing similar or inferior qualifications. With the personal rating included in the models, that disparity becomes statistically insignificant.

Harvard argued that the personal rating belonged in the admissions models, because it was not influenced by race. As a fallback position, the school engaged in the tortured semantic hair-splitting that characterizes racial preference jurisprudence. Race per se does not influence the personal rating, the college maintained, but a student's experience *based on race* might.

Harvard's core contention—that the personal rating is a race-neutral, unbiased assessment of applicants' character—put the university in an awkward position. It was implicitly arguing that Asians really are less likable. Yet Harvard's personnel denied this proposition on the stand. The judge, too, felt compelled to distance herself from this inference. "The Court firmly believes that Asian Americans are not inherently less personable than any other demographic group," Burroughs wrote. If Asians are not "actually weaker in personal criteria," in Burroughs's words, how to explain their lower

personal ratings? Neither Harvard nor Burroughs resolved this question. Instead, Burroughs fell back on the fact that she found no credible evidence that Harvard bore overt racial animus against Asians, invoking admissions officers' strenuous assertions during the trial that they would never intentionally discriminate against Asians or anyone else.

This personal ratings debate ultimately proved a sideshow. But it did provide one of the more hilarious instances of Harvard's hypocrisy, in a trial filled with such hypocrisy. SFFA had suggested that perhaps Harvard was implicitly (i.e., unconsciously) biased against Asians, whatever its conscious intent. Harvard professed to be outraged at such a suggestion. SFFA "makes the extraordinary suggestion that Harvard must prove it 'has uniquely escaped [the] infiltration' of societal prejudice," Harvard wrote in its final brief. To invoke the specter of implicit bias simply demonstrates that SFFA lacks all evidence for bias, the righteous defendant sniffed.

Harvard's contempt for the implicit bias concept was rich, to say the least. Harvard hosts the Project Implicit website, which offers free computer tests of the test-taker's implicit biases against people of color and other allegedly disfavored groups. One of the two developers of that test, known as the Implicit Association Test, Mahzarin Banaji, is a professor of social ethics in Harvard's psychology department; Banaji consults with corporations and governments around the country, teaching them how to overcome their employees' deep-seated prejudices. In every other context, Harvard embraces the idea animating Project Implicit: that nearly all members of our bigoted society are infected by unconscious bias. Faced on the stand with such an accusation itself, however, the college declares the concept ludicrous.

SFFA's emphasis on the insulting personal rating gap made for good PR. Even racial preference defenders like *The New York Times* struggled to come up with a politically correct explanation for the gap. SFFA argued that Harvard's alleged anti-Asian prejudice was a modern-day version of Harvard's anti-Jewish prejudice in the first half of the twentieth century. Even back then the school's resulting pro-WASP admissions quotas hid themselves under the guise of "holistic review." But SFFA's effort to turn Harvard's anti-Asian penalty into a matter of racial animus mistakes the radically different admissions

game being played today. Harvard *must* limit Asian enrollment to make room for so-called "underrepresented minorities." The presence or absence of any anti-Asian stereotyping on Harvard's part is irrelevant. It could deem Asians the most personable students in the country and still be compelled to put a ceiling on their admissions if it wants to achieve "diversity." Invoking alleged personal animus is a more easily grasped story line, but it masks the ineluctable arithmetic that drives contemporary admissions policy.

Surprisingly, Burroughs adopted Arcidiacono's statistical model with the personal rating excluded, despite clearing Harvard of the charge of intentional bias against Asians. It didn't matter. And the two reasons why it didn't matter suggest both the possible flaw in SFFA's litigation strategy and the ultimate futility of any litigation under the Supreme Court's current case law. In a key finding, Burroughs noted that the disparity in the personal ratings, even if unwarranted, "did not burden Asian American applicants significantly more than Harvard's race-conscious policies burdened white applicants." This was glaringly true. SFFA had chosen to heavily build its case on the disparity in white-Asian admission rates. But that disparity paled in significance compared to the massive boost awarded blacks: Harvard's pro-black preference vis-à-vis whites was ten times as large as any anti-Asian penalty vis-à-vis whites. And the Supreme Court has repeatedly upheld pro-black preferences of Harvard's magnitude.

