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# What Constitutes Fair Treatment of Asian American Applicants?

*Jishian Ravinthiran*

Abstract

Today's challengers of affirmative action in university admissions allege that these policies discriminate against Asian Americans. However, this focus detracts from a more just and effective locus of intervention: admissions disparities between white and Asian American applicants. Notably, defenders of affirmative action err when they reject claims of discrimination against Asian Americans by pointing to differences in facially neutral characteristics between white and Asian American applicants to explain away these admissions disparities. They fail to recognize how these differences in facially neutral factors between white and Asian American applicants result from legacies of racial injustice.

To avoid this error, this Article draws on anti-subordination and sociological literature to posit that identifying unfair treatment against Asian American applicants is fundamentally a normative issue. The question of whether the admissions disparities between white and Asian American applicants evince discrimination will never be settled without grappling with which facially neutral criteria can fairly and legitimately explain these disparities. An inquiry into the fairness of facially neutral criteria must consider how such criteria build on the subordination of Asian Americans. To concretize this inquiry, this Article uses the analyses and data from *SFFA v. Harvard* to examine the fairness of certain facially neutral criteria that contribute to admissions disparities between white and Asian American applicants, criteria that scholars have neglected to consider. These admissions factors are parental occupation, declared career interests, and additional preferences for legacy applicants. This Article then seeks to invigorate a public conversation about the complex considerations that undergird labeling admissions criteria unfair. It concludes by suggesting possible reforms to admissions schemes based on how these public deliberations may unfold.

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## About the Author

Jishian Ravinthiran is a graduate from Yale Law School, J.D. 2021 and McGill University, M.Sc. 2018, B.Sc. 2016. He is deeply grateful for the guidance of Professor Monica C. Bell, whose kind and rigorous feedback was critical to the evolution of this piece. He also thanks Jessica Zou, and Professors Issa Kohler-Hausmann, Amy Kapczynski, and Yuvraj Joshi for their helpful comments. Special thanks to the editors of the *Asian Pacific American Law Journal*, particularly Goldie Shen and Seth Wacks, for their time and labor in helping produce this piece. Lastly, the author wishes to thank Laith Aqel, Shiv Rawal, and Kyla Eastling for their endless support.

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## Introduction

Students for Fair Admissions' (SFFA) lawsuit[1] against Harvard University is one of the latest initiatives seeking to invalidate a university's use of race in its admissions program, this time with a novel twist: allegedly, Harvard's admissions program discriminates against Asian American[2] applicants.[3] The district court issued a decision in favor of Harvard,[4] which was affirmed by the First Circuit.[5] However, the newly composed Supreme Court is poised to end affirmative action in university admissions across the nation.

Scholars have depicted SFFA's claim that affirmative action discriminates against Asian American applicants as a pretext to accomplish conservatives' true goal of ending affirmative action in higher education.[6] However, the lawsuit brings to the fore a longstanding concern that selective admissions programs are unfair to Asian American applicants. Even so, ending affirmative action will not remedy unfairness against Asian Americans. As scholars have underscored, other facets of admissions schemes will

1. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard*), 397 F. Supp. 3d 126 (D. Mass. 2019); Jay Casplan Kang, *Where Does Affirmative Action Leave Asian Americans?*, N.Y.T. Mag. (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html [https://perma.cc/8848-B7DN] [hereinafter Kang, *Where Does Affirmative Action Leave Asian Americans?*].

2. The racial category, Asian, is a consequence of a centuries-long process that racialized the identities of people originating from countries on the Asian continent for legal purposes, such as immigration. *See* Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. Irvine L. Rev. 947, 952–56 (2013). The term "Asian American" evolved out of the experiences of discrimination against those within the Asian race. *See id.* at 956–59. Though this Article focuses on addressing the unfair treatment of Asian American applicants, I note that Pacific Islanders face distinct challenges in higher education and contend with disparate legacies of injustice, including continued colonization, that deserve unique attention. *See e.g., Advocacy*, Empowering Pacific Islander Communities, https://www.empoweredpi.org/advocacy (detailing educational disparities faced by Pacific Islanders); Nicholas Wu, *Ivy League Admissions: A Red Herring for AAPI Groups*, Data Bits (Aug. 17, 2018), http://aapidata.com/blog/wu-ivy-league-admissions/ (discussing differential community college completion rates for Chinese Americans compared to Native Hawaiians and Pacific Islanders); Kyla Eastling, Mothering on Guam: Applying a Reproductive Justice Framework to the Reproductive Lives of CHamoru Women 19–58 (May 26, 2020) (unpublished Supervised Analytical Writing, Yale Law School) (on file with author) (examining how the historical and continued subjugation of Guam shapes the reproductive realities of CHamoru women); Li Zhou, *The Inadequacy of the term "Asian American,"* Vox (May 5, 2021, 10:10 AM), https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks (describing the origin of and issues with the term "Asian American and Pacific Islander" (AAPI) and unique challenges faced by Pacific Islanders).

3. *See* Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1.

4. *SFFA,* 397 F. Supp. 3d at 203–04.

5. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 204 (1st Cir. 2020).

6. *See, e.g.*, Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate,* 64 UCLA L. Rev. Discourse 90, 91–92 (2016).

continue to disproportionately privilege white applicants compared to Asian Americans and other minority groups.[7]

Defenders of affirmative action seeking to dismiss the allegations against Harvard point to statistical evidence that facially neutral criteria justify the admissions disparities between Asian American and white applicants. Through this uncritical use of statistics, defenders of affirmative action fall into a trap. They affirm a legal theory of discrimination that obfuscates how racial injustice causes Asian American and white applicants to differ in even facially neutral characteristics.[8] The issue of which facially neutral criteria can fairly be used to explain admissions disparities must be addressed, or the longstanding controversy regarding the admissions of Asian American applicants (the Asian American Admissions Controversy) will never cease. This is because opposing parties looking at identical evidence of admissions disparities can disagree about which facially neutral criteria can legitimately be used to explain away such disparities.[9]

To date, we only have a superficial understanding of the facially neutral admissions criteria that suppress the acceptance rate of Asian American applicants relative to white applicants. The reason: universities have historically guarded the operation of their admissions programs from public scrutiny,[10] and this lack of knowledge hampers the public's ability to collectively engage with difficult questions concerning the fairness of any particular criterion for admission. Thus, the data disclosures in *SFFA v. Harvard* and the related statistical analyses are vital. They provide a unique opportunity to start a conversation about less conspicuous facially neutral admissions criteria that induce admissions disparities between Asian American and white applicants.

This Article proceeds in three parts to move us closer to redressing the unfair treatment of Asian American applicants. Part I contextualizes the Asian American Admissions Controversy and underscores why a proper understanding of this controversy focuses on identifying the unfair treatment of Asian American applicants compared to white applicants. It then draws on anti-subordination and sociological scholarship to advance a method of identifying unfair treatment that derives from facially neutral conduct. Part II uses the data from *SFFA v. Harvard* to demonstrate how admissions disparities are sustained by heretofore neglected criteria: the consideration of parental occupation, use of declared career interests, and procedures granting additional preferences for legacy applicants. Critically, this Part uncovers how each criterion is tied to the unjust sociohistorical treatment of Asian

7. *See infra* notes 124–127 and accompanying text.

8. *See infra* note 276 and accompanying text.

9. Andrew Gelman, Daniel E. Ho, Sharad Goel, *What Statistics Can't Tell Us in the Fight over Affirmative Action at Harvard*, Bos. Rev. (Jan. 14, 2019), https://bostonreview.net/articles/andrew-gelman-sharad-goel-daniel-e-ho-affirmative-action-isnt-problem [https://perma.cc/Y9RQ-M447].

10. *See* Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* 3, 3 n.4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26316, 2019).

Americans. Part III concludes by advocating that we reinvigorate the public conversation about the Asian American Admissions Controversy to democratically engage with the complex, fraught project of determining fair metrics for selective admissions with respect to Asian American applicants. Based on how these conversations might unfold, Part III details possible reforms that admissions offices can adopt to address the unfairness of certain criteria. This approach stands in stark contrast to the legal initiatives that SFFA or other organizations in the future may undertake, which are ill-suited for promoting fairness in selective admissions. Ultimately, I seek to clarify the Asian American community's concerns about selective admissions without furthering the elimination of affirmative action policies that benefit groups with their own legacies of subordination in the United States.

## I. Situating Asian Americans' Claims of Discrimination in Higher Education

This Part situates the contemporary controversy over Asian American admissions in its historical context. It then demonstrates why a proper understanding of the controversy must focus on unfair admissions practices that sustain disparities between Asian Americans and whites instead of affirmative action for underrepresented minorities. Because opponents of affirmative action allege that the use of race in admissions programs unlawfully discriminates against Asian Americans, Subpart A describes the legality of considering race in selective admissions. Subpart B traces the evolution of Asian Americans' claims of unfairness in higher education admissions from past to present. Subpart C discusses the theoretical concept of negative action to explain why addressing admissions disparities between whites and Asian Americans is more logical than curtailing admissions policies assisting underrepresented minorities. More importantly, this Subpart reformulates the concept's functional definition to more accurately identify unfair treatment of Asian American applicants.

### A. *The Legality of Affirmative Action in Higher Education*

The Court's first decision regarding affirmative action in university admissions was *Regents of University of California v. Bakke* in 1978.[11] In a plurality opinion, Justice Powell struck down a separate admissions program for racial minorities to a public university's medical school while sustaining the use of race in admissions.[12] Justice Powell approved of only one state interest that could justify the use of race: the educational benefits derived from a diverse student body.[13] He explained that diversity encompasses a wide array of characteristics of which race or ethnicity is just one factor.[14] Simultaneously, he authorized some consideration of numbers with respect

11. 438 U.S. 265 (1978).
12. *Id.* at 271–72.
13. *Id.* at 311–12.
14. *Id.* at 314, 317–18.

to racial diversity by using Harvard's admissions program, which did not use inflexible quotas, as an exemplar.[15]

In the 2003 decisions of *Grutter v. Bollinger*[16] and *Gratz v. Bollinger*,[17] a majority of the Supreme Court affirmed that attaining a diverse student body is a compelling state interest.[18] The Court held that the use of race as simply a plus factor in the individualized, holistic review of applicants is sufficiently narrowly tailored,[19] though the automatic allocation of points based on race is not.[20] The Court noted that an institution is afforded some measure of deference in finding that diversity is critical to its educational mission.[21] Further, universities must consider workable race-neutral alternatives for achieving diversity prior to adopting affirmative action policies in their admissions programs.[22] These policies must be limited in time or subject to periodic reviews to determine when they can be terminated.[23]

In *Fisher v. University of Texas (Fisher I)*,[24] the Court reversed a decision by the Fifth Circuit that deference to universities applied not only to the university's articulation of diversity as a compelling interest, but also to the determination of whether its admissions practices were narrowly tailored.[25] Upon remand, the Fifth Circuit once again decided in the university's favor, but this time, the Supreme Court in *Fisher v. University of Texas (Fisher II)*[26] affirmed the Fifth Circuit's decision.[27] The Court held that the university had articulated its compelling interest in diversity with sufficient specificity,[28] and it concretized how universities may satisfy the requirement to provide a "reasoned, principled explanation" for pursuing this interest.[29] The Court also rejected each of the posited race-neutral alternatives.[30] It held that the institution bore an ongoing obligation to analyze its data and ensure that "race plays no greater role than necessary to meet its compelling interest."[31] *Fisher II* is the most recent clarification from the Court as to how universities may consider race in their admissions programs.

15. *Id.* at 316–317, 321–24; *see* also Yuvraj Joshi, *Racial Indirection*, 52 UC Davis L. Rev. 2495, 2515 (2019).
16. 539 U.S. 306 (2003).
17. 539 U.S. 244 (2003).
18. *See Grutter*, 539 U.S. at 325, 328-29; *Gratz*, 539 U.S. at 275.
19. *See Grutter*, 539 U.S. at 334.
20. *See Gratz*, 539 U.S. at 270.
21. *See Grutter*, 539 U.S. at 328.
22. *Id.* at 339–40.
23. *Id.* at 341–42.
24. 570 U.S. 297 (2013).
25. *See id.* at 310–15. This lawsuit was brought under the auspices of conservative activist, Edward Blum, who also coordinated the latest lawsuit against Harvard. *See* Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1.
26. 136 S. Ct. 2198 (2016).
27. *See id.* at 2207.
28. *Id.* at 2211.
29. *Id.*
30. *Id.* at 2213–14.
31. *Id.* at 2210.

### B. *The Evolution of Claims of Unfairness in Selective Admissions*

Claims of unfairness against Asian American applicants originated in the 1980s.[32] They largely focused on different admission rates between white and Asian American applicants and "ceilings" on Asian American enrollment.[33] In that decade, Asian Americans organized to directly pressure universities to admit their biases against Asian American applicants and reform their policies.[34] Some community members supplemented their organizing efforts with investigations and hearings from state institutions.[35] However, by the end of the 1980s, conservatives had successfully changed the terms of the public debate by suggesting that affirmative action policies were the culprit for inequities with respect to Asian American applicants.[36] From the 1990s to the present, the types of remedies requested for alleged discrimination against Asian American applicants have varied.[37] Some advocates targeted affirmative action exclusively, while others sought to safeguard underrepresented minorities' prospects for admission as well.[38] Still others challenged athlete and legacy preferences.[39] Since 1990, activists have increasingly turned to the courts and federal investigations to validate claims that affirmative action programs disadvantage Asian Americans.[40] Anti-affirmative action activists

32. *See* Dana Takagi, The Retreat From Race: Asian American Admissions and Racial Politics 23 (1992) [hereinafter Takagi, The Retreat From Race]; *see also infra* notes 51–69 and accompanying text.

33. *See* Takagi, The Retreat From Race, *supra* note 32, at 23; *see also infra* notes 51–69 and accompanying text.

34. *See* Takagi, The Retreat From Race, *supra* note 32, at 25–42; *see also infra* notes 51–63 and accompanying text.

35. *See* Takagi, The Retreat From Race, *supra* note 32, at 89–97; *see also infra* notes 64–69 and accompanying text.

36. *See* Takagi, The Retreat From Race, *supra* note 32, at 121–122; *see also infra* notes 75–80 and accompanying text.

37. *See e.g.,* Selena Dong, Note, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev 1027, 1033 (1995); Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 393 n.5 (2008) [hereinafter Liu, *Affirmative Action & Negative Action*]; *130+ Asian American Organizations Filed Civil-Rights-Violation Complaint against Yale University, Brown University & Dartmouth College*, AACE (May 23, 2016) http://asianamericanforeducation.org/en/pr_20160523 [https://perma.cc/QJE9-BTH3] (last visited May 21, 2020); *see also infra* notes 81–115 and accompanying text.

38. *Compare 130+ Asian American Organizations Filed Civil-Rights-Violation Complaint against Yale University, Brown University & Dartmouth College*, AACE (May 23, 2016) http://asianamericanforeducation.org/en/pr_20160523 [https://perma.cc/QJE9-BTH3] (last visited May 21, 2020) *with* Dong, *supra* note 37, at 1033; *see also infra* notes 85–95 and accompanying text.

39. *See* Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 393 n.5 (2008) [hereinafter Liu, *Affirmative Action & Negative Action*]; *see also infra* notes 94–95 and accompanying text.

40. *See e.g,* Petition for Writ of Certiorari, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 142 S.Ct. 895 (No. 20-1199) (*petition for cert. granted* Jan. 24, 2022); *130+ Asian American Organizations Filed Civil-Rights-Violation*

are now on the verge of victory, as the Supreme Court will decide whether such policies penalize Asian American applicants.[41]

1. The Admissions Controversies of the 1980s

Factors implicated in the Asian American Admissions Controversy can be traced back to U.S. immigration reforms in the 1960s, which resulted in an influx of highly educated migrants from Asian countries.[42] As these immigrants' children began applying to universities, Asian American enrollment at selective institutions rapidly increased in the 1980s,[43] setting the stage for the first wave of admissions controversies to rock the country. Professor Dana Takagi has provided a comprehensive account of how events unfolded at five universities when Asian Americans alleged unfair suppression of their admission rates: Harvard,[44] Princeton,[45] Stanford,[46] Brown,[47] and the University of California at Berkeley (UC Berkeley)[48] had virtually identical data showing whites were admitted at higher rates than Asian Americans.[49] Only the latter three universities acknowledged unfairness to Asian American applicants.[50]

In 1983, members of the Asian American student group at Harvard raised concerns with the university administration about the falling admission rate of Asian American applicants.[51] After growing pressure and national media scrutiny of the issue at several institutions,[52] in 1988, Harvard officials explained away admission disparities between white and Asian American applicants by referring to Asian Americans' weaker evaluations on

*Complaint against Yale University, Brown University & Dartmouth College*, AACE (May 23, 2016) http://asianamericanforeducation.org/en/pr_20160523 [https://perma.cc/QJE9-BTH3] (last visited May 21, 2020); *see also infra* notes 87, 90–95, 96–100, 103–107 and accompanying text.