In a second key finding, Burroughs exposed the quaint irrelevance of the fierce personal rating battle. That battle was waged over whether the personal ratings were influenced by racial considerations. But whether they were or not, it ultimately didn't matter because both parties admitted that the final rating Harvard assigned to candidates—the one that conclusively determined admission decisions—*was* influenced by race, and that Harvard was perfectly within its rights under existing precedent to inject race into that final rating. As Burroughs wrote: The "Court finds it unnecessary to delve further into the overall rating disparity because it is the odds of admission, not an apparent disparity in the odds of receiving a high overall rating, that is primarily at issue, and Harvard acknowledges and intends that race may be factored into the overall rating."

As a practical matter, if Harvard were banned from any impermissible stacking of the personal rating deck, it would undoubtedly compensate by awarding an even greater preference to blacks to guarantee its desired admissions outcome. So the whole personal rating kerfuffle was a legal dead end.

Though SFFA hoped to win on the novel Asian v. white issue, it included more traditional arguments and data about Harvard's black- and Hispanic-favoring preferences. It was in addressing those arguments that Burroughs exposed the logical bankruptcy and empirical bad faith of the Supreme Court's preference jurisprudence, since she herself rebutted the key planks of that jurisprudence without realizing she was doing so.

Burroughs's conclusions of law dutifully regurgitated the requisite doctrinal bromides:

> 1. "Harvard does not have a quota for students from any racial group"; it does not engage in racial balancing.
> 2." Race has no specified value in the admissions process and is never viewed as a negative attribute."
> 3. "Minimum goals for minority enrollment . . . [without a] specific number firmly in mind" is not "the functional equivalent of a quota."
> 4. Harvard engages in "individualized review" of each applicant right up to the very last stage of the admissions process.
> 5. Race is never the "defining feature" of applications. It is just a "plus" or "tip."
> 6. "Harvard's admissions policy does not result in underqualified students being admitted in the name of diversity."

None of this was true, as Burroughs's opinion itself made clear. Harvard obsessively monitors race throughout every stage of its admissions process. The racial breakdown of the applicant pool is projected on a screen during every meeting of the admissions subcommittees and the full committee. The Admissions Dean and his close subordinates regularly read aloud from a "one-pager" that tracks the evolving racial status of the pool, to make sure that the Committee is meeting its "*goals* for minority enrollment" (in Burroughs's words, quoting *Grutter*; emphasis in original). At the last stage of the admissions process, Harvard prepares a "lop list" itemizing the race, gender, athletic

potential, legacy status, and financial-aid needs of the finalists, and the committee begins lopping off contestants until it whittles the class down to desired size and racial proportions.

Burroughs acknowledges these facts, which establish that Harvard is racially balancing and that it discards anything remotely approaching "individualized review" in the final stages of the admissions process (if not before). Yet she concluded the opposite.

As for Burroughs's claim that race is but a slight plus or tip and never the defining feature of an application, she contradicts those assertions as well. In fact, by Harvard's own calculations, race is the "determinative tip," she writes, for more than half of the admitted African Americans, who "would most likely not be admitted in the absence of Harvard's race-conscious admissions process." (For the trial, Harvard had calculated that the current 14 percent black share of its student body would drop to 6 percent without racial preferences.)

This particular bit of doctrinal lore—that race is just the slightest of factors in the admissions process—creates yet another conundrum for universities. They forecast a cataclysmic decline in diversity if racial preferences were banned. Without racial preferences, Burroughs writes, "racial diversity at Harvard would likely decline so precipitously that Harvard would be unable to offer students the diverse environment that it reasonably finds necessary to its mission." Yet the schools also have to argue that something so pivotal to the racial composition of their class is at the same time a negligible feature of the admissions process. Both positions cannot be true.

It is also not the case that race is just a positive and never a negative. Burroughs walks back that claim through empty qualifiers. Yes, she admits, Asians may face a "relative burden" (whatever that means). Yes, race-conscious admissions "will always penalize to some extent groups that are not being advantaged in the process." Not to worry, however. Preferences do not "unduly" harm members of any racial group; moreover, it is "not clear" that the burden is "disproportionate." Burroughs fails to lay out any test for

what a "disproportionate" or "undue burden" would look like. She does not have to, since it is a foregone conclusion that any "burden" needed to engineer racial balance is by definition "due" and "proportionate."