41. *See* Ian Millhiser, *The Supreme Court Will Hear Two Cases That Are Likely to End Affirmative Action*, Vox (Jan. 24, 2022, 9:32 AM), https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard [https://perma.cc/T9RZ-J4GZ]; *See* Ayyan Zubair, *Brown's Lost Promise: New York City Specialized High Schools as a Case Study in the Illusory Support for Class-Based Affirmative Action*, 11 Cal. L. Rev. Online 557, 566 (2021).

42. *See* Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Policies at the University of California*, 15 Asian Am. L.J. 129, 134 (2008).

43. *Id.* ("[B]etween 1976 and 1986, the proportion of Asian Americans in freshman classes grew from 3.6% to 12.8% at Harvard, from 5.3% to 20.6% at Massachusetts Institute of Technology, from 5.7% to 14.7% at Stanford, and from 16.9% to 27.8% at Berkeley.").

44. *See* Dana Y. Takagi, *From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy*, 37 Soc. Probs. 578, 578 (1990) [hereinafter Takagi, *From Discrimination to Affirmative Action*].

45. *See* Takagi, The Retreat From Race, *supra* note 32, at 67.

46. *See* Takagi, *From Discrimination to Affirmative Action*, *supra* note 44, at 584.

47. *Id.* at 580.

48. *Id.* at 581.

49. *Id.* at 580–81

50. *See* Takagi, The Retreat From Race, *supra* note 32, at 65–70, 96–97.

51. *Id.* at 32–33.

52. *Id.* at 49.

extracurricular criteria and underrepresentation among children of alumni and varsity athletes.[53] Similar events unfolded at Princeton in 1985: after Asian American students raised such concerns with faculty, Princeton officials responded almost identically.[54] These responses sharply contrasted with the concessions by Stanford in 1986 after an Asian American student brought similar concerns to the administration's attention.[55] There, a university subcommittee stated that it found no factor it considered could completely explain the admissions disparity,[56] and that unconscious bias in rating personality traits may have harmed Asian American applicants.[57]

At Brown, Asian American students working in the admissions office detected admissions disparities by 1983 and organized to change their school's practices.[58] Brown officials initially rationalized the depressed admission rates among Asian American applicants as resulting from (1) the fact that Asian American applicants disproportionately chose pre-med majors, (2) financial constraints in the areas of interest of Asian American applicants, (3) overrepresentation of Asian Americans among the applicant pool, and (4) an ever-increasing number of applicants generally, which required more stringent admissions criteria.[59] The Asian American Students' Association (AASA), however, claimed that Asian American applicants were as academically qualified as whites, and thus disparate admission rates between the two groups must have arisen from the admissions office's subjective review of applicants' interviews.[60] In 1984, a university committee rejected the notion that there were too many Asian American pre-med applicants after conducting an investigation, further validating AASA's concerns.[61] The committee conceded that differential admission rates between whites and Asian Americans and the biases of some admissions officers were serious problems.[62] The committee also found that Brown's enrollment goals, which were predicated on the previous year's figures, stagnated the racial diversity of each admitted class, thus disadvantaging Asian Americans whose applicant group had been rapidly increasing[63] in light of the immigration reforms of the 1960s.

The struggle to elicit a concession of bias from Berkeley was more protracted. An Asian American Studies faculty member detected a significant drop in Asian American enrollment from 1983 to 1984 and raised the issue with lawyers, judges, academics, and community leaders in the Bay Area.[64]

53. *Id.* at 70.
54. *Id.* at 41, 67–68, 107.
55. *Id.* at 39.
56. *Id.* at 39–40.
57. *Id.* at 40.
58. *Id.* at 27–29.
59. *Id.* at 28.
60. *Id.* at 37.
61. *Id.* at 64–65.
62. *Id.*
63. *See* Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 Yale L.J. 659, 669 (1989).
64. *See* Takagi, The Retreat From Race, *supra* note 32, at 25, 33.

This group of individuals eventually became the prominent Asian American Task Force on University Admissions (the Task Force).[65] The Task Force critiqued the imposition of a minimum SAT verbal score and the introduction of a two-tier system of admission that began using supplemental criteria in addition to academic measures, both of which disadvantaged Asian American applicants.[66] The president of the University of California system defended the institution against claims of discrimination by underscoring the overrepresentation of Asian Americans relative to their population in the state. He argued that this deprived other underrepresented minority applicants of critical spots.[67] In light of the administration's resistance, the Task Force successfully lobbied the state legislature and the Regents of the University of California to investigate and hold hearings on the issue in 1987 and 1988.[68] Subsequently, the Chancellor of Berkeley issued apologies in 1988 and 1989 to the Asian American community for Berkeley's handling of the claims and its policies.[69]

2. Convergence with Opposition to Affirmative Action in 1989

By 1989, there was a crucial shift in the discourse regarding the Asian American Admissions Controversy,[70] as conservatives linked the issue to their stance against affirmative action in hiring and admissions. Historically, backlash to affirmative action programs emerged almost as soon as they had been created, though it did not always have a partisan valence. Anti-affirmative action sentiments grew strong by 1969, as the Nixon Administration implemented such programs with government construction contractors.[71] By 1971, affirmative action policies had become so contentious that the Administration condemned their use in university admissions, despite its history of implementing affirmative action programs with federal contractors.[72] In its early years, the Reagan Administration did not support calls from senators to end these policies in government programs because of internal divisions on the issue.[73] By 1983, those differences were apparently resolved as the Administration challenged an affirmative action policy for promoting police officers in Detroit.[74]

65. *Id.*
66. *Id.* at 35–37, 45, 47, 73.
67. *Id.* at 53.
68. *Id.* at 85, 89, 92, 95, 96.
69. *Id.* at 96, 123–25, 127–28.
70. *Id.* at 121, 133.
71. *See* William A. Gamson & Andre Modigliani, *The Changing Culture of Affirmative Action*, *in* Equal Employment Opportunity: Labor Market Discrimination and Public Policy 373, 373–74 (Paul Burstein ed., 1994).
72. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 111 Harv. L. Rev. 1470, 1524–1526 (2004) [hereinafter Siegel, *Equality Talk*].
73. *See* Gamson & Modigliani, *supra* note 71, at 375.
74. *Id.*

In late 1988, the Reagan Administration inserted Asian Americans into its discourse against affirmative action in higher education. Assistant Attorney General William B. Reynolds, head of the Civil Rights Division of the Department of Justice, stated, "[T]he phenomenon of a 'ceiling' on Asian Americans admissions is the inevitable result of the 'floor' that has been built for a variety of other favored racial groups."[75] Conservatives accepted that Asian Americans were being discriminated against, but also exploited university officials' explanation that pursuing diversity resulted in admissions disparities for Asian American applicants.[76] This provided conservatives with the opportunity to suggest that affirmative action was the culprit for unfair admissions practices against Asian Americans.[77] In 1989, Republican Congressmen Dana Rohrabacher introduced a resolution that condemned the alleged use of quotas in higher education and encouraged universities to investigate discrimination against Asian American applicants.[78] The resolution sparked renewed public debate on Asian American admissions and was a turning point in how the media reported on the issue, as stories increasingly alleged that affirmative action policies caused discrimination against Asian Americans.[79] Importantly, both university officials and Asian American community leaders were frustrated with conservatives' success in shifting public discourse to the validity of affirmative action.[80]

3. Claims of Unfairness in Selective Admissions from the 1990s to the Present

Multiple events since the 1990s further solidified the emerging notion that affirmative action in admissions programs was unfair to Asian American applicants. In 1990, the Office of Civil Rights (OCR) of the Department of Education completed an investigation of possible discrimination against Asian American applicants at UCLA and Harvard.[81] Due to the convergence of claims of unfairness against Asian American applicants in selective admissions with opposition to affirmative action, OCR expanded its review to the universities' affirmative action programs.[82] OCR subsequently cleared Harvard of the allegations because the admissions disparities could be explained by athlete and legacy preferences.[83] In contrast, OCR found that UCLA violated Title VI of the Civil Rights Act because there were no athlete

75. Takagi, The Retreat From Race, *supra* note 32, at 102, 104–05.
76. *Id.* at 118.
77. *Id.*
78. *Id.* at 121, 133–36.
79. *Id.* at 121.
80. *Id.* at 141.
81. *Id.* at 164. Notably, no individual had filed a specific complaint, but OCR had commenced this review because of the media's scrutiny of the issue. *Id.* at 102.
82. *Id.* at 162. However, it does not appear that the OCR officials ultimately challenged the affirmative action programs. *See id.* at 166 ("According to OCR, although all applicants qualify for consideration under affirmative action, as a general rule Asian Americans did not benefit from the program.").
83. *Id.* at 164.

or legacy preferences that could justify its graduate admissions disparities between white and Asian American applicants.[84]

Controversy over Asian American admissions also blossomed in high schools in the early 1990s. At issue were admissions policies at the elite magnet school, Lowell High School, in San Francisco. A desegregation order from 1983 effectively capped Chinese American enrollment at the school and split the community: one group, Chinese for Affirmative Action, supported the cap to achieve desegregation, whereas the Chinese American Democratic Club criticized the policies as unduly burdening Chinese Americans.[85] The Club lobbied for separate admission pools, one of which would preserve special consideration for Black and Hispanic students while the other would maintain race-blind admissions, even while the Club opposed the cap.[86] To challenge the desegregation plan, the Club established the prominent Asian American Legal Foundation (AALF) to spearhead a lawsuit in 1994 against the school district.[87]

In 1995, a year after AALF sued Lowell High School, opponents of affirmative action wielded data on admissions disparities affecting Asian American medical school applicants to convince the Regents of the University of California to ban the use of race in admissions, hiring, and contracting.[88] This portrayal of Asian Americans as victims of affirmative action likely furthered the first successful statewide referendum in California to ban affirmative action policies in public hiring, contracting, and education in 1996.[89]

In the early 2000s, AALF was the only Asian American group to oppose universities' affirmative action policies before the nation's highest court.[90] In the 2003 decisions *Grutter* and *Gratz*, AALF filed the only amicus brief by an Asian American group advocating against affirmative action, citing its lawsuit against the school district containing Lowell High School to buttress its concerns about affirmative action policies.[91] AALF was opposed by a number of other Asian American groups.[92] Three years later, allegations of unfairness in selective admissions against Asian American applicants once again caught

84. *Id.*

85. *See* Dong, *supra* note 37, at 1030–1033, 1032 n.21.

86. *Id.* at 1033.

87. *See* Kelsey Inouye, Note, *Asian American: Identity and the Stance on Affirmative Action*, 23 Asian Am. L.J. 145, 157 (2016) (citing Caitlin M. Liu, *Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Policy.* 5 Asian Am. L.J. 341, 343 (1998)); *see also* Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 Asian Am. L.J. 57, 59–61 (2007); Claire Jean Kim, *Are Asians the New Blacks? Affirmative Action, Anti-Blackness, and the 'Sociometry' of Race*, 15 Du Bois Rev. 217, 239 n.4 (2018).

88. *See* Michael Omi & Dana Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 Representations 155, 156 (1996).

89. *See* Lee, *supra* note 42, at 145.

90. *Id.* at 146–147.

91. *Id.*

92. *Id.* at 146–148.

national attention.[93] Jian Li, an applicant rejected by Princeton, filed a civil rights complaint with OCR alleging that Princeton's admissions program discriminated against Asian American applicants.[94] Specifically, he challenged the university's affirmative action policies and the institution's legacy and athlete preferences.[95]

The next decade, however, can be characterized by significant mobilization among Asian American groups to dismantle affirmative action. In 2013, AALF again filed an amicus brief claiming that affirmative action policies harmed Asian American applicants in *Fisher I*, and again, many other Asian American groups opposed them.[96] Concurring in *Fisher I*, Justice Thomas explicitly suggested that the admissions program discriminated against Asian American applicants, indicating these claims were finally receiving greater attention from the Court's conservatives.[97] After the failure of *Fisher I*, Edward Blum, the conservative activist who spearheaded the litigation, believed it would be more prudent to challenge a university's use of race with

93. *See* Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 392 (2008) [hereinafter Liu, *Affirmative Action & Negative Action*].

94. *Id.* at 392–93.

95. *See id.* at 393 n.5; Daniel Golden, *Is Admissions Bar Higher for Asians at Elite Schools?*, Wall St. J. (Nov. 11, 2006, 12:01 AM), https://www.wsj.com/articles/SB116321461412620634 [https://perma.cc/NH5A-DQA8] ("His complaint seeks to suspend federal financial assistance to Princeton until the university discontinues discrimination against Asian-Americans in all forms by eliminating race preferences, legacy preferences, and athlete preferences."). The investigation concluded nine years later in September 2015, clearing Princeton of discriminatory conduct. *See* Letter from Timothy C.J. Blanchard, United States Department of Education Office of Civil Rights, Region II, to Dr. Christopher L. Eisgruber, President, Princeton University (Sept. 9, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02086002-a.pdf [https://perma.cc/42VF-XLDN]. It is important to note that Jian Li was not the only Asian American to file civil rights complaints against selective institution alleging discrimination against Asian American applicants. For example, in August 2011, OCR received another complaint against Princeton from the parents of a rejected Indian American applicant alleging that the applicant had been discriminated against. *Id.* at 2 n.1. Subsequently, the parents withdrew the individual complaint but maintained that Princeton had discriminated against the entire Class of 2015 on the basis of race and national origin, an allegation that OCR rejected. *Id.* It is unclear whether other civil rights complaints alleging unfairness against Asian American applicants also gained national attention, or if complaints had been filed against other institutions, as suggested by certain media outlets. *See* Daniel de Vise, *Student Claims Harvard, Princeton Discriminate Against Asian-Americans*, Wash. Post (Feb. 2, 2012), https://www.washingtonpost.com/blogs/college-inc/post/student-claims-harvard-princeton-discriminate-against-asian-americans/2012/02/02/gIQAkIZYkQ_blog.html [https://perma.cc/FFF3-UBMV]; Letter form Alice Wender, Director, District of Columbia Office, Department of Education Office of Civil Rights, to Dr. Holden Thorp, Chancellor, University of North Carolina (Nov. 27, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html [https://perma.cc/E3KG-PWKB].

96. Kim, *supra* note 87, at 233–34; Emily S. Zia, Note, *What Side Are We On? A Call to Arms to the Asian American Community*, 23 Asian Am. L.J. 169, 180 (2016).

97. *See* Fisher v. University of Texas at Austin (*Fisher I*), 570 U.S. 297, 331 (Thomas, J. concurring); Kim, *supra* note 87, at 234.

Asian American claimaints.[98] This led Blum to establish SFFA, which filed suit against Harvard in November 2014 on behalf of Asian American plaintiffs.[99] SFFA also filed suit against the University of North Carolina at Chapel Hill (UNC-Chapel Hill) claiming that its use of race in admissions violated the Equal Protection Clause and the Civil Rights Act, thereby harming both white and Asian American applicants.[100]

That year, events on the opposite coast would help galvanize a movement against affirmative action within the Asian American community. California state senators had sought to end the state's ban on affirmative action in public programs, but a segment of the Chinese American community mobilized to block the proposed legislation, fearing that reauthorizing affirmative action would depress their children's enrollment at the state's universities.[101] This helped drive the formation of the Asian American Coalition for Education (AACE) in 2014.[102] AACE filed a civil rights complaint against Harvard with the Departments of Education and Justice on May 15, 2015, challenging the university's affirmative action program and alleging discrimination against Asian American applicants.[103] The complaint was dismissed in light of SFFA's lawsuit.[104]

A year later, in *Fisher II*, AACE, claiming to represent 117 affiliated Asian American organizations, and AALF filed an amicus brief seeking an end to affirmative action policies in admissions programs.[105] A dissent, written by Justice Alito and joined by Chief Justice Roberts and Justice Thomas, directly cited AALF's brief, validating the notion that these policies victimized Asian American applicants.[106] AACE also filed a civil rights complaint

98. *See* Sam Sanders, *New Affirmative Action Cases Say Policies Hurt Asian-Americans*, NPR: Code Switch (Nov. 20, 2014, 6:28 PM), https://www.npr.org/sections/codeswitch/2014/11/20/365547463/new-affirmative-action-cases-say-policies-hurt-asian-americans [https://perma.cc/X97C-NS7S]. While Edward Blum was working with Abigail Fisher on her lawsuit against the University of Texas at Austin, he had a conversation with Michael Wang about his rejection from various selective institutions. *See* Hua Hsu, *The Rise and Fall of Affirmative Action*, New Yorker (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/JC4W-C4DX].

99. *See* Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1.

100. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14CV954, 2019 WL 4773908, at *4–5 (M.D.N.C. Sept. 30, 2019).