The most shameless tautology in preference dogma, however, is the claim that all students admitted via racial preferences are "highly qualified." Harvard's current admissions policy "does not result in underqualified students being admitted in the name of diversity," Burroughs states in her factual findings. Harvard's position in the case directly rebutted this claim. SFFA had argued that the university could achieve comparable levels of diversity without racial classifications. It called as witness the Century Foundation's Richard Kahlenberg, who proposed several alternative admissions schemes, including eliminating consideration of SAT scores and placing more emphasis on students' economic status. Harvard and Burroughs rejected all of Kahlenberg's proposals, because they would lower the academic caliber of the class. But the gap between Harvard's current academic profile and what would result under Kahlenberg's schemes was far smaller than the existing gap between Asian and white admits, on the one hand, and black admits, on the other. Under Kahlenberg's models, the average freshman academic index (which takes into account high school grades and SAT I and SAT II scores) would drop from 227.8 to 225.9, a reduction of 1.9 or 0.83 percent. Harvard and Burroughs considered that drop intolerable. Yet Harvard's black students have an academic index of 221.5—6.3 points or 2.7 percent below the average. In Burroughs's words, a reduction of 0.83 percent in the academic index would "require Harvard to sacrifice the academic strength of its class," but Harvard has already proved its willingness to sacrifice such strength in its admissions of black students on average. How blacks can be deemed "highly qualified" or even just "not underqualified" if their academic qualifications, writ large, would destroy Harvard's academic profile was a puzzle that went unremarked upon by all parties.

Harvard invoked a parade of horribles that would ensue if racial preferences were ever held illegal. "If that day ever comes," the university warned ominously in its final brief, the court would "send the message—and create the reality—that America's universities are no longer its cradles of opportunity and its beacons of social mobility." Except that Harvard doesn't much care about serving as a cradle of opportunity and beacon of social

mobility. Not only does it reject any increased enrollment of lower income students, it prefers wealthy blacks over poor blacks. At the dawn of the racial preference era, in the late 1960s, Harvard really did seek out lower-income blacks. They performed so poorly that Harvard soon shifted its focus to middle income and wealthy blacks. Currently, Harvard's preference for well-to-do blacks compared to well-to-do whites is much larger than the preference it awards poor blacks compared to poor whites. Being black is worth far more than being poor in Harvard's admission schemes. Preferring students of low socioeconomic status, as Kahlenberg had advocated, would net many more of those pesky Asians and whites than blacks, since poor white students on average greatly outperform middle- and upper-class black students.

Burroughs's peroration reveals the political assumptions that drove her reasoning. Though she had kept the specter of racism offstage, by the end of her opinion, she could contain herself no longer. Justice Sandra Day O'Connor had speculated in 2003 that preferences would no longer be needed in twenty-five years. That prognosis may have been optimistic, Burroughs notes, since it failed to take into account the ongoing effects of "entrenched racism and unequal opportunity." There is no evidence in the record regarding "entrenched racism," but it is apparently so uncontroversial a fact that Burroughs feels entitled to take judicial notice of it. Burroughs could find no illegal discrimination against Asians at Harvard, despite powerful statistical evidence to the contrary, but she just knew that American racism is entrenched.

Far from discriminating against blacks, however, every mainstream institution in the country is twisting itself into knots to hire and promote as many underrepresented minorities as possible, awarding them hiring advantages easily as large as college admissions preferences. Philanthropists across the political spectrum, elected officials, and government bureaucrats obsess about black uplift; taxpayers have funded trillions of dollars in government programs to engineer social and economic equality. Anti-racism has become a national religion, supported by an industry dedicated to ginning up examples of white bigotry. Yet Burroughs knows that racism is so entrenched that, long after 2028, preferences will still be necessary.

Her convictions about American bigotry also compel her to part ways with the "wise and esteemed" Toni Morrison, in Burroughs's words. "Race is the least reliable information you can have about someone. It's real information, but it tells you next to nothing," Burroughs quotes Morrison as saying. This actually wise observation, if acted on, would dismantle the entire diversity edifice, since that edifice is premised on racial essentialism. Black students routinely gripe about being looked to in class for the "black view" on civil rights, current affairs, and history, among other things. But providing the black view is precisely why they have been admitted, absent competitive qualifications, in a diversity regime. Students cannot demand admission in the name of their unique and racially determined point of view and complain when they are asked to represent that view.