101. *See* Kim, *supra* note 87, at 218 (describing the role of "conservative, affluent, first generation Chinese Americans" in defeating the amendment); *see also* Zia, *supra* note 96, at 183–85.

102. *See* Hsu, *supra* note 98 (describing how opposition to SCA-5 helped drive Yukong Zhao to found AACE).

103. *Timeline of Asian American Coalition's Complaint against Harvard*, AACE (Aug. 4, 2015), http://asianamericanforeducation.org/en/harvard-complaint-timeline [https://perma.cc/C2XB-PNZW].

104. *Id.*

105. Zia, *supra* note 96, at 180; Brief for the Asian American Legal Foundation & the Asian American Coalition for Education et al. as Amicus Curiae Supporting Petitioner, Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S.Ct. 2198 (2016) (No. 14–981).

106. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S.Ct. 2198, 2227–29 (2016)

against Yale, Brown, and Dartmouth with the Departments of Education and Justice in 2016, alleging that these institutions discriminated against Asian American applicants and demanding an end to their affirmative action policies.[107] Surveys of the Asian American community from this period indicate that the emergent opposition to affirmative action had precipitated a rapidly growing divide on the issue.[108] Slight differences in framing questions resulted in extremely divergent results, with some polls indicating that upwards of sixty percent of the Asian American community favored affirmative action whereas other polls suggested support was as low as thirty-six percent.[109] Chinese American support for affirmative action fell sharply between 2012 and 2016, a time period that coincides with efforts by segments of the Chinese American community to protest the reintroduction of affirmative action in California public programs.[110] In particular, the online platform, WeChat, seemed to play a unique role in fueling and spreading anti-affirmative action sentiments among recent immigrants from China.[111] In 2017, the Trump Administration began acting on claims that affirmative action in admissions programs burdened Asian Americans. The Department of Justice confirmed that it was investigating Harvard based on the allegations in SFFA's lawsuit that year, and in 2018, both the Departments of Justice and Education began investigating AACE's similar allegations against Yale.[112]

More recently, there have been a flurry of legal developments that suggest affirmative action in university admissions is about to be outlawed nationwide. In a victory for affirmative action proponents, the district court decided *SFFA v. Harvard* in Harvard's favor in October 2019,[113] which the First Circuit

(Alito, J. dissenting); Cynthia Chiu, Note, *Justice Or Just Us:* SFFA v. Harvard *and Asian Americans in Affirmative Action*, 92 S. Cal. L. Rev. 441, 444 (2019); Kim, *supra* note 87, at 233–34. Notably, the majority opinion cited the Asian American Legal Defense Fund's rejection of claims that the University of Texas discriminated against Asian American applicants. *See Fisher II*, 136 S.Ct. at 2207; Kim, *supra* note 87, at 234.

107. *See 130+ Asian American Organizations Filed Civil-Rights-Violation Complaint against Yale University, Brown University & Dartmouth College*, AACE (May 23, 2016) http://asianamericanforeducation.org/en/pr_20160523 [https://perma.cc/QJE9-BTH3] (last visited May 21, 2020).

108. *See* Karthick Ramakrishnan & Janelle Wong, *Survey Roundup: Asian American Attitudes on Affirmative Action*, Data Bits (June 18, 2018), http://aapidata.com/blog/asianam-affirmative-action-surveys [https://perma.cc/MD2U-UZZR].

109. *See* Janelle Wong, Jennifer Lee, & Van Tran, *Asian Americans' Attitudes Toward Affirmative Action: Framing Matters*, Data Bits (Oct. 1, 2018), http://aapidata.com/blog/aa-attitudes-affirmative-action [https://perma.cc/M7BZ-NJSU].

110. *See* Ramakrishnan & Wong, *supra* note 108 (indicating that support for affirmative action among Chinese Americans fell from 78% to 41% in this time frame).

111. *See* Alia Wong, *The App at the Heart of the Movement to End Affirmative Action*, Atlantic (Nov. 20, 2018), https://www.theatlantic.com/education/archive/2018/11/asian-americans-wechat-war-affirmative-action/576328 [https://perma.cc/WVN4-75RS].

112. *See* Katie Benner & Erica L. Green, *U.S. Investigating Yale Over Complaint of Bias Against Asian-American Applicants*, N.Y. Times (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html [https://perma.cc/3ZJX-6ZKD].

113. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.

affirmed.[114] Just before the First Circuit's decision, Trump's Department of Justice sued Yale for allegedly discriminating against both Asian American and white applicants after concluding its investigation of the university, which had been triggered by AACE's allegations from 2016.[115] Though the Biden Administration voluntarily dropped the lawsuit,[116] SFFA subsequently sued Yale based on the Department of Justice's investigation.[117] On February 25, 2021, SFFA appealed the First Circuit's decision upholding Harvard's admissions scheme to the Supreme Court, asking it to formally overrule *Grutter* and find that Harvard illegally penalizes Asian American applicants.[118] After losing its case against UNC-Chapel Hill,[119] SFFA also appealed the district court's decision directly to the Supreme Court, which agreed to hear SFFA's challenges to the affirmative action policies at both universities on January 24, 2022.[120] Three justices who remain on the Court endorsed the view that

(Harvard Corp.), 397 F. Supp. 3d. 126, 201–04 (D. Mass. 2019). I also briefly note that in 2019, Asian American organizations (including AACE) sued Mayor Bill De Blasio and the Chancellor of the New York City Department of Education for changes to a facially neutral program that would increase admission of disadvantaged students to highly competitive, specialized schools in the city. *See* Zubair, *supra* note 41, at 559–62; Complaint at 4, Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253 (S.D.N.Y. 209) (No. 18 Civ. 11657). This is a significant development, highlighting that Asian American organizations at the core of opposing affirmative action policies in university admissions have also set their sights on dismantling facially neutral programs that benefit underrepresented minorities.

114. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 204 (1st Cir. 2020).

115. *See Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions*, Dep't. of Just. Off. of Pub. Aff. (Oct. 8, 2020), https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate [https://perma.cc/U6EQ-7HTF]; Letter from Eric S. Dreiband, Assistant Attorney General, Department of Justice Civil Rights Division, to Peter S. Spivack, Partner, Hogan Lovells US LLP (Aug. 13, 2020), https://www.justice.gov/opa/press-release/file/1304591/download [https://perma.cc/L3GE-BK4G].

116. *See* Notice of Voluntary Dismissal, U.S. v. Yale Univ., No: 3:20-cv-01534-CSH (D. Conn. Feb. 3, 2021).

117. Complaint, Students for Fair Admissions, Inc., v. Yale Univ., No. 3:21-cv-00241 (D. Conn. Feb. 21, 2020).

118. Petition for Writ of Certiorari, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 142 S.Ct. 895 (No. 20-1199) (*petition for cert. granted* Jan. 24, 2022).

119. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14CV954 (M.D.N.C. Oct. 18, 2021) (No. 21-707). It is briefly worth mentioning that SFFA had sued UT Austin in 2020 for its affirmative action policies, even after its initial loss in *SFFA v. Harvard*. *See* Complaint, Students for Fair Admissions, Inc., v. Univ. of Tex. at Austin, No. 1:20-cv-763 (W.D. Tex. July 20, 2020). However, the district court there rejected the lawsuit on the basis of res judicata, in light of the *Fisher* cases. *See* Students for Fair Admissions, Inc., v. Univ. of Tex. at Austin, No. 1:20-CV-763-RP (W.D. Tex. July 26, 2020).

120. Petition for a Writ of Certiorari Before Judgment, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S.Ct. 895 (No. 20-1199) (*petition for cert. granted* Jan. 24, 2022); Amy Howe, *Court Will Hear Challenges to Affirmative Action at Harvard and University of North Carolina*, SCOTUSblog (Jan. 24, 2022, 11:44 AM), https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina [https://

affirmative action discriminates against Asian American applicants in *Fisher II*.[121] It is all but certain that they will unite with three new hardline conservative justices to overturn an equity-serving admissions practice that has been repeatedly affirmed for nearly half a century.[122]

In conclusion, there have been clear trends in claims of unfairness that Asian Americans have leveled against universities. Initially, Asian Americans organized directly against universities to address the phenomenon of ceilings on Asian American enrollment, and they did not challenge programs benefiting underrepresented minorities. However, by the end of the 1980s, conservatives successfully shifted the terms of the debate by asserting that affirmative action programs harmed Asian American applicants. Since then, activists have increasingly used federal investigations and the courts to claim that these programs are detrimental to Asian American applicants. This past decade, in particular, rising opposition to affirmative action within segments of the Asian American community has coincided with more effective mobilization by conservative activists to nullify these policies.

### C. *Discerning Negative Action*

Because conservatives began to exploit Asian Americans' claims of unfairness in admissions in their efforts to dismantle affirmative action programs, scholars have used the theoretical concept of "negative action" to re-center the issue of disparate admissions treatment and rates between whites and Asian Americans.[123] Professor Jerry Kang developed the concept of negative action in 1996, defining the term as "unfavorable treatment based on race, using the treatment of [w]hites as a basis for comparison."[124] Functionally, this refers to when "a university denies admission to an Asian American who would have been admitted had the person been [w]hite," while "keep[ing] every characteristic of the applicant constant except for race."[125] The concept of negative action has become a predominant frame through which to analyze the Asian American Admissions Controversy.[126]

perma.cc/4UTG-GDGD].

121. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S.Ct. 2198, 2227–29 (2016) (Alito, J. dissenting).

122. *See* Millhiser, *supra* note 41, Zubair, *supra* note 41.

123. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3 (1996) [hereinafter Kang, *Negative Action Against Asian Americans*].

124. *Id.* (responding to Dworkin's defense of affirmative action, explaining that their conception would authorize the mistreatment of Asian Americans).

125. *Id.* at 3, 3 n.8.

126. *See*, *e.g.*, Robert Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that Is America*, 23 Hastings Const. L.Q. 1115, 1127 (1996) [hereinafter Chang, *Reverse Racism!*]; Gabriel J. Chin, Sumi Choi, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA Asian Pac. Am. L.J. 129, 159 (1996); Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 Cal. L. Rev. 707, 724 (2019); Shawn Ho, *A Critique of the Motivations Behind Negative Action Against Asian Americans in U.S. Universities: The Model Victim*, 5 Colum. J. Race & L. 79 (2015); Liu, *Affirmative Action &*

It helps clarify that even if affirmative action for underrepresented minorities were eliminated, the advantages bestowed upon whites vis-à-vis Asian American applicants would continue to curtail the admission of Asian Americans.[127] Scholars suggest these advantages for white applicants relative to Asian American applicants arise from a variety of mechanisms, including the conscious imposition of ceilings on Asian Americans,[128] the evaluation of whiteness as a plus factor in holistic admissions relative to Asian American identity,[129] the stereotyping of Asian American applicants,[130] and the use of

*Negative Action*, *supra* note 93, at 416–24; William Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 60–66 (2000) [hereinafter Kidder, *Situating Asian Pacific Americans*]; Michele S. Moses, Daryl J. Maeda, & Christina H. Paguyo, *Racial Politics, Resentment, and Affirmative Action: Asian Americans as "Model" College Applicants*, 90 J. Higher Educ. 1, 5, 15–21 (2019); Julie J. Park & Amy Liu, *Interest Convergence or Divergence?: A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. Higher Educ. 36, 39–40, 45–46 (2014); OiYan A. Poon, *Haunted by Negative Action: Asian Americans, Admissions, and Race in the "Color-Blind Era,"* 18 Asian Am. Pol'y Rev. 81, 81, 84–85 (2009); Frank Wu, *Are Asian Americans Now White*, 23 Asian Am. L.J. 201, 206–07 (2016); Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. Rev. Discourse 590, 597–99 (2017); Chiu, *supra* note 106, at 444.

127. *See* Chin, Choi, Kang & Wu, *supra* note 126, at 159; Feingold, *supra* note 126, at 724, 729; Wu, *supra* note 126, at 206–07; West-Faulcon, *supra* note 126, at 589–99. *But see* Chan Hee Chu, Note, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 Asian Am. L.J. 99, 133 (2016) (describing that negative action and affirmative action necessarily share a common connection in furthering parity with the overall population); Note, *The Harvard Plan that Failed Asian Americans*, 131 Harv. L. Rev. 604, 616–19 (2017) (contesting that "[i]f diversity derives meaning from proportionality, negative action against overrepresented groups is the flipside of affirmative action for underrepresented minorities."). I disagree with these pieces' conclusions that negative action is necessarily linked to affirmative action. In Part II, I will show that facially neutral criteria, divorced from the use of race, help sustain admissions disparities between Asian Americans and whites. Further, an influential piece by Professor Mari Matsuda suggests that possible links between affirmative action and negative action derive from a university's desire to maintain its predominantly white character. *See* Mari J. Matsuda, *We Will Not Be Used: Are Asian Americans the Racial Bourgeoisie?*, *in* Where is Your Body? And Other Essays on Race, Gender, and the Law 153–54 (1996) ("When university administrators have hidden quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we cannot let in all those Asian overachievers and maintain affirmative action for other minority groups."). Thus, universities' desire to retain its white character should be our collective target as a community, not invalidating affirmative action policies for underrepresented minorities. This Article contributes to that goal by seeking to address the unfair treatment of Asian American applicants relative to whites. Further, it is possible to address this perverse institutional interest by pressuring university administrators to recognize that, in pursuing the educational benefits of diversity, the intra-racial diversity of the Asian American community matters, and administrators must redress the phenomenon by which certain diverse characteristics are treated as more valuable in white applicants than Asian American applicants. *See* Chiu, *supra* note 106, at 479–83.

128. *See* Chin, Choi, Kang, & Wu, *supra* note 126, at 159–60; Chiu, *supra* note 106, at 444; Ho, *supra* note 126, at 84.

129. *See* Chang, *Reverse Racism!*, *supra* note 126, at 1127.

130. *See* West-Faulcon, *supra* note 126, at 599.

facially neutral criteria with racially disparate effects[131] such as preferences for legacy applicants who are disproportionately white.[132]

Empirical data and attendant analyses underscore the notion that invalidating affirmative action in admissions programs is inappropriate and that the Asian American community's focus should instead be negative action. Professor William Kidder has debunked claims that eliminating affirmative action most benefits Asian Americans.[133] He has critiqued scholars who have failed to consider concurrent demographic trends that explain increasing Asian American enrollment at institutions where affirmative action has been banned.[134] Further, he has pinpointed that certain claims that Asian Americans would benefit most from bans on affirmative action derive from flawed statistical techniques that simultaneously eliminate the role of affirmative action (preferences for underrepresented minorities) and negative action (the penalty imposed on Asian Americans vis-à-vis whites).[135] Thus, Kidder concludes that whites gain the most from the elimination of affirmative action.[136] Because many more slots go to whites than underrepresented minorities, it is likely that a strong Asian American applicant lost their spot, not to an applicant belonging to an underrepresented minority, but to a white applicant.[137] His work also underscores the illogic of seeking the invalidation of affirmative action policies. Basic arithmetic demonstrates that affirmative action in university admissions does not appreciably affect the collective admission rate for individual applicants, because underrepresented minorities receiving a tip in admissions processes constitute a small portion of the broader applicant pool.[138]

SFFA's own expert, Professor Peter Arcidiacono, also demonstrates the sheer magnitude of preferences that disproportionately benefit white applicants, which further supports attending to negative action as opposed to affirmative action.[139] Harvard provides tips—boosts in its undergraduate admissions programs—to ALDC applicants: recruited Athletes, Legacies

131. *See* Feingold, *supra* note 126, at 724–26.

132. *See* Chin, Choi, Kang, & Wu, *supra* note 126, at 159; Ho *supra* note 126, at 85.

133. *See generally* Kidder, *Situating Asian Pacific Americans, supra* note 126.

134. *See* Kidder, *Situating Asian Pacific Americans, supra* note 126, at 40–45.

135. *See id.*; William Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 611–17 (2006) [hereinafter Kidder, *Negative Action versus Affirmative Action*].

136. *See* Kidder, *Situating Asian Pacific Americans, supra* note 126, at 43–45; Kidder, *Negative Action Versus Affirmative Action*, *supra* note 135, at 616–17.

137. Kidder, *Negative Action Versus Affirmative Action*, *supra* note 135, at 615–16.

138. *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. R. 1045, 1052–54, 1078 (2002); s*ee also* Sherrick Hughes, Dana N. Thompsey Dorsey, & Juan F. Carrillo, *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 Educ. Pol'y 63, 80–83 (2016) (illustrating that the likelihood of admission for white and Asian rejected applicants would not be significantly affected by the elimination of affirmative action for Black and Hispanic applicants).

139. *See* Arcidiacono, Kinsler & Ransom, *supra* note 10, at 1.