Burroughs rejects Morrison's insight because whites are so benighted in their racial attitudes. "Although this [i.e., Morrison's statement] has been said, it must become accepted and understood before we close the curtain on race conscious admissions policies," she writes. Who, exactly, is not understanding the unreliability of race as a predictor of character and world view? The millions of Americans who long to be post-racial but are not allowed to be by the academic-corporate-media diversity machine that harangues them incessantly about the monumental importance of racial identity? And how is a judge to determine when Morrison's statement has "become accepted and understood"? Such a judgment lies completely outside judicial competence.

Burroughs believes that only the racially engineered "rich diversity at Harvard and other colleges" will allow white Americans to gain the "tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete." Students admitted to that utopian realm crafted by the seers and sages in college admissions offices will lead the country in knowing and understanding "one another beyond race, as whole individuals with unique histories and experiences. It is this, at Harvard and elsewhere, that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not the fact that tells us what is important, but we are not there yet." How, again, does Burroughs know that we are "not there yet?" She is deciding cases based on a set of assumptions that have not been aired in her courtroom. And the idea that Harvard or any other college stresses interpersonal understanding that goes "beyond race" is ludicrous. Nearly every college in the country cultivates racial separatism,

whether through race-based freshmen orientations, social clubs, dorms, graduation ceremonies, seminars and conferences on "white privilege," or racially designated diversity bureaucrats.

The biggest fiction of racial preference jurisprudence is that admitting students on the basis of race rather than academic qualifications "break[s] down racial stereotypes," a phrase endlessly regurgitated by judges and universities since first uttered by Justice O'Connor in *Grutter*. In fact, racial preferences either confirm whatever racial stereotypes students might bring with them to college or create those stereotypes in the first place. This truth, and the facts that lie behind it, should form a core part of SFFA's argument to the Supreme Court on appeal. Students admitted with academic qualifications far below those of their non-racially preferred peers struggle to keep up in classes whose instruction is pitched to a level of knowledge that they have not yet mastered. The so-called "beneficiaries" of racial preferences overwhelmingly end up at the bottom of the academic curve. They switch out of more demanding majors, above all in the STEM fields, or drop out of college entirely.

Ideally, college admissions would be purely meritocratic and objective, selecting students on the basis of academic qualifications alone.

The effect of this academic mismatch is best demonstrated in law schools, since they have objective class rankings based, in the first year at least, on blind grading. Every minimally selective law school employs maximal racial preferences. At the end of the first year of legal education, 51 percent of black students in a large nationwide sample were in the bottom tenth of their class, compared to 5 percent of white students, according to an analysis by the UCLA law professor Richard Sander. Two-thirds of black students were in the bottom fifth of their class. Only 45 percent of black law graduates passed the bar on their first try, compared to 80 percent of whites. Many failed to pass the bar at all after six attempts. Such results, readily observable by students but banned from public acknowledgment, are not a way to break down racial stereotypes.

They are a way, however, to stoke the academic grievance industry. A Harvard committee on diversity, hastily cobbled together after SFFA filed its suit, warned that any diminution in Harvard's ability to employ racial preferences would exacerbate the "ongoing feelings of isolation and alienation among racial minorities in Harvard's community." Those feelings of "isolation and alienation" are *created* by preferences that put racial minorities at a competitive disadvantage in the classroom. Awaiting those struggling students is an army of diversity bureaucrats to tell them that their discomfort is the result of Harvard's racism. Students and diversocrats then jointly agitate for more diversity admissions, diversity hires, anti-bias training, and such academic racial redoubts as ethnic studies. Upon graduation, these preference "beneficiaries" take their predilection for seeing bigotry where none exists into the world at large, where they inject grievance politics into the media, big business, and government.

In its appeal to the Supreme Court, SFFA should point out that artificially engineered diversity results in more segregation, not less. It should challenge the empirically dubious connection between diversity and education. It should decry a system that penalizes in students the very qualities that a university should most value: a passion for academic accomplishment. Ideally, college admissions would be purely meritocratic and objective, selecting students on the basis of academic qualifications alone. Not only is that the fairest, most transparent system, but it would have the added advantage of putting out of business those legions of admissions bureaucrats who view themselves as artistes crafting an ideal community and whose self-righteous power now determines the very shape of American childhood.

Finally, SFFA should broach the painful truth: racial preferences paper over the vast academic skills gap by catapulting minority students into academic environments for which they are unprepared. By allowing the country to turn its attention away from that skills gap, colleges are retarding the cause of racial progress, not advancing it.

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OPINION | UPWARD MOBILITY

Harvard's Asian Quotas Repeat an Ugly History

Jews, long disfavored by elite universities, might find Judge Burroughs's reasoning familiar.

By Jason L. Riley

Oct. 8, 2019 7:06 pm ET

A view of Harvard Memorial church in Cambridge, Mass, Aug. 28. PHOTO: KAYANA SZYMCZAK FOR THE WALL STREET JOURNAL

A popular college ditty during the 1910s began:

Oh, Harvard's run by millionaires,

And Yale is run by booze,

Cornell is run by farmers' sons,

Columbia's run by Jews.

If you thought that sort of bigotry at elite universities was a thing of the past, you might want to reconsider in light of a federal district court ruling last week on Harvard's admissions policies. It seems the only thing that's changed over the past century is the group being targeted for exclusion.

In 1914 about 40% of Columbia's students were Jewish. By 1918 effective quotas had reduced their numbers to 22%. In the 1920s Harvard and Yale would follow Columbia's lead. Harvard's freshman class of 1925 was nearly 30% Jewish. The next year it fell to 15% and remained thereabouts for the next two decades.

Today's concern is the overrepresentation of Asian students on elite campuses and the sneaky ways that colleges go about capping their numbers. In 2014 Students for Fair Admissions, a nonprofit, sued Harvard, alleging that the school had passed over Asians for admission because of their race. The plaintiffs presented data showing that Asian applicants needed SAT scores that were about 140 points higher than their white peers to be accepted. And they argued that the percentage of Asians admitted to Harvard was suspiciously similar year after year despite dramatic increases in the number of Asian applicants and the size of America's Asian population.

Asian enrollment at Harvard was 19% in 1992, 18% in 2013, and in the interim always remained roughly between 15% and 20%. By contrast, Asian enrollment at another highly selective school, the California Institute of Technology, grew steadily from 25% to 43% over the same two-decade period. The plaintiffs argued that the disparity in Asian enrollment at the two institutions reflected the fact that Harvard's admissions process is race-conscious while Caltech's is race-blind.

It's bad enough that Judge Allison Burroughs's decision last week ignored this evidence and blessed Harvard's admissions policies. What's equally disturbing is that she also ignored the history. Harvard boasts that it vets applicants using a "holistic" approach that weighs social characteristics as well as test scores. What often goes unmentioned is that Harvard and other schools developed this approach a century ago for the express purpose of excluding Jews.

Back then, Harvard argued that Jews were excellent students with deficient personalities. Their social characteristics were described as "different" and "peculiar." They were accused of being clannish and focusing on their studies to a fault. Harvard maintained that it was trying to create a certain type of environment on campus, and Jews were a poor fit. "No one suggested the Jewish students threatened academic standards," wrote Stephen Steinberg in a 1971 Commentary magazine article about Jewish quotas in the Ivy League. "Rather it was argued that the college stood for other things, and that social standards were as important and valid as intellectual ones." Harvard is still making that argument, and the courts are still indulging it.

In her ruling, Judge Burroughs writes that a "partial cause" of racial disparities in admissions rates is that "Asian American applicants' disproportionate strength in academics comes at the expense of other skills and traits that Harvard values." She says it's "possible" that the Asian applicants "did not possess the personal qualities that Harvard is looking for at the same rate as white applicants." Moreover, "it would be unsurprising to find that applicants that excel in one area, tend to be somewhat weaker in other areas." To Jews, such language and reasoning might sound painfully familiar. And if a judge today wrote that blacks or Hispanics excel at sports and

have outgoing personalities, so it would be really surprising if they flourished academically as well, liberals would be calling for his head.

Harvard is a private school but receives federal funding. That makes it subject to the Civil Rights Act of 1964, which outlaws racial discrimination. Supreme Court rulings dating to the 1970s ban "racial balancing" and racial quotas in college admissions. But the court also has said schools may use an applicant's race as a "plus factor" so long as it isn't the determining one. The upshot is that colleges find endless ways to discriminate racially without being too obvious about it. And we get rulings like Judge Burroughs's, which pretends there are "no quotas" in place at Harvard while acknowledging that the school "uses the racial makeup of admitted students to help determine how many students it should admit overall."

Students for Fair Admissions says it will appeal the ruling all the way to the Supreme Court if necessary. Until the justices resolve the matter, expect more of the same admissions-office antics and convoluted lower-court decisions. Do we want preferences for favored groups, or equal treatment of individuals? We can't have both.