(children of alumni), applicants on the Dean's or Director's Interest list,[140] and Children of faculty and staff .[141] While under 41% of Harvard's typical applicants (applicants not in these four categories) are white, "recruited athletes, legacies, and dean's list applicants are over 68% white."[142] The admission rate for white ALDC applicants is 43.55%, a striking contrast to the admission rate for typical white applicants (4.89%).[143] Over 43% of admitted white applicants are members of the ALDC categories, whereas no more than 16% of any other racial/ethnic minority group are members of the ALDC categories.[144] If white ALDC applicants were treated as typical white applicants, a mere 26% of these preferred candidates would have been admitted.[145] That is, approximately 32% of all admitted white applicants would not have been accepted without the ALDC preferences.[146]

The district court in *SFFA v. Harvard* stated that approximately 55% of African American and Hispanic applicants would have been admitted without the tip for race.[147] Assuming that the African American and Hispanic share of the admitted class was the highest recorded for those classes between the Class of 2010 and 2017, and further assuming that these groups are distinct (even though in reality they are not), their highest share of an admitted class would have been 23%.[148] Simple arithmetic shows that so long as the share of Harvard's admitted class that is white exceeds 35%, whites who benefit from ALDC preferences would outnumber the Black and Hispanic applicants who benefit from affirmative action.[149] This is certainly true given that Harvard's enrolled class is approximately 60% white, even accounting for different yield

140. Harvard's expert, Professor Card, explains that this list has "no particular criteria," but examples include "applicants that the Dean or Director have encountered at recruiting events, as well as applicants related to donors to Harvard or lineage applicants." Report of David Card ¶ 70, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB) [hereinafter Card Report].

141. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126, 138, 142 (D. Mass. 2019).

142. *See* Arcidiacono, Kinsler & Ransom, *supra* note 10, at 41 tbl.2.

143. *Id.* at 49 tbl.10.

144. *Id.* at 16, 42 tbl.3.

145. *Id.* at 29.

146. *See id.* at 49 tbl.10.

147. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126, 178 (D. Mass. 2019).

148. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 41, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB).

149. This calculation derives from the fact that 45% of Black and Hispanic admittees would not have been admitted without the tip for race and multiplying that by the highest potential total number of Black and Hispanic admittees (23%), which shows approximately 10% of Harvard's admitted class would not have been admitted without the use of race. In comparison, nearly one third of white applicants would not have been admitted without ALDC preferences. If white admittees constitute 35% of the admitted class, then around 11% of Harvard's admitted class would not have been accepted because of the ALDC tips for these white admittees.

rates between racial groups. This also suggests a large portion of Harvard's admitted class would not have been accepted without the ALDC preferences.[150] Therefore, even for those who refuse to acknowledge the equity concerns of banning affirmative action in maximizing Asian American admissions, addressing the unfavorable treatment of Asian American applicants compared to whites is a more productive goal than invalidating affirmative action programs.

Nevertheless, Kang's functional definition of negative action as when an Asian American would have been admitted had they been white, all other factors held constant, is limited. The exercise of imagining how a person would have been treated had their race been different at a certain time point is problematic given how race powerfully shapes the course of individuals' lives. Indeed, more recent scholarship on negative action is responsive to this issue, expanding the term's scope beyond Kang's original functional definition. The common thread in scholars' use of the term is a reference to unfair treatment of Asian Americans compared to white applicants,[151] comporting with Kang's overarching definition of negative action as "unfavorable treatment based on race, using the treatment of [w]hites as a basis for comparison."[152] Yet, Kang's functional definition of negative action—the phenomenon in which an Asian American would have been admitted had they been white, holding all other factors except for race constant—is difficult to reconcile with scholars' use of the term to describe facially neutral mechanisms producing admissions disparities. Kang's functional definition of negative action holds facially neutral factors constant between whites and Asian Americans, which leaves out consideration of how facially neutral criteria, such as legacy preferences, are in fact racially biased against Asian American applicants. Notably, scholars do not address this limitation of Kang's functional definition of the term.[153]

The benefits of focusing on identifying and eradicating negative action, particularly in forms concealed by facially neutral criteria, are supported by anti-subordination literature. Scholars of antidiscrimination jurisprudence have articulated the anti-subordination principle as a value that should, and sometimes does, undergird our nation's aspirations for equality. The principle centers disestablishing unjust hierarchies afflicting historically disadvantaged

150. David Freed & Idrees Kahloon, *Class of 2019 by the Numbers*, Harvard Crimson, https://features.thecrimson.com/2015/freshman-survey/makeup [https://perma.cc/TZ9Z-Z2AC].

151. *See, e.g.*, Chang, *Reverse Racism!*, *supra* note 126, at 1127; Chin, Choi, Kang, & Wu, *supra* note 126, at 159–60; Feingold, *supra* note 126, at 724–26; Ho, *supra* note 126, at 81–86; Liu, *Affirmative Action & Negative Action*, *supra* note 93, at 416–22; Kidder, *supra* note 126, at 60–66; West-Faulcon, *supra* note 126, at 598–99; Chiu, *supra* note 106, at 444.

152. Kang, *Negative Action Against Asian Americans*, *supra* note 123, at 3.

153. *See* Chin, Choi, Kang, & Wu, *supra* note 126, at 159; Feingold, *supra* note 126, at 724–26, 731, 734; Ho *supra* note 126, at 81–82, 85–86; West-Faulcon, *supra* note 126, at 598 n.26, 599*; see also* Moses, Maeda, & Paguyo, *supra* note 126, at 5, 15–16 (failing to note the flaw in Kang's functional definition, but also confronting the conceptual difficulty of identifying discrimination in their use of the theoretical concept, negative action).

groups, such as racial minorities and women.[154] The notion stands in stark contrast to the anti-classification approach to antidiscrimination jurisprudence, which merely seeks to protect individuals from forbidden classifications based on group identity.[155] There is a consensus among scholars that the judiciary has distanced itself from explicit anti-subordination reasoning in race-related equal protection cases, instead opting for the narrower anti-classification approach.[156] A key criticism levied by anti-subordination scholars is that the anti-classification principle provides redress for only the most overt forms of discrimination resulting from explicit racial classifications, a relatively rare phenomenon today.[157] This leaves in place material subordination and social stratification that arise from widespread facially neutral norms and conduct.[158] In contrast, anti-subordination theory eschews formal equality that does not address the substantive conditions of the marginalized. This theory advances principles and methods for addressing how facially neutral conduct

154. *See, e.g.*, Laurence H. Tribe, American Constitutional Law, § 16–21, at 1514–21 (2nd ed. 1988); J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2313–16 (1997); Jack M. Balkin & Reva B. Seigel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9, 9–10 (2003); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1007 (1986); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1336, 1336 n.20, 1341, 1384–85 (1988); Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Affs. 107, 147–70 (1976); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 950–51 (2001); Siegel, *Equality Talk*, *supra* note 72, at 1472–73; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1144–48 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*]; Abigail Nurse, Note, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. Rev. 293, 300–04 (2014).

155. *See, e.g.*, Balkin & Siegel, *supra* note 154, at 10; Colker, *supra* note 154, at 1005–10; Crenshaw, *supra* note 154, at 1342; Fiss, *supra* note 154, at 108–29; Lawrence, *supra* note 154, at 951 n.78; Siegel, *Equality Talk*, *supra* note 72, at 1470–74; Siegel, *Why Equal Protection No Longer Protects*, *supra* note 154, at 1113; Nurse, *supra* note 154, at 298–300.

156. *See* Balkin & Siegel, *supra* note 154, at 10; Siegel, *Equality Talk*, *supra* note 72, at 1473–78, 1535–38; Nurse, *supra* note 154, at 307–12. *But see* Balkin & Siegel, *supra* note 154, at 10, 27–28; Siegel, *Equality Talk*, *supra* note 72, at 1538–40. Balkin and Siegel note that anti-subordination values sometimes underly decisions clothed in the language of anti-classification. *See* Balkin & Siegel, *supra* note 154, at 10, 27–28; Siegel, *Equality Talk*, *supra* note 72, at 1538–40.

157. *See* Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 175 (1987) [hereinafter Bell, And We Are Not Saved]; Tribe, *supra* note 154, at 1518–19; Balkin, *supra* note 154, at 2352 n.122; Balkin & Siegel, *supra* note 154, at 12; Crenshaw, *supra* note 154, at 1342 n.52, 1378–81; Colker, *supra* note 154, at 1032–34; Fiss, *supra* note 154, at 171; Lawrence, *supra* note 154, at 949–58; Siegel, *Why Equal Protection No Longer Protects*, *supra* note 154, at 1130–44.

158. *See* Bell, And We Are Not Saved, *supra* note 157, at 175; Tribe, *supra* note 154, at 1518–19; Balkin, *supra* note 154, at 2352 n.122; Balkin & Siegel, *supra* note 154, at 12; Crenshaw, *supra* note 154, at 1342 n.52, 1378–81; Colker, *supra* note 154, at 1032–34; Fiss, *supra* note 154, at 171; Lawrence, *supra* note 154, at 949–58; Siegel, *Why Equal Protection No Longer Protects*, *supra* note 154, at 1130-–44.

perpetuates or aggravates group subordination.[159] Only then can true equality be secured. In the context of the Asian American Admissions Controversy, these insights require reevaluation of Kang's functional definition of negative action, which obscures how facially neutral admissions criteria sustain the racial subordination of Asian American applicants to whites.

To provide a more accurate functional definition of the term negative action, we can apply the sociological insights of Professor Issa Kohler-Hausmann's critique of standard methods of discerning discrimination.[160] She posits that such methods are predicated on the flawed counterfactual causal thinking of predicting how a unit would have been treated if its race was changed where all other contextual factors are held constant.[161] Kang uses the same reasoning, describing that negative action occurs when an Asian American applicant would have been admitted had they been white, holding other factors constant. Kohler-Hausmann points out that such counterfactual causal thinking is at odds with the socially and historically contingent construction of race.[162] Because of race's historical and social significance, it is not possible to theorize a change in a person's race in a single hypothetical moment.[163]

159. *See* Tribe, *supra* note 154, at 1520; Colker, *supra* note 154, at 1059–62; Crenshaw, *supra* note 154, at 1384; Fiss, *supra* note 154, at 157–68, 171; Lawrence, *supra* note 154, at 968–75; Siegel, *Why Equal Protection No Longer Protects*, *supra* note 154, at 1144–46.

160. *See* Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 Nw. U. L. Rev. 1163, 1181–1207 (2019) [hereinafter Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*].

161. *See* Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, *supra* note 160, at 1181–1207.

162. *Id.* at 1169–72, 1204–07; *see also* Ian Haney Lopez, White by Law: The Legal Construction of Race 35–55 (2006) (describing fluctuating conceptions of race by the legal system in identifying those eligible for citizenship until 1952, when such restrictions were abolished); Michael Omi & Howard Winant, Racial Formation in the United States 105–27 (3rd ed. 2015); Mathew Desmond & Mustafa Emirbayer, *What is Racial Domination*?, 6 Du Bois Rev. 335, 336–39, (2009); Tanya Golash-Boza, *A Critical and Comprehensive Sociological Theory of Race and Racism*, 2 Soc. of Race & Ethnicity 129, 130–31, 135–37 (2016); Gary Peller, *History, Identity, and Alienation*, 43 Conn. L. Rev. 1479, 1495–96 (2011) (describing how Kimberlé Crenshaw's development of "intersectionality" emphasized "the socially articulated, contingent quality of community characteristics."). The socially and historically constructed nature of race is implicitly recognized in our jurisprudence. If race were simply a biological or phenotypical difference between individuals, divorced of any social or historical context, such classifications by the State would be no different from other classifications subject to rational basis review. However, it is precisely because race has a specific social and historical context in this country that racial classifications are subject to strict scrutiny. *See* Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, *supra* note 160, at 1185–86; Neil Gotanda, *A Critique of "Our Constitution is Color Blind*," 44 Stan. L. Rev. 1, 50–52 (1991); Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1775 n.289 (1993).

163. Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, *supra* note 160, at 1204.

Take, for example, the issue of identifying discriminatory policing against Black neighborhoods. The standard conception of discrimination raises the following inquiry: holding all other factors constant, is the racial composition of the neighborhood the reason it is subjected to unreasonable policing practices? However, racially contingent practices of labor market exclusion and residential segregation and their intergenerational effects[164] help constitute what it means to be a Black neighborhood along numerous other dimensions, including wealth, educational achievement, and so forth. Thus, it is a mistaken endeavor to ask whether a Black neighborhood would not have been subject to a particular set of policing practices if it retained all its other characteristics except for race, because these other characteristics have been profoundly affected by legacies of subordination based on race. In essence, attempting to hold confounding variables constant, often discussed as statistical controls in research examining discrimination, to discern the effect of race often ignores how racial groups are distributed across these variables due to racial injustice.[165] With respect to admissions programs, then, attempting to hold constant contextual variables such as facially neutral characteristics to discern racial discrimination would obfuscate how racial minority applicants systematically differ from white applicants along facially neutral criteria due to racial subordination.

Kohler-Hausmann instead posits that identifying discrimination simultaneously requires understanding how racial categories are constituted and deeming certain actions, policies, and practices acting upon those constitutions as wrong.[166] That is, the question of identifying discrimination is a normative one. Returning to the example of policing a Black neighborhood, one can acknowledge how the neighborhood has been constituted along a number of dimensions because of racial injustice and still deem the police's action with respect to this racialized subject as morally reprehensible. Applying this to negative action, identifying discriminatory treatment of Asian American applicants versus whites requires us to examine how Asian Americanness is differently constituted than whiteness and the instances in which admissions regimes acting upon these different constitutions is unfair.[167] Again,

164. *See e.g.*, Michael K. Brown and David Wellman, *Embedding the Color Line: The Accumulation of Racial Advantage and the Disaccumulation of Opportunity in Post-Civil Rights America*, 2 Du Bois Rev. 187, 196–202 (2005); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 Race & Soc. Problems 21 (2015).

165. *See* Gelman, Ho & Goel, *supra* note 9.

166. *See* Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, *supra* note 160, at 1221–27.

167. This functional definition of unfair treatment of Asian Americans stands in contrast to SFFA's flawed reliance on principles of admissions parity, abstracted from the constitution of racial groups in the United States, for its claims of discrimination. *See* Issa Kohler-Hausmann, *What's the Point of Parity? Harvard, Groupness, and the Equal Protection Clause*, 115 Nw. U. L. Rev. Online 1 (2020) [hereinafter Kohler-Hausmann, *What's the Point of Parity?*]. Other scholars have also emphasized normative concerns relating to how Asian Americans ought to be treated in selective admissions programs,

this is fundamentally a normative question. By addressing how facially neutral admissions criteria interact with the social and historical construction of Asian Americans and whites to produce admissions disparities, we can cure the deficit in the functional definition of negative action and further ask whether the criteria cause unfair treatment of Asian Americans.

Examining the fairness of admissions criteria with respect to Asian Americans, however, cannot be done in a vacuum. As Part II of this Article will show, some of the admissions criteria that suppress Asian American admissions based on their unique sociohistorical positioning may benefit other subordinated groups. This stems from the fact that facially neutral criteria have always been race-selective, because they benefit certain groups as opposed to others based on the particular history of the group in question.[168] Because of the distinctive ways that admissions criteria can benefit various classes of applicants based on these histories, each will have competing claims of unfairness concerning admissions schemes. Declaring the use of certain criteria as unfair solely because of their effect on Asian American applicants compared to whites could ignore the just effects these criteria may have for other subordinated groups. Thus, deciding what admissions practices are unfair and deserve to be reformed for Asian Americans requires understanding how labeling those admissions criteria as unfair and targeting them for changes might affect other disadvantaged groups. Further, there may also be strong countervailing institutional interests that cut against labeling the admissions criteria as unfair, even if the criteria result in admission disparities between whites and Asian Americans.[169] Given the current state of antidiscrimination jurisprudence, the courts are ill-suited for this type of deep

though they have a distinct approach to defining unfair treatment to Asian American applicants. *See* Moses, Maeda, & Paguyo, *supra* note 126, at 2, 15–16, 24 (focusing on the role of "demeaning distinctions" to identify discrimination).

168. This Article sheds the term "race conscious" from its vocabulary because this term obscures how admissions programs exert powerful racial preferences for white applicants through supposedly "facially neutral" criteria. *See, e.g.*, Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 384 (2005) ("The most important step was to admit that Yale's seemingly neutral academic standards were, in the end, not neutral at all. For the first time, the Admissions Office acknowledged that a candidate's academic profile was profoundly influenced by the opportunities that had been available to him. By 1965–1966 . . . the Admissions Office made it standard procedure—at least for African Americans—to 'seriously consider the possibility that SAT scores might reflect cultural deprivation rather than lack of intelligence'"); Park & Liu, *supra* note 126, at 43–47 (discussing how conceptions of merit fluctuate based on context, and how these can serve the interests of dominant groups); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 1012, 987–97 (1996) (discussing how standardized testing and legacy preferences reproduce wealth and racial inequalities); Takagi, The Retreat From Race, *supra* note 3245, at 67–68, 70, 107 (discussing how legacy and athlete preferences were used to justify disparate admission rates between Asian Americans and whites).

169. Seminal works in the anti-subordination tradition have also analyzed the benefits of a practice and its harm to disadvantaged groups to adjudicate the practice's permissibility. *See* Fiss, *supra* note 154, at 166–68.

sociological inquiry of unfairness in selective admissions that weighs a variety of histories and interests. Critically, this weighing of various histories and rational interests in deciding whether a criterion is unfair to Asian Americans is only necessary to the extent that the undesirable effect on Asian American applicants cannot be remedied without affecting these other interests.

Ultimately, whether a criterion causes unfair treatment to Asian American applicants will determine whether it can justify the admissions disparities faced by the Asian American community. Similarly, failing to grapple with what criteria can fairly account for the admissions disparities faced by Asian Americans will cause the Asian American Admissions Controversy to persist in perpetuity. Opposing parties pointing to the same evidence of admissions disparities will continually war over whether such evidence demonstrates discrimination towards Asian American applicants. This is because they proceed from fundamentally different assumptions about the factors that can justify admissions disparities.[170] Even if we cannot reach an agreement about the fairness of criteria used to explain away these disparities, advocates for racial justice can at least become more informed about the racially biased effect of facially neutral criteria and avoid arguments that leave their harm to Asian American applicants unchallenged.

With this reframing for discerning the unfair treatment of Asian American applicants compared to whites, Part II identifies aspects of selective admissions that have racially disparate effects using the example of *SFFA v. Harvard* and explores their possible relationships to how the racial categories, Asian Americans and whites, are differently constituted. Part III recommends a public, democratic, and deliberative approach to forming complex normative judgments about whether we can label these selective admissions' criteria as producing negative action—that is, these metrics cause unfair treatment of Asian American applicants compared to whites. This Article envisions these deliberations as a necessary precursor to reforming unfairness to Asian American applicants within selective admissions schemes.

## II. Admissions Metrics and the Sociohistorical Treatment of Asian Americans

To discern what selective admissions practices unfairly disadvantage Asian American applicants, we must first understand how overlooked aspects of selective institutions' admissions regimes disparately affect Asian Americans and their connection to the social and historical construction of the category, Asian American. Then we can weigh this context against countervailing institutional considerations and concerns for underrepresented minorities to ultimately conclude whether these criteria are unfair to Asian Americans. The First Circuit and the district court's reliance on the statistical analyses provided by Harvard's expert, Professor David Card, and SFFA's expert, Professor Peter Arcidiacono, in rejecting SFFA's claims provide rare

170. *See* Gelman, Ho & Goel, *supra* note 9.

insights into the operation of admissions schemes that can facilitate this understanding.

Based on the district court's and experts' analyses, this Part examines the use of parental occupation, intended career, and criteria magnifying the advantages of legacy preferences in admissions programs. It shows how these criteria build on the particular sociohistorical treatment of Asian Americans in the United States to sustain admissions disparities between Asian American and white applicants.

This Part does not address the topic of non-academic, subjective evaluations, such as personal ratings, because journalists, scholars, and courts have examined why Asian American applicants score lower on these evaluations. Some have already addressed how this criterion may disadvantage Asian American applicants based on stereotyping.[171] Additionally, the First Circuit in *SFFA v. Harvard* referenced research that Asian Americans are more likely to attend public schools compared to whites, and the strain on guidance counselors and teachers in these settings may result in worse recommendation letters for Asian American applicants.[172] These recommendation letters, in turn, are an important input into the personal rating, partially explaining why Asian Americans score worse on the personal rating than whites.[173] However, I will return to these evaluations in Part III in my discussion of how we chart a path forward.

### A. *An Overview of Harvard's Admission Process and the Lower Courts' Decisions*

This Subpart presents the main aspects of Harvard's admission process and the lower courts' decisions. This Subpart aims to facilitate discussing the admissions criteria that sustain admissions disparities between Asian American and white applicants in order to examine their relationship to the sociohistorical treatment of Asian Americans.

Harvard employs a holistic review process using materials that high school applicants typically submit for college admission.[174] It provides tips for applicants who "will offer a diverse perspective or are exceptional in ways that do not lend themselves to quantifiable metrics."[175] The bases for these tips include being recruited Athletes, Legacies, applicants on the Dean's or

171. *See* Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1 ("Sally's top personality score seemed to come from the fact that she broke the stereotype and wouldn't just be quiet and self-segregated. If this is Harvard's idea of 'diversity,' it's a white-down vision that rewards students for acting, in essence, more like wealthy white kids."); *see also* Chiu, *supra* note 106, at 476; Seth Johnson, *Students for Fair Admissions v. Harvard: Admissions Administrators Threaten the Future of Affirmative Action in the United States*, 24 Pub. Int. L. Rep. 151, 159 (2019); Park & Liu, *supra* note 126, at 47–48.

172. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 200 (1st Cir. 2020).

173. *Id.*

174. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d. 126, 136–37 (D. Mass. 2019).

175. *Id.* at 142.

Director's Interest list, or Children of faculty and staff (ALDCs); having a capacity for leadership; creative ability; and "geographic, economic, and racial or ethnic factors."[176]

The majority of applicants interview with an alumnus;[177] very few interview with admissions staff.[178] A subcommittee of the full Admissions Committee reviews dockets of applicants based on geography before collectively determining a list of applicants to recommend for admission to the full Admissions Committee.[179] "Each subcommittee member is responsible for reading all applications from a subset of the docket's high schools."[180] The evaluators "assign an overall rating; four profile ratings: (1) academic, (2) extracurricular, (3) athletic, and (4) personal; and at least three school support ratings that reflect the strength of each teacher and guidance counselor recommendation."[181] The academic rating assesses the academic strength and potential of the candidate.[182] The extracurricular rating evaluates the applicant's "involvement in activities during high school" and their "potential to contribute to the extracurricular student life of Harvard."[183] The athletic rating indicates whether they are a recruited athlete and gauges their leadership or participation in high school athletics.[184]

A key part of the controversy in this case centers the personal rating, which "reflects the admissions officer's assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities."[185] Admissions procedures have not provided detailed guidance for this rating, but "relevant qualities might include integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit."[186] The overall rating reflects a determination of the overall strength of the applicant, and officers may consider race in assigning this rating, unlike the other ratings.[187]

With respect to the merits of the suit, the district court rejected SFFA's claims. Finding that Title VI of the Civil Rights Act applies to Harvard because it accepts federal funds and imputing the standards of the Equal Protection

176. *Id.*
177. *Id.* at 137–38.
178. *Id.* at 138.
179. *Id.* at 142–43.
180. *Id.* at 139.
181. *Id.* at 140. Ratings generally range from 1 to 4, with 1 being the strongest, and officers can indicate + or – to provide further gradations in the rating. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 140–41.
185. *Id.* at 141.
186. *Id.*
187. *See id.* "Admissions officers are not supposed to, and do not intentionally, take a student's race directly into account when assigning ratings other than the overall rating, but Harvard's reading procedures did not instruct readers not to consider race in assigning those ratings until 2018." *Id.* at 146.

Clause, the court subjected Harvard's admissions program to strict scrutiny.[188] The court found that Harvard's program is designed to achieve the compelling interest of attaining student body diversity and its educational benefits, and that these goals were articulated with sufficient specificity under *Fisher II*.[189] The court also found Harvard's program narrowly tailored because of its individualized consideration of applicants, its use of race in a flexible manner, and the lack of workable race-neutral alternatives.[190] In the context of the Asian American Admissions Controversy, the court stated that narrow tailoring requires the program "not unduly harm members of any racial group" and concluded that Asian American applicants were not disadvantaged in such a manner.[191] Finally, the court held that SFFA could not satisfy the burden of its intentional discrimination claim under Title VI of the Civil Rights Act.[192]

The First Circuit upheld the district court's decision, holding that Harvard's admissions program survived strict scrutiny and that Harvard had not intentionally discriminated against Asian American applicants.[193] Importantly, the First Circuit affirmed the district court's analysis of statistical models that explained away the admissions disparity between white and Asian American applicants in rejecting SFFA's intentional discrimination claim.[194]

Next, this Part examines that statistical analysis to unveil how facially neutral criteria build on the subordination of Asian Americans to result in the admissions disparity between Asian Americans and whites, a factor to be weighed in concluding whether or not these criteria are unfair.

### B. *The Use of Parental Occupation*

Parental occupation, as used in an admissions process, can provide insight as to (1) how remarkable a candidate is, and (2) the socioeconomic constraints applicants faced for which officers provide an admission tip.[195] The parental occupations of Asian American and white applicants to selective institutions can systematically differ,[196] and these differences can be weighted in a manner during the evaluation process that depresses the admission rate of Asian Americans relative to whites. First, the occupations in which Asian

188. *Id.* at 189–90.

189. *Id.* at 191–92.

190. *Id.* at 192–95, 199–201.

191. *Id.* at 193–95.

192. *Id.* at 201–04.

193. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 980 F.3d 157, 202–204 (1st Cir. 2020).

194. *Id.* at 195–204.

195. *See* Rebuttal Report of David Card ¶ 62, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d. 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB) [hereinafter Card Rebuttal Report]; Expert Report of Richard D. Kahlenberg at 25, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d. 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB) [hereinafter Kahlenberg Report].

196. *See* Card Report, *supra* note 140, ¶ 80.

American applicants' parents are more concentrated relative to whites may signify higher socioeconomic status, and thus admissions officers may provide a tip to some white applicants to compensate for a lack of these backgrounds and attendant resources. These tips, in aggregate, may help account for why there is a disparity between Asian American and white admission rates. Second, admissions officers may undervalue the accomplishments of Asian American applicants in certain fields when these applicants' parents are concentrated in those same fields. This is because admissions officers may view these applicants' accolades and talents as less impressive when they follow in their parents' footsteps. Ultimately, however, sociohistorical processes related to restrictive immigration policies and exclusionary labor market dynamics helped constrain many Asian Americans to particular professions, and this context may be relevant for determining whether the use of parental occupation in admissions schemes is unfair to Asian American applicants.

A review of Harvard's admissions data clarifies how this criterion can sustain an admissions disparity between whites and Asian Americans based on the social historical treatment of the latter group. Professor Card notes, "33% of fathers and 16% of mothers of Asian-American applicants work in the fields of 'Computer and Mathematical,' 'Life, Physical, Social Science,' or 'Architecture and Engineering,' while only 16% and 5% (respectively) of fathers and mothers of [w]hite applicants work in those fields."[197] Critically, he indicates how these factors may be taken into consideration by admissions officers:

> Such differences can reflect not just differences in a family's economic prosperity, but also differences in applicant's life experiences. For example, if the son of a professional writer and the son of a police officer display talent in writing, Harvard might regard the latter's talent as more impressive than the former's. The same might be true of the daughter of professional scientists and the daughter of factory workers, both of whom exhibit talent in a scientific field. In fact, one of the examples from Harvard's casebook specifically notes parental occupation as relevant context for evaluating her achievements.[198]

Card also repeats and elaborates on the significance of parental occupation to admissions officers in his rebuttal report: "Parental occupation is an important fact from which Harvard gleans information about family background and socioeconomic status."[199] It is also highly salient throughout the admissions process; for example, it is listed on a summary sheet, which has "key pieces of information that guide the discussion about a candidate" and on docket sheets in admission committee meetings.[200] Harvard's admissions officers use this information to provide a tip to applicants from lower socioeconomic backgrounds.[201]

197. *Id.* ¶ 85.
198. *Id.* ¶ 86.
199. Card Rebuttal Report, *supra* note 195, ¶ 62.
200. *Id*.
201. Deposition testimony indicates that parental occupation helps admission officers

Card further evaluates the significance of parental occupation in his statistical model. He finds that parental occupation explains more about admissions decisions than other factors signifying socioeconomic status, such as whether the applicant applied for financial aid, whether they applied for an application fee waiver, and whether admissions officers designated the applicant as "disadvantaged."[202] This is because the parental occupation criteria has 24 categories to choose from, providing a more informative picture of applicants' socioeconomic status.[203] Contrast this with the limited information one gains about an applicant based on the other criteria signifying socioeconomic status. Not much can be gleaned from the fact that the applicant had applied for financial aid or a fee waiver, or had been designated "disadvantaged" by the admissions officers.[204] In criticizing Arcidiacono's decision to leave parental occupation out of his models, Card states that "parental occupation is a variable that reduces the alleged 'bias' against Asian American applicants found in Prof. Arcidiacono's model."[205] That is, by considering parental occupation in the statistical models, richer information about applicants' socioeconomic status becomes available to help explain the disparity in admissions between Asian American and white applicants.

Further, in Exhibit 13, Card changes Arcidiacono's model sequentially to demonstrate how adding controls and expanding the data set to include ALDC candidates nullify Arcidiacono's findings of bias.[206] After adding ALDC applicants, running the model on a yearly basis, and adding the personal rating (factors that, according to Card, increase the accuracy of Arcidiacono's statistical model), the model still found a statistically significant penalty against Asian American applicants compared to whites.[207] However, adding parental occupation as a control, on top of these changes recommended by Card, rendered the negative effect of Asian American identity on odds of admission statistically insignificant and further attenuated the penalty (relative to whites) by .19 percentage points.[208] For context, the overall penalty of Asian American identity on chances of admission relative to whites was -1.02 percentage points in Arcidiacono's preferred model.[209] The district court, believing parental occupation to be a significant control, integrated the variable into the final statistical analysis it relied upon, thereby reducing the Asian American penalty, but not rendering it statistically insignificant in the

determine if an applicant is socioeconomically disadvantaged, *see id.*, which receives a tip in the admission process, *see* Kahlenberg Report, *supra* note 195, at 25; Card Rebuttal Report, *supra* note 195, ¶ 176 ("In fact, the results from my admissions model suggest that Harvard gives an admissions 'tip' to students who are flagged as disadvantaged, and to students whose parents work in lower-paying occupations.").

202. *Id.* ¶¶ 64–65.
203. *Id.* ¶¶ 64.
204. *Id.*
205. *Id.* ¶ 69.
206. *Id.* ¶¶ 105–06.
207. *Id.*
208. *Id.*
209. *Id.*

model excluding the personal rating.[210] From the statistical analysis and the court's decision, it is clear that systematic differences in parental occupation between whites and Asian Americans are supposed to help explain differential admission rates between the two groups.

To summarize so far, parental occupation is a contextual variable that (1) provides a background measure of socioeconomic status for which officers provide an admission tip[211] and (2) makes sense of how "impressive" a candidate's accomplishments are.[212] These contextual considerations help explain the admissions disparity between white and Asian American applicants according to the statistical analyses by Card and the district court. There are two likely explanations for this phenomenon. First, according to Harvard's admissions office, Asian American applicants' parents are more concentrated in certain high socioeconomic occupations compared to white applicants, such that fewer Asian American applicants relative to whites are eligible for the admissions tip for disadvantaged applicants. In aggregate, this fact helps explain the lower admission rate of Asian Americans compared to whites. Second, Asian American applicants' accomplishments may be more concentrated in their parents' occupational fields, relative to white applicants, such that white applicants' accolades are given greater weight by the admissions officers. This also helps account for the lower chance of admission for Asian American applicants compared to whites.

These contextual considerations can sustain the admissions disparity between white and Asian Americans based on the sociohistorical treatment of Asian Americans. First, let us examine the use of parental occupation as a proxy for socioeconomic status for which admissions officers give tips. The normative justification for why parental occupation should bear on an applicant's admissions chances is logical. Candidates that have faced socioeconomic constraints deserve a tip in the admissions process to compensate for the lack of opportunities and advantages that wealthier applicants have. Further, this rationale is common sense if we consider the legacy of racial discrimination in this country.[213] Given the United States' history of racial subordination, including government policies that ensured residential segregation;[214] discriminatory practices in providing loans and federal grants to underrepresented minorities;[215] and longstanding racial prejudice in employee

210. *See* Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d. 126, 173–74 (D. Mass. 2019).

211. *See* Card Rebuttal Report, *supra* note 195, ¶ 62.

212. *See* Card Report, *supra* note 140, ¶ 86.

213. *See, e.g.*, Derrick Bell, *Diversity's Distractions*, 103 Colum. L. Rev. 1622, 1624–25 (2003) [hereinafter Bell, *Diversity's Distractions*]; Monica C. Bell, *Anti-Segregation Policing*, 95 NYU L. Rev. 650, 669–722 (2020) (discussing how urban policing mutually reinforces residential segregation); Brown and Wellman, *supra* note 164, at 196–202; Rothstein, *supra* note 164, at 23–28; William Julius Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 Du Bois Rev. 5, 8–9 (2012).

214. *See* Brown and Wellman, *supra* note 164, at 199–200; Rothstein, *supra* note 164, at 24–48.

215. *See* Brown and Wellman, *supra* note 164, at 198–202.

selection and access to services,[216] minorities today have much less wealth and opportunity compared to whites, who have reaped advantages from these disparate practices over time.[217] However, what is the normative justification for using parental occupation to help account for the admissions disparity between whites and Asian Americans? Rather than resulting from random chance or the subordination of whites, parental occupation differences between these groups can be traced to the United States' racist immigration policies and the discrimination Asian Americans face in the workplace.

Starting in the late 1800s, most migrants from Asian countries were excluded from entering the country[218] and denied citizenship.[219] These policies later yielded to draconian quotas in the 1950s[220] until the Black-led Civil

216. *See* Bell, *Diversity's Distractions*, *supra* note 213, at 1624–25.

217. *See* Brown and Wellman, *supra* note 164, at 198–201; Wilson *supra* note 213, at 7–9.

218. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241, 1296–99 [hereinafter Chang, *Toward an Asian American Legal Scholarship*]; Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. Am. Hist. 67, 80–81 (1999). In 1882, Congress barred Chinese laborers from entering the United States and renewed the ban twice before codifying it permanently in 1904. *Id.* at 81 n.35. In 1917, Congress expanded this ban to bar immigration from the Asiatic zone, encompassing almost all Asian countries. *Id.* Japan was not subject to these restrictions because of U.S. foreign policy considerations, but in 1907, the countries finalized an agreement that would prevent Japanese laborers from immigrating to the United States too. *Id.* at 80. The Immigration Act of 1924 codified this exclusion into law by barring the migration of persons ineligible for citizenship. *Id.* at 80–81.

219. *See* Chang, *Toward an Asian American Legal Scholarship*, *supra* note 218, at 1292–93; Ngai, *supra* note 218, at 81. The Nationality Act of 1790 provided a right to naturalization for free white persons, and in 1870, the Act was amended in light of the Civil War and the Fourteenth Amendment to provide this right to people of African descent. *Id.* Though the Chinese Exclusion Act of 1882 denied Chinese individuals the right to citizenship, it remained unclear whether other Asians could naturalize under the white or Black racial category. *Id.* In 1906, the United States Attorney General stated that Japanese and Asian Indians were barred from citizenship, but many were still naturalized by 1920. *Id.* From 1878 to 1929, the lower courts grappled with Asian individuals' eligibility for citizenship in light of these racial prerequisites, finding that Asians were generally barred, though instability existed over whether Asian Indians could be considered white. *See* Lopez, *supra* note 162, at 43–48. The Supreme Court resolved the question in *United States v. Thind*, 261 U.S. 204, 215 (1923) (rejecting an Asian Indian's claim that he was Caucasian and describing that Congress's manifested intent in the Immigration Act of 1917 to bar the immigration of individuals from Asia implied that Congress also desired a bar against the naturalization of such individuals). *See also* Ngai, *supra* note 218, at 85. Asian migrants were eventually provided the right to naturalize in waves starting in the mid-1900s: "1943 for Chinese, 1946 for Asian Indians and Filipinos, and 1952 for all other Asians." Chin, Choi, Kang & Wu, *supra* note 126, at 144.

220. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 291 (1996). In 1952, Congress passed the McCarran-Walter Act, which permitted very limited migration from the Asiatic barred zone. Replacing this zone with an area titled the Asia-Pacific Triangle, the Act permitted 2,000 individuals who traced their descent to this area to migrate every year. *Id.*

Rights Revolution liberalized the United States' immigration regime with the passage of the Immigration and Nationality Act of 1965.[221] This resulted in the astronomical increase of the Asian American population in the latter half of the 20th century.[222] The reform, however, prioritized migrants of professionalized backgrounds, particularly in the fields of Science, Technology, Engineering, and Mathematics (STEM),[223] the very same backgrounds that help explain the disparity in admissions between white and Asian American applicants. The immigration reform's employment preferences were an outgrowth of pressures related to the Cold War: the United States feared the Soviet Union's technological advancement and sought to increase the immigration of professionals in scientific and technical disciplines to maintain its global standing.[224] As a result of the new immigration regime, highly educated Asian immigrants, primarily from East and South Asia, began arriving in the United States.[225] A large subpopulation of Asian Americans now possesses

221. *Id.* at 297–98, 300–02; Chin, Choi, Kang & Wu, *supra* note 126, at 144.

222. *See* The Rise of Asian Americans, Pew Rsch. Ctr. (Apr. 4, 2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/04/Asian-Americans-new-full-report-04-2013.pdf [https://perma.cc/53WS-K4SQ]; Karthick Ramakrishnan, *How 1965 Changed Asian America, in 2 Graphs*, Data Bits (Sept. 28, 2015), http://aapidata.com/blog/1965-two-graphs [https://perma.cc/Q753-W926].

223. *See* Grace A. Chen & Jason Y. Buell, *Of Models and Myths: Asian(Americans) in STEM and the Neoliberal Racial Project*, 21 Race Ethnicity & Educ. 607, 612 (2018); Chin, Choi, Kang & Wu, *supra* note 126, at 149–50, 150 n.102; Johnson, *supra* note 171, at 157; Charles Hirschman & Morris G. Wong, *The Extraordinary Educational Attainment of Asian-Americans: A Search for Historical Evidence and Explanations*, 65 Soc. Forces 1, 5 (1986) [hereinafter Hirschman & Wong, *The Extraordinary Educational Attainment of Asian Americans*]; Charles Hirschman & Morris G. Wong, *Trends in Socioeconomic Achievement Among Immigrant and Native-Born Asian- Americans, 1960–1976*, 22 Soc. Q. 495, 507–08 (1981) [hereinafter Hirschman & Wong, *Trends in Socioeconomic Achievement*] (documenting a significant rise in Asian professionals in the wake of the 1965 reform); Moses, Maeda, & Paguyo, *supra* note 126, at 11 (noting the reforms privileged "medical professionals in the 1970s and high-tech workers more recently."). The 1965 Act also introduced the H-1B visa, prioritizing the entry of engineers, mathematicians, scientists, and other STEM professionals for temporary periods, providing restricted avenues for permanent migration. *See* Chen & Buell, *supra*, at 613. In recent years, Asian persons have come to dominate this category of visa holders. *Id.* Thus, the H-1B visa system is another manner in which the U.S. immigration system shaped what type of Asian immigrants could enter the country and possibly what type of careers Asian Americans might value. Congress further built on these preferences for high skilled, professional workers and increased the degree of specialization required for the H-1B visa in the Immigration Act of 1990. *See* Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 Fordham Int'l L.J. 328, 330–332 (1990); OiYan A. Poon, Megan S. Segoshi, Lilianne Tang, Kristen L. Surla, Caressa Nguyen, & Dian D. Squire, *Asian Americans, Affirmative Action, and the Political Economy of Racism: A Multidimensional Model of Raceclass Frames*, 89 Harv. Educ. Rev. 201, 209 (2019).

224. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 Boston U. L. Rev. 101, 113 (2022).

225. *See* Brief of Amicus Curiae for the Asian American Legal Defense Fund, et al., in support of Defendant-Appellee at 4, Students for Fair Admissions v. President and Fellows of Harvard College, 980 F.3d 157 (1st Cir. 2020) (No. 19–2005) [hereinafter Brief for Asian American Legal Defense Fund]; *see also* Pew Rsch. Ctr., *supra* note 222, at 38, 45, 51

the advantages and opportunities that accumulated not from subordinating whites, but from restrictive preferences woven into the immigration regime that prevent Asians of lesser means and educational attainment from immigrating to this country.[226] Accordingly, this facilitated the overrepresentation of Asian Americans in higher education and the stronger academic and extracurricular profiles that came with access to advantages and resources associated with these professionalized backgrounds.[227] Thus, in attempting to rectify the harms of the previous century, the lawmakers who helped pass the Immigration and Nationality Act of 1965 unwittingly helped shape the college admissions controversies we face today.

I acknowledge the criticism that portraying Asian Americans in this manner can be construed as reinforcing harmful model minority myths and overgeneralizing the community.[228] It is important to note that even when Asian Americans receive structural advantages from immigrant parents with

(2013) (detailing large-scale Chinese, Indian, and Korean immigration following the 1965 immigration act).

226. *See* Brief for Asian American Legal Defense Fund, *supra* note 225, at 4. ("Many East Asian and South Asian immigrants from India, Korea, China, and Taiwan traveled voluntarily to the United States as highly-educated professionals. They spoke fluent English before arriving, and entered through immigration policies giving employment preference to professionals who 'hold[] advanced degrees' or have 'exceptional ability.' These immigrants arrived with substantial social capital that 'often correlated with educational and social mobility.'") (citations omitted). Though I concur in the brief's conclusion that many Asian migrants passing through this restrictive immigration system have occupation-related advantages compared to their non-migrant peers, I note that these Asian migrants may still have lacked knowledge to effectively navigate American institutions and systems in pursuing educational success.

227. *See* Hirschman & Wong, *The Extraordinary Educational Attainment of Asian Americans supra* note 223, at 2. Further, Hirschman and Wong contend that the racist, exclusionary policies prior to the 1965 Immigration and Nationality Act targeted working-class migrants, but upper-class migrants could still migrate, bringing with them above-average levels of education and resources compared to whites on the mainland. *Id.* at 10. They posit that this limited influx of highly selected Asian immigrants reduced strain on Asian American communities to absorb and support immigrants and may have resulted in the imposition of higher educational expectations on their children. *Id.* at 22. In sum, they conclude that this racist history actually helped consolidate the resources of the Asian American community and facilitated their educational and economic advancement. *See id.* at 22–23. Qualitative interviews with Chinese Americans in Los Angeles demonstrated that hyper-selection (the U.S. immigration regime's effect of selecting disproportionately highly educated and professionalized Asian migrants) has reverberating consequences for the rest of the community. *See* Jennifer Lee & Min Zhou, *Why Class Matters Less for Asian American Academic Achievement*, 43 J. Ethnic & Migration Stud. 2316, 2317-18, 2321 (2017). Because of ethnic networks, Chinese Americans from lower socioeconomic backgrounds were able to access the knowledge and resources available to their hyper-selected peers, furthering the academic achievement of their own children. *Id.* at 2321–24 (rejecting the explanation that such success is due to a distinctive cultural orientation).

228. For a description of the origin of the model minority myth, the characteristics that compose it, and how it furthers white hegemony, see Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 119–24 (1999). *See also* Moses, Maeda, & Paguyo, *supra* note 126, at 12.

professional backgrounds, their privilege cannot be equated with that of their white counterparts who may have access to greater intergenerational wealth and knowledge of American institutions beneficial to navigating the admissions process. Further, the Asian American community actually encompasses a wide range of socioeconomic diversity. For example, Hirschman and Wong show that in the wake of the 1965 immigration reform, many Asian Americans worked in the service sector.[229] More recent data illustrate that the Asian American community has higher wealth inequality than whites, and whites in the bottom half of the income distribution have double the wealth of their Asian American counterparts.[230] Indeed, many Southeast Asian Americans face disparities in education and income relative to other Asian American subgroups and the overall US population.[231] These disparities can be partially explained by their different starting points upon arriving in the United States: more recent Southeast Asian migrants were refugees of political conflict who did not have similar resources to prior waves of migrants from their own subgroup and other Asian subgroups.[232] Starting in 1979, these refugees escaped armed conflict, persecution, and genocide in Vietnam, Laos, and Cambodia.[233] They arrived impoverished, with little to no educational qualifications or training valued by the U.S. labor market.[234] The resulting disparities today are a reminder that affirmative action is not only critical to preserving the enrollment of Black, Latinx, and indigenous applicants. It also ensures that admissions officers can consider race to ensure the sufficient enrollment of Southeast Asian American applicants, given the disparities this group faces.[235]

However, acknowledging the socioeconomic diversity of the Asian American community does not invalidate the fact that the immigration regime's preferences resulted in a "very favorable educational and occupational composition" among a significant portion of the Asian American community, "which gave a strong basis for socioeconomic success in the United States."[236] Rather than reinforce the model minority myth, this historical context helps debunk it by showing that the socioeconomic success and educational advancement of higher income Asian Americans cannot be

229. *See* Hirschman & Wong, *Trends in Socioeconomic Achievement*, *supra* note 223, at 510.

230. *See* Christian E. Weller & Jeffrey Thompson, Center for American Progress, Wealth Inequality Among Asian Americans Greater Than Among Whites (2016).

231. *See* Bic Ngo & Stacey J. Lee, *Complicating the Image of Model Minority Success: A Review of Southeast Asian American Education*, 77 Rev. Educ. Res. 415, 419–21 (2007).

232. *See* id. at 418–19; Brief for Asian American Legal Defense Fund, *supra* note 225, at 5.

233. Stacy M. Kula & Susan J. Paik, *A Historical Analysis of Southeast Asian Refugee Communities: Post-War Acculturation and Education in the U.S.*, 11 J. Southeast Asian Am. Educ. & Advancement 1, 10–12 (2016).

234. *Id;* Pew Rchs. Ctr., The Rise of Asian Americans 47, 48 (2013).

235. *See* Brief for Asian American Legal Defense Fund, *supra* note 225, at 6–7; Kidder, *Negative Action versus Affirmative Action*, *supra* note 135, at 623.

236. Hirschman & Wong, *Trends in Socioeconomic Achievement*, *supra* note 223, at 512; *see* Brief for Asian American Legal Defense Fund, *supra* note 225, at 4.

accounted for by the widely popularized myth of distinctive cultural values.[237] Instead, this socioeconomic success derives from an immigration regime that selected for immigrants with the educational qualifications and capital facilitative of such advancement.[238] Further, the absence of a structural explanation for the socioeconomic advantages of these Asian Americans leaves a vacuum that fails to explain why Asian Americans are overrepresented at selective institutions relative to their proportion of the national population and why, collectively, the group tends to have higher academic evaluations than their peers. In this vacuum, the fallacious cultural explanation for the success of these Asian Americans thrives. Thus, it is important to underscore that the success of many Asian American applicants enrolling at these selective institutions, who certainly do not reflect the diversity of Asian Americans across the United States, can be partially explained by the structural advantages of families passing through the United States' selective immigration regime. Ultimately, however, this resulted in a different career distribution for parents of Asian American applicants compared to whites.

In addition to the effects of immigration laws on the career profiles of Asian American applicants' parents, exclusionary labor market dynamics also differentiate these parents' career occupations from those of their white counterparts. Asian Americans have historically been subject to employment discrimination (including accent discrimination) and stereotypes that they lack social and communicative skills, erecting barriers to their representation in leadership and management positions.[239] Earlier generations of Asian Americans were also discouraged from pursuing nontechnical careers by authority figures due to these harmful stereotypes.[240] Asian American applicants' parents may have been reluctant to stray from STEM-related careers in order to avoid employment discrimination based on stereotypes that they lack social skills.[241] Many Asian Americans have internalized stereotypes that Asian Americans are high achieving in STEM fields as opposed to disciplines

237. *See* Hirschman & Wong, *The Extraordinary Educational Attainment of Asian Americans*, *supra* note 223, at 3–4.

238. *See supra* notes 226 & 227.

239. Harvey Gee, *Redux: Arguing About Asian Americans and Affirmative Action at Harvard After* Fisher, 26 Asian Am. L.J. 20, 35–36 (2019); U.S. Comm'n on Civ. Rts, Civil Rights Issues Facing Asian Americans in the 1990s 20, 131–39 (1992).

240. U.S. Comm'n on Civ. Rts, *supra* note 239, at 20 (describing that Asian Americans are perceived as talented in science and math, but unaggressive and lacking communication skills, "which may blind employers to the qualifications of individual Asian Americans . . . .It may also lead teachers and counselors to discourage Asian American students from even pursuing nontechnical careers.").

241. *See* Neeta Kantamneni, Kavitha Dharmalingam, Grant Orley & Sutha Kanagasingam, *Cultural Factors, Perceived Barriers, and Asian American Career Development: An Application of Social Cognitive Career Theory*, 26 J. Career Assessment 649, 651–52, 660 (2018); Oi Yan Poon, "*The Land of Opportunity Doesn't Apply to Everyone": The Immigrant Experience, Race, and Asian American Career Choices*, 55 J. Coll. Student Dev. 499, 508–511 (2014) (discussing that qualitative interviews with Asian American students demonstrated that "perceptions of racial inequalities in the labor market and stereotypes played roles in hindering them from pursuing their career interests.").

involving more communication,[242] which may have contributed to the greater concentration of Asian American applicants' parents in STEM occupations. Additionally, underrepresentation and lack of role models in certain fields, such as the arts, deter some Asian Americans from pursuing these occupations,[243] contributing to the overrepresentation of Asian American applicants' parents in STEM fields. In sum, structural forces undergirding the United States' historical immigration policies and labor market can help explain why Asian American parents are more concentrated in certain occupations accorded higher status relative to white applicants.

In light of increasing socioeconomically advantaged Asian American applicants, some institutions engaged in disparate admissions practices that suppressed the growth of Asian Americans at these universities, whereas others simply relied on longstanding legacy and athletic recruitment policies to rationalize disparities in the Asian American and white admission rate.[244] Now, *SFFA v. Harvard* and Card's analysis help shed light on another manner through which these disparities are sustained. Admissions officers' consideration of parental occupations in a universal manner depresses the admission rate of Asian Americans based on their particular history in this country. This criterion helps counterbalance whites' lack of professional backgrounds relative to Asian Americans and its attendant benefits, a consequence of the United States' decision to finally accept immigrants deemed ideal to the exclusion of the rest and the discriminatory dynamics Asian Americans encounter in employment settings. Thus, a general tip to compensate for socioeconomic constraints in the admissions processes will boost the chance of admission for more white applicants than Asian American applicants because these structural factors restricted many Asian Americans to fields accorded higher status. The average admission rate across all white applicants, then, may be higher than the Asian American admission rate, in part, because so many individual white applicants obtained such a boost, whereas Asian American applicants did not.[245]

The second manner in which admissions officers use parental occupation—to weigh the merits of a candidate's accomplishments—also likely constrains the admission rate of Asian American applicants vis-à-vis whites based on their immigration histories and exclusionary labor market dynamics. The higher concentrations of Asian American applicants' parents in

242. *See* Kantamneni, Dharmalingam, Orley & Kanagasingam, *supra* note 241, at 651, 660; *see also* Poon, *supra* note 241, at 509, 511 (discussing how Asian American peer networks internalize stereotypes about STEM majors being associated with intellect and how their reinforcement of these occupational choices can reflect internalized racism).

243. *See* Poon, *supra* note 241, at 509.

244. *See supra* Subpart 1 (discussing the allegations of discrimination against Asian American applicants at various selective institutions in the 1980s).

245. Although white disadvantaged LDC applicants do not receive an apparent tip based on their socioeconomic status, their share of all white LDC applicants and admittees is so low that I do not believe it detracts from this general hypothesis. *See* Arcidiacono, Kinsler, & Ransom, *supra* note 10, at 43 tbl.4.

"'Computer and Mathematical,' 'Life, Physical, Social Science,' or 'Architecture and Engineering'" fields compared to whites[246] likely means that their accomplishments in these fields are evaluated as less impressive by admissions officers, thereby manifesting another way in which the admissions disparity is attenuated or disappears when controlling for parental occupation. Again, there may be concerns about the equity of using parental occupation to evaluate the impressiveness of Asian American applicants' accomplishments in these fields because the American immigration regime and tangible fears of discrimination and stereotypes restrict the occupations of Asian American applicants' parents, while the same cannot be said for whites.

### C. *The Use of Intended Career Interests*

Just as Asian American applicants' choice of major was used to justify admissions disparities in the 1980s,[247] applicants' intended career interests are used to justify the disparity between the admission rates of Asian Americans relative to whites today. Namely, if admissions officers find that Asian American applicants are disproportionately choosing a narrow set of intended career interests, as compared to whites, officers may reject more Asian American applicants to preserve a balance of career interests on their college campuses.[248] However, the reason why Asian Americans and whites systematically differ in terms of career interests stems, in part, from the previously described labor market dynamics and restrictive immigration policies of the United States that shape the occupational desires of Asian Americans and whites in divergent ways. This context, too, may bear on whether the use of this criterion should be deemed unfair.

Harvard's admissions data highlight how the use of intended career interests sustains disparate admission rates. Professor Card states:

> Asian Americans are much more likely to intend to pursue a career in medicine or health, while [w]hite applicants are much more likely to intend to pursue careers in the arts, communications, design, social service, government, or law. The difference in the intended career of medicine or health is particularly stark—[w]hite applicants are 37% less likely than Asian-American applicants to pursue this intended career, an intended career with the lowest admission rate (5%).[249]

246. Card Report, *supra* note 140, ¶ 85.

247. *See* Takagi, The Retreat from Face, *supra* note 32, at 64–65.

248. *See infra* note 249.

249. Card Report, *supra* note 140, ¶ 88. 19% of white applicants intend a career in medicine or health, whereas 30% of Asian American applicants declare this career interest. *Id.* at 44 ex.13. 14% of white applicants intend a career in government or law, and 5% intend to pursue the arts, communications, design, or social services. *Id.* By contrast, 9% of Asian American applicants declare a career interest in government or law, and 3% intend a career in the arts, communications, design, or social services. *Id.* These careers have a higher admission rate of 8%, compared to those who declare a career interest in medicine or health (5%). *Id.* Further, 18% of white applicants declare that they are undecided, whereas 14% of Asian American applicants select this option in their applications. *Id.* Those who declare that they are undecided have double the chance of admission as those

Further, "an applicant's future plans and fields of interest can be critical to the assessment of how the applicant will contribute to the Harvard community both inside and outside the classroom,"[250] and "a student body in which all students had the same career interests, or the same intellectual interests, would have less diversity of thought."[251] Both Card and the district court control for this criterion, which diminishes the penalty against Asian American applicants.[252] It can thus be inferred that admissions officers' desire for diversity in intended careers among the student body may impose greater selective pressure against Asian American applicants, who based on Card's evidence, may express less diverse career interests than their white peers. Others have suggested that there are implicit quotas on Asian American applicants that force them to compete against each other for limited slots.[253] Instead, it appears that universities seeking diversity in intended careers will inevitably impose higher selective pressure on Asian American applicants if they indicate or are perceived as pursuing narrower careers relative to whites. This can account for some of a penalty against Asian American applicants relative to whites.

Using applicants' identified career interests does not, at face value, appear to carry concerns of unfairness. After all, applicants have complete agency to identify their career interests on their applications, and universities, in seeking intellectually diverse student bodies that will make varied contributions to society, should consider applicants' identified interests. Yet the question remains as to whether the systematic difference in career interests identified by Asian American applicants versus whites truly derives from randomness rather than causes relating to sociohistorical factors affecting Asian Americans. If it is the latter, there may be concerns about the fairness of using this criterion to justify the admissions disparity between white and Asian American applicants, especially if differences in career interests between these groups relate to injustices inflicted upon the Asian American community.

This difference in career interests likely derives from a combination of capital among Asian Americans in the wake of the immigration reforms of the mid-20th century and the frames of success this capital enabled relative to whites. As stated earlier, high educational and socioeconomic success among many Asian Americans resulted from a liberalized immigration regime in the 1960s that, after decades of exclusion and restrictions, instituted preferences for immigrants with professional backgrounds.[254] These Asian migrants not

declaring a career interest in medicine or health (10% vs 5%). *Id.*

250. *Id.* ¶ 88.

251. *Id.* ¶ 72.

252. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d. 126, 172–76 (D. Mass. 2019); Card Rebuttal Report, *supra* note 195, ¶ 105–06.

253. *See* Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 Tex. Rev. L. & Pol. 317, 331–32 (2018).

254. *See supra* notes 226 & 227 and accompanying text.

only had a different starting point in terms of resources to facilitate their children's success, but also "selectively import[ed] *middle-class-specific* cultural frames, institutions, and mindsets from their countries of origin, and recreate[d] those that are most useful in their host society."[255] The combination of (1) high capital from these immigrants in ethnic communities, which creates resources and supports for individuals across class boundaries, and (2) selectively imported middle-class-specific cultural frames, knowledge, and mindsets, helps Asian Americans achieve a particular frame of success.[256] This frame of success includes pursuing high status professional fields, such as medicine, engineering, and science.[257] Thus, a general Asian cultural ethos cannot help account for why Asian Americans pursue high status careers in health and medicine.[258] Professors Min Zhou and Jennifer Lee pinpoint the illogic of the essentialist view of Asian culture that supposedly explains the achievements of many Asian Americans in the United States by highlighting that Asian migrants in other countries do not have similar educational or occupational outcomes.[259] Instead, the reformation of U.S. immigration law after decades of excluding Asians resulted in a bias for Asian immigrants with capital, knowledge, and mindsets that facilitated striving for career paths viewed as adaptive. This clarifies why there is a divergence in the distribution of career interests among white and Asian American applicants, as the former do not share a similar immigration arc in this country.

Further, Asian American applicants may be less likely to pursue careers in the arts, communications, design, social service, government, or law due to the previously described labor market dynamics that may have discouraged

255. *See* Min Zhou & Jennifer Lee, *Hyper-Selectivity and the Remaking of Culture: Understanding the Asian American Achievement Paradox*, 8 Asian Am. J. of Psych. 7, 11 (2017) (emphasis added).

256. *Id.*

257. *Id.*

258. *See* Kantamneni, Dharmalingam, Orley & Kanagasingam, *supra* note 241, at 649, 653, 660 (2018) ("However, our findings did not support the notion that adherence to traditional Asian values predicted vocational outcomes.").

259. *See* Lee and Zhou, *supra* note 227, at 2318 ("International comparisons also prove illuminating: Koreans in Japan have abysmal educational outcomes, and the children of Chinese immigrants in Spain and Italy exhibit the lowest educational aspirations and expectations of all second-generation groups . . . The disconfirming evidence is overwhelming, yet culturally essentialist explanations that reduce achievement to Confucianism, Asian culture, and values thrive in popular discourse."). Koreans in Japan also have worse educational outcomes that are borne out of a history of forced migration (including forced labor and sexual slavery) by Japan and systemic discrimination. *See* Jennifer Lee & Min Zhou, The Asian American Achievement Paradox 185 (2015). Similarly, Chinese immigrants in Spain have lower educational qualifications and perceive a lack of opportunities for visible minorities. Thus, many do not believe higher education will help them overcome these obstacles and have chosen instead to pursue entrepreneurship to achieve their frame of success. *Id.* at 186. Whereas the educational success frame in the U.S. is supported by capital in the form of supplementary educational resources within ethnic communities, the entrepreneurship success frame for Chinese immigrants in Spain is sustained through hometown associations and transnational business networks. *Id.*

their parents from pursuing these occupations. These dynamics include fears of discrimination in these fields, internalizing stereotypes about Asian Americans, and a lack of role models in these occupations.[260] It is not difficult to imagine that language barriers for immigrants[261] may have hindered Asian American representation in some of these careers as well. Additionally, Asian American parents' underrepresentation among career interests dominated by whites[262] may form a barrier for Asian American children to pursue these occupations because they lack direct knowledge and resources for aspiring to such careers.[263] Some Asian immigrants who leave behind repressive governments may be particularly distrustful of government entities in the U.S.[264] As a result, they may be reluctant to pursue government careers or encourage their children to aspire to these careers. Thus, the different profile of career interests that accounts for some of the admissions disparity between white and Asian American applicants can be partially traced to the historical and social construction of the group, Asian Americans. This context should be weighed in our deliberations about whether and how this criterion is unfair to Asian American applicants.

### D. *Additional Preferences for Legacy Applicants*

In addition to legacy preferences that have been widely problematized for the disproportionate benefit they bestow on white applicants,[265] other aspects of college admission schemes may allocate an even greater marginal preference to children of alumni. These facets of the admission system can be used to justify an admissions disparity between white and Asian American applicants, independent of legacy preferences themselves. Further, such components of admission schemes reproduce the exclusionary histories of selective educational institutions and the United States. Examining how these facets of admission schemes are linked to past racial injustice provides

260. *See* Gee, *supra* note 241, at 35; Kantamneni, Dharmalingam, Orley & Kanagasingam, *supra* note 241, at 651–52, 658, 660; Poon, *supra* note 241, at 508, 509, 511.

261. U.S. Comm'n on Civ. Rts, *supra note* 239, at 20–21, 136.

262. *Labor Force Statistics from the Current Population Survey*, U.S. Bureau of Lab. Stats., https://www.bls.gov/cps/cpsaat11.htm [https://perma.cc/J2GZ-V5M5](Jan. 20, 2022) (displaying how Asian Americans are underrepresented in most careers related to art, social services, and government).

263. One study indicates that Asian American children are more likely to choose STEM majors if their parents were in a STEM occupation. *See* Martin W. Moakler Jr. and Mikyong Minsun Kim, *College Major Choice in STEM: Revisiting Confidence and Demographic Factors*, 62 Career Dev. Q. 128, 138 (2014). The authors suggested this phenomenon occurred because such children could become directly familiar with these occupations and receive reinforcement and mentorship in pursuing these fields. *Id.* I suggest a similar mechanism explains why Asian Americans are less likely to pursue the interests identified by whites, namely, the lack of familiarity and support that arises from the underrepresentation of Asian American parents in those fields.

264. U.S. Comm'n on Civ. Rts., *supra note* 239, at 21.

265. *E.g.*, Chang, *Reverse Racism!*, *supra* note 126 at 1124; Leong, *supra* note 6, at 95–96; Liu, *Affirmative Action & Negative Action*, *supra* note 93, at 416–18.

useful context for evaluating the fairness of less visible admissions factors benefiting children of alumni.

One such mechanism favoring white applicants came to light from Harvard's admissions data: interviews conducted by admissions staff. In their statistical models, Card and the court controlled for a staff interviewer's rating of an applicant, if available, which attenuates the penalty against Asian Americans.[266] However, Arcidiacono explains that staff interviews are only given to 2.2% of all applicants,[267] 20% of individuals who fall into the ALDC category get such an interview, and those who receive this staff interview are less likely to be Asian American but are admitted at a disproportionately high rate.[268] Additionally, one special recruitment category has not received sufficient scrutiny: the Dean's or Director's Interest list. Although it has no defined criteria, the Director and Dean's List may include applicants that Deans have met at recruiting events, children of donors, or legacy applicants.[269] Thus, some children of alumni receive an admissions tip for being on the Dean's or Director's List on top of the tip provided by the special recruitment category for legacies. Because Asian Americans are less likely than whites to be in the special recruitment categories disproportionately receiving the staff interview in the first place, controlling for the staff interview rating to justify the admissions disparity between white and Asian American applicants is problematic.[270] But why is it that Asian Americans are less likely than whites to be among recruited Athletes, Legacies, applicants on the Dean's or Director's Interest list, or Children of Faculty and Staff—that is, why are the two racial groups differently constituted with respect to these categories?

Though further research is necessary to understand the social and historical reasons Asian Americans are underrepresented in the special recruitment categories unrelated to legacy preferences, scholars have clarified why children of alumni are disproportionately white. Whites have historically had greater access to selective institutions which translates to greater representation among alumni.[271] The disproportionate representation of whites among alumni, of course, is the flip side to the low acceptance of racial minority applicants, until university administrators began changing recruitment and evaluation processes in the 1960s and 70s in response to the Civil Rights Revolution, increasingly violent protests for racial injustice, and

266. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126, 172–76 (D. Mass. 2019); Card Rebuttal Report, *supra* note 195, ¶¶ 105–06.

267. *See* Rebuttal Expert Report of Peter S. Arcidiacono at 66, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB) [hereinafter Arcidiacono Rebuttal Report].

268. *Id.* at 67, 67 n.38.

269. *See* Card Report, *supra* note 140, ¶ 70.

270. Arcidiacono Rebuttal Report, *supra* note 267, at 67 n.38 ("8.0% of white applicants are in one of these categories, compared to 2.7% of African Americans, 2.2% of Hispanics, and 2.0% of Asian Americans").

271. *See* Chang, *Reverse Racism!*, *supra* note 126, at 1124; Leong, *supra* note 6, at 95–96; Liu, *Affirmative Action & Negative Action*, *supra* note 93, at 416–418.

student activism.[272] Further, as universities instituted robust affirmative action programs to mirror the federal government's efforts to diversify its workforce during this time, such efforts were quickly curtailed in *Bakke*, less than two decades after their advent.[273] In addition, the United States' suppression of migration from Asian countries until the 1960s[274] likely contributed to the disproportionate representation of whites among alumni at these institutions.

The district court and Card's analyses show that the staff interview rating disadvantages Asian American applicants compared to whites.[275] The staff interview is given disproportionately to ALDC applicants, but recruitment categories benefiting children of alumni cannot be disentangled from the exclusionary history of selective institutions and the United States. Due to these inequities, Asian Americans and whites now meaningfully differ in their total representation among alumni. To the extent that selective institutions employ admissions processes that provide additional tips to legacy applicants, it is likely that these processes help sustain depressed admission rates among Asian Americans compared to whites. Again, this should be considered in our collective deliberations about the fairness of such criteria to Asian American applicants.

## III. Imagining and Achieving Fairer Admissions

Thus far, I have presented a descriptive account of how disparities can manifest based on more subtle aspects of selective admissions schemes and their intersection with the construction of the Asian American community. This account provides greater clarity as to why Asian Americans perceive suppression of their racial group's admission rate at selective institutions. The question remains, however, as to what we should do about the suppressive effects of admissions schemes on Asian American applicants compared to whites.

My answer lies with the novel functional definition of negative action relying on Professor Kohler-Hausmann's theory of discrimination: we must decide whether the nexus of admissions criteria and the sociohistorical mistreatment of Asian Americans is so morally reprehensible that we label the intersection unfair, thus warranting our intervention. This is fundamentally a normative inquiry. It requires us to weigh the disadvantages current admissions criteria impose on Asian American applicants relative to their just effects on other subordinated groups and the rational institutional interests undergirding these facets of admissions schemes. This weighing is

272. *See* Karabel, *supra* note 168, at 378–409 (describing how Harvard, Yale, and Princeton changed their institutional practices to increase the admission of Black applicants in the 1960s, which in turn paved the way for other racial minority students to advocate for greater admission of their respective groups); Chang, *Reverse Racism!*, *supra* note 126, at 1124, 1124 n. 32.

273. *See* Allred, *supra* note 87, at 64–66.

274. *See supra* discussion Subpart B

275. *See, e.g.,* Allred, *supra* note 87, at 63–64; Liu, *Affirmative Action & Negative Action*, *supra* note 93, at 416–418.

necessary because, in some instances, a criterion's legitimate ends cannot be disentangled from its disparate impact on Asian Americans. This controversial, sociohistorical inquiry is unlikely to take place in our courts. Therefore, I recommend that we first reinvigorate the conversation around the Asian American Admissions Controversy. We must engage in public, deliberative discussions which include Asian Americans and other communities that have been historically excluded from selective institutions, about the fairness of the aforementioned admissions criteria. In addition, we should consider subjective evaluations and other criteria that may be found to sustain admissions disparities in the future. Only after deep, probing inquiries into the fairness of admissions criteria should we undertake the task of tinkering with admissions schemes.

Part III proceeds by discussing why public deliberation is a necessary precursor to efforts aimed at improving the treatment of Asian American applicants. Once we have settled on theories of unfairness in a democratic manner that engages the voices of traditionally excluded communities, I suggest that admissions officers take cues from these public conversations to institute reforms that improve admissions programs with respect to Asian American applicants. Finally, I discuss the strengths and limitations of having admissions offices reform their programs for Asian American applicants.

### A. *Reinvigorating the Conversation*

This Subpart discusses the harms of attempting to change selective admissions without having a public conversation about the fairness of admissions criteria disparately affecting Asian Americans, underscores the necessity of these conversations to reach complicated normative judgments about the fairness of these criteria, and lastly describes the collateral benefits of this public, deliberative process.

The primary harm of forging ahead to change selective admissions without a conversation about fair admissions that accounts for the histories of various groups and rational institutional interests at stake is that we risk entrenching an irrational and harmful conception of discriminatory, and hence unfair, admissions. Take, for example, SFFA's argument in their lawsuit against Harvard. Their claim of discrimination against Asian American applicants simply turns on statistical evidence that the chance of admission varies by race for applicants with similar observable characteristics.[276] Undergirding their conception of discrimination is the notion that fair admissions should be based on "group-based conditional parity" that there should be similar chances of admission for applicants with similar observable characteristics across racial lines.[277]

This notion of fair admissions is flawed, however, because, as Kohler-Hausmann has detailed and Part II of this Article illustrates, legacies of racial subordination help account for why racial groups vary in their observed

276. *See* Kohler-Hausmann, *What's the Point of Parity?*, *supra* note 167, at 3.
277. *Id.*

characteristics.[278] Thus, any efforts by universities to enroll a sufficient number of racial minority students and attain the educational benefits of diversity, in light of the reality of these inequities, will obviously result in different chances of admission on the basis of race.

Problematically, Harvard and the district court in *SFFA v. Harvard* adopt SFFA's notion of fair admissions.[279] They simply add more observable characteristics to the statistical models of applicants' chances of admission and explain away any remaining admissions disparities by pointing to unobservable, unquantifiable factors they perceive as legitimate, or the existence of slight, non-actionable implicit biases.[280] Defenders of affirmative action, then, fall into the trap of affirming a legal theory of discrimination and conception of fairness in admissions that obfuscates how observed characteristics of applicants are symptomatic of group-based inequities through this uncritical use of statistics. Most dangerously, this conception of fairness in selective admissions harms other initiatives and efforts to redress unfairness towards Asian American applicants (such as AACE's initiation of federal investigations).[281] It does not question the suppression of Asian American admissions based on how the group has a different profile of facially neutral characteristics than whites based on the social treatment and historical policies that have affected Asian Americans. For example, this theory of discrimination and fairness in admissions leaves unchallenged that whites disproportionately receive a beneficial admissions staff interview over Asian Americans, even though this phenomenon is an outgrowth of the racially exclusionary histories of the US and its institutions. Instead, the concept of group-based parity justifies whites' greater admissions chances than Asian Americans, in part, because they differ on the observed characteristic of the flawed staff interview rating. The lack of an adequate theory of discrimination may have hampered past efforts to tackle such admissions disparities between white and Asian American applicants. Indeed, Asian American constituencies attempting to address the admissions controversies of the 1980s continuously clashed with universities over whether statistical disparities supported claims of discrimination.[282] In these early attempts, Asian American community members did

278. *See id.* at 15–17.

279. *See id.* at 3, 10.

280. *See id.* at 10; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard*), 397 F. Supp. 3d 126, 163–65 (D. Mass. 2019).

281. *See* Benner & Green, *supra* note 112.

282. For example, in the midst of the admissions controversy at Berkeley, the state auditor general determined that the majority of admissions schemes administered by Berkeley's colleges over seven years had a lower rate of admission for Asian Americans versus whites. Takagi, The Retreat from Race, *supra* note 32, at 91. However, in a majority of those instances of disparate admission rates, the difference was less than 5%. *Id.* University officials believed the small difference and the lack of an official charge of discrimination in the auditor's report buttressed their position that Berkeley did not discriminate against Asian Americans. *Id.* at 92–93. In contrast, the Asian American Task Force construed the report as evidencing that Asian Americans were held to a higher standard than whites and that Berkeley had engaged in discrimination. *Id.* Notably,

not center a theory of discrimination that could adequately challenge the use of facially neutral criteria sustaining admissions disparities.

Civil rights litigation to resolve unfairness to Asian American applicants will fail to grapple with why racial groups differ in facially neutral characteristics due to histories of racial injustice,[283] so I suggest that we begin a public, participatory conversation to examine the fairness of criteria sustaining admissions disparities between whites and Asian Americans. We must first understand whether the suppressing effect of various admissions criteria on Asian Americans, as detailed in Part II, is negative action—that is, a departure from fair and just admissions that warrants our intervention. These determinations necessarily integrate complex normative judgments weighing various institutional interests and legacies of discrimination against minority groups.

The statistical evidence in *SFFA v. Harvard* highlights at least four aspects of selective admissions processes that have suppressive effects on Asian American applicants: (1) non-academic, subjective evaluations, (2) criteria that magnify preferences for legacy applicants, (3) usage of intended career, and (4) consideration of parental occupations. These disparities do not arise from mere randomness; rather, they build off the discriminatory and exclusionary treatment of Asian Americans throughout this nation's history.

However, with the exception of criteria magnifying tips for legacy applicants,[284] it would be difficult to argue that these criteria are inherently unfair and deserve to be completely eliminated from admissions schemes. Therefore, it is necessary to carefully weigh these criteria's benefits against their harm to Asian American applicants in order to determine whether they should be labeled unfair. First, non-academic evaluations provide insight into the content of an individual's personal statement, letters of recommendation, alumni interview reports, and personal and family hardship. These evaluations can be based on officers' assessment of the candidate's "integrity, helpfulness,

Assistant Vice Chancellor Travers went on to explain even this small difference could be explained by the "admission of 'protected' groups, such as handicapped, rural students, and athletes, the membership of which are predominantly white." *Id.* at 92.

283. *See* Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 Harv. L. Rev. F. 281, 283–85, 288–89 (2016) (discussing how the Court's jurisprudence has evolved to preclude the consideration of general historic discrimination to justify affirmative action policies in university admissions and its consequences for university officials, a perspective provided by Lee Bollinger, who was integral to the lawsuit, *Grutter v. Bollinger* (2003)); Joshi, *supra* note 15, at 145–50 (explaining how the Court's affirmative action jurisprudence constrains advocates from discussing legacies of racism as a justification for such policies); Reva B. Seigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278, 1354–55 (2011) (describing how concerns of social cohesion animate legal requirements that the government implement affirmative action policies in ways that reduce the salience of race, such as the Court's general repudiation of the remedial rationale for affirmative action).

284. *See supra* Subpart D (discussing how admissions staff interviews disproportionately benefit special recruitment categories, particularly legacies).

courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity or grit."[285] Though these subjective evaluations may be susceptible to implicit biases arising from stereotypes of Asian Americans,[286] information within personal statements, letters of recommendation, and experiences of personal and family hardship are valid metrics for admission.[287] Second, parental occupation can provide important information about socioeconomic advantages a person has had relative to others over the course of their life. Though the use of parental occupation reproduces harms of the U.S. immigration system and labor markets to Asian American applicants, it remains an important proxy for racial minority applicants who do not have the wealth-related advantages of their peers because of this country's legacy of racial subordination.[288] Further, some may respond that still, on average, Asian American applicants may have had access to advantages and opportunities that whites have not, and thus officers may justifiably continue to use parental occupation in an unmodified manner. Additionally, the institution has a valid interest in discerning how remarkable an applicant's accomplishments are by understanding whether their family's background facilitated such successes. Third, selective institutions may rationally seek to have student bodies that represent a variety of career interests to ensure there is intellectual diversity on their campuses and to maximize their contribution to a variety of fields.

Identifying whether these admissions criteria contribute to negative action thus requires weighing a variety of factors to conclude they are unfair: (1) the disparate impact of these criteria on Asian American applicants and its relation to the sociohistorical mistreatment of Asian Americans, (2) the just effects these criteria can have for other subordinated groups based on their unique legacies of injustice in this country, (3) the fairness of these criteria with respect to white applicants, particularly those who are disadvantaged; and (4) countervailing, rational interests the university may have in shaping its student body. Given the nature of this probing, controversial normative inquiry, I believe that these judgments are best shaped in public, deliberative settings in order to draw on the democratic legitimacy of participatory, transparent forums.[289] Crucially, these deliberations must include Asian

285. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard*), 397 F. Supp. 3d 126, 141 (D. Mass. 2019).

286. *See supra* note 171 and accompanying text.

287. *See* Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—the Untold Story Behind* Fisher v. University of Texas, 62 Buff. L. Rev. 237, 244 (2014) (emphasizing the validity of holistic review over simply relying on test scores). With respect to advocates who believe holistic review benefits unqualified applicants compared to reliance on test scores, Brodin asks how "they choose their own doctors, lawyers, or accountants? Do they ignore matters of character, dependability, judgment, commitment, personal affability, in favor of a singular focus on academic record and test scores?" *Id.*

288. *See* Brown and Wellman, *supra* note 164, at 198–201; Wilson *supra* note 213, at 7–9.

289. *Cf.* Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. Rev. 373, 406–09 (2007) (describing that deliberative engagement is a good that produces social stability within the framework of democratic

Americans,[290] other underrepresented minorities, and socioeconomically disadvantaged communities who have much to lose if admissions criteria, such as parental occupation, are modified or eliminated to redress the suppressing effect they have on Asian Americans. These public deliberations can unfold in a variety of discursive spaces. They can include online forums used by Asian Americans; events and meetings on the topic of selective admissions convened by student affinity groups, racial justice groups, Asian American organizations, and other entities representing underrepresented minorities or communities suffering from economic injustice; and news outlets read by the broader public. Support for why public discourse should be our first site of change can also be found in the history of the Asian American Admissions Controversy.[291] Conservatives in the 1980s successfully changed the public conversation surrounding Asian American admissions disparities by tying it to the validity of affirmative action.[292] Today, they reap the benefits of those efforts as SFFA's lawsuit brings them closer to dismantling affirmative action. Analogously, we too may be able to effect progressive changes in selective admissions after creating sustained scrutiny on the social and historical inequities interlaced with facially neutral admissions criteria through salient, public deliberations.

Finally, there are several collateral benefits to reinvigorating the conversation around the Asian American Admissions Controversy before attempting to achieve any change in selective admissions. First, it would provide a critical opportunity to discuss the merits of targeting affirmative action programs that mitigate legacies of sociohistorical mistreatment suffered by

constitutionalism); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323, 1341 (2006) (explaining the importance of participant engagement and collective deliberation in a democracy); Lani Guinier, *The Supreme Court 2007 Term Foreword: Demosprudence Through Dissent*, 122 Harv. L. Rev. 4, 48 (2008) (noting the significance of "citizen participation over time in the form of deliberation and iteration is vital to the legitimacy and justice function of lawmaking and to the sustainability of democracy itself"). Recent scholarship confirms that democracy–enhancing practices are beneficial to domains beyond constitutional law or legal interpretation. *See* Monica Bell, Stephanie Garlock, & Alexander Nabavi-Noori, *Towards a Demosprudence of Poverty*, 69 Duke L.J. 1473, 1510–11 (2020) (describing how judges can take up democracy–enhancing practices to improve the relationship of courts to individuals in poverty); *see also* Allison K. Hoffman, *Health Care's Market Bureaucracy*, 66 UCLA L. Rev. 1926, 2014–22 (2019) (discussing how collective deliberation over priorities in the healthcare context may be more beneficial for the future of U.S health law and policy, as opposed to building on its ineffective market-based bureaucracy).

290. These public deliberations should include first-generation Chinese Americans who tend to be the most organized Asian American constituency for dismantling affirmative action. *See* Kim, *supra* note 87, at 216; Poon, et al., *supra* note 223, at 202; Wong, *supra* note 111. Perhaps using existing community networks, spaces, and communication mediums may be effective in including these individuals in the conversation. *Cf.* Poon, et al., *supra* note 223, at 209 (using WeChat to recruit Asian American study participants who opposed affirmative action after experiencing failure through other online platforms).

291. *See supra* Subpart 2

292. *Id.*

underrepresented minorities. Such discussions would demonstrate how eliminating the program would leave unabated the preferences built-in for whites over Asian Americans in light of our community's own past.

For example, if the type of discourse envisioned here took root in popular culture, it could become obvious why opposing affirmative action programs is hypocritical. That is, it would be paradoxical for Asian American community members to problematize the suppressive effect of facially neutral criteria based on our community's legacies of suffering sociohistorical discrimination while invalidating a program that addresses *legacies of sociohistorical discrimination* for others. It borders on incredulity for Asian American opponents of affirmative action to ask that we take seriously the racial injustice underlying the disparate effect of admissions criteria on Asian American applicants, while categorically ignoring that racial subordination also causes other underrepresented minorities to suffer on facially neutral metrics of admission, for which affirmative action is a necessary remedy. Addressing the lack of merit behind dismantling affirmative action programs in salient, public conversations could stymie the tide of rising anti-affirmative action sentiments within the Asian American community.[293] By underscoring how supposedly facially neutral criteria benefit white applicants to the detriment of Asian Americans and the hypocrisy of targeting affirmative action programs in these public conversations, we may be able to inoculate current and future generations from falling prey to the simplistic logic of eliminating affirmative action policies to increase Asian American admissions.[294] These public, deliberative conversations would also make it easier for Asian American supporters of affirmative action to defend the policy while also acknowledging unfair aspects of selective admissions with respect to Asian American applicants that must be addressed.[295]

Second, public discussion of university admissions practices' unfairness, in the context of institutional interests and legacies of subordination, can help

293. *See* Ramakrishnan & Wong, *supra* note 110.

294. The attractive logic undergirding at least some opposition to affirmative action policies among Asian Americans can be boiled down to this quote by Jay Casplan Kang:

> For many of these parents, the Harvard case, with its revelations about personal ratings, . . . has created a binary choice. They can choose the side that is trying to get more of their children into Harvard and other elite schools, or they can choose the side that will not even bother mentioning them.

Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1.

295. For some Asian Americans, it appears difficult to support affirmative action policies while acknowledging that selective admissions program may be discriminatory. *See* Kang, *Where Does Affirmative Action Leave Asian Americans?*, *supra* note 1 ("'Look, I support Harvard's right to pursue the diversity they want,' said one Asian-American who described herself as a 'staunch supporter of affirmative action.' 'But *of course* they discriminate against Asian kids.'"). The re-oriented inquiry of this Article makes sense of this problem and clarifies the issue for similarly situated Asian Americans. By examining legacies of discrimination, we can justify helping underrepresented minorities through affirmative action policies and advocate for addressing the suppressive effect of supposedly facially neutral criteria if deemed unfair.

us avoid being bogged down by statistical analyses that obscure sociohistorical effects on applicants' chances of admission.[296] In particular, claims of unfairness resulting from these deliberations cannot be easily disregarded by selective institutions. To justify their reliance on facially neutral factors that actually produce disparities, admissions offices