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The New York Times

That Affirmative Action Ruling Was Good. Its Rationale, Terrible.

In this legalistic world, sometimes how you win is as important as winning itself.

By Melissa Murray
Ms. Murray is a professor of law at New York University.

Oct. 2, 2019

On Tuesday, a federal judge, Allison D. Burroughs, upheld Harvard's use of race-conscious admissions in a legal challenge from Students for Fair Admissions, which claims the school was unfairly denying Asian-American students in favor of less qualified candidates in violation of the Civil Rights Act. As soon as the lawsuit made news, it set off a host of broader debates about elite institutions, inequality, intra-racial and interracial divisions and the value of meritocracy itself.

While the ruling will surely be appealed, the judge came to the correct conclusion, faithfully applying the Supreme Court's well-established standards on including race in admissions decisions. Though not final, the ruling is a victory for both the rule of law and evermore endangered affirmative action policies.

So why do I feel uneasy? Because how you win is as important as winning itself.

The court's decision focused on diversity as the sole grounds on which the use of race in admissions may be justified. As Judge Burroughs noted in her ruling, diversity-centered admissions policies can "enhance the education of students of all races and backgrounds, to prepare them to assume leadership roles in the increasingly pluralistic society into which they will graduate," "broaden the perspectives of teachers" and "expand the reach of the curriculum and the range of scholarly interests."

Her words echo the standard refrains that have been deployed to defend affirmative action since Justice Lewis Powell's opinion in University of California v. Bakke (1978). Justice Powell famously extolled the virtues of the "Harvard Plan," which recognized that a "farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer." The problem, of course, is that thinking about diversity in terms of what beneficiaries might contribute makes the benefits of affirmative action contingent and conditional — worthy only because its beneficiaries serve the broader needs of institutions and those who are assumed to belong.

The jurisprudence on which the Students for Fair Admissions v. Harvard opinion was based also insists that race-conscious admissions come with an expiration date: Justice Sandra Day O'Connor, the deciding vote in 2003's Grutter v. Bollinger ruling upholding affirmative action, wrote that "25 years from now, the use of racial preferences will no longer be necessary." Just 16 years later, such a forecast seems naïve — especially in light of recent academic and journalistic work that has detailed the persistent way that racial wealth gaps and implicit and explicit discrimination limit opportunity. Still, Judge Burroughs elided these realities, writing that "the benefits that flow from that diversity will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete."

The decision — and the logic on which it depends — is far removed from the remedial rationales that first animated affirmative action policies. When affirmative action was introduced in the 1960s by virtue of a series of executive orders, it was widely understood as a measure designed to correct the historic underrepresentation of minorities in federal employment and contracting. By the 1970s, when affirmative action had migrated to higher education, the remedial case was even more explicit, from state schools to Ivy League schools like Harvard.

And critically, the interest in correcting underrepresentation was not limited by an artificial, desperately-hoped-for deadline. Those who fought for affirmative action expected institutions to maintain policies that ensured continued representation of those who had long been excluded. But at least in the courts, these convictions have been largely jettisoned.

In the meantime, economists have found more than 40 percent of white students accepted to Harvard from 2009 to 2014 are classified as "ALDC" — athletes, legacies, "dean's list" (donors' kids) or the children of faculty members — a generally affluent, white demographic. The prioritization of these students is a larger distortion of the admissions process (and diversity goals) than the inclusion of race as one of many evaluative factors.

Students for Fair Admissions v. Harvard may wend its way to the Supreme Court, where Neil Gorsuch and Brett Kavanaugh would have their first opportunity to stake out their positions on the issue as justices. If so, the diversity rationale will once again be the foundational defense upon which affirmative action rests.

In that regard, Students for Fair Admissions v. Harvard has been a disappointment so far. By giving a full-throated endorsement of diversity as the primary rationale, the decision backed down from other urgent implications. It could have engaged more deeply and directly with the question of whether affirmative action is now merely a tool to promote pluralism or remains an appropriate remedy for longtime systemic, state-sanctioned oppression.

It was an opportunity to more frankly interrogate the perversity of challenging policies designed to remedy exclusion of minorities by pitting these groups against one another. And perhaps most important, it was a chance to question whether our defense of affirmative action should hinge entirely on a vision of inclusion in which all future changes must benefit everyone — even as we compensate for past offenses that were strictly visited upon a few.

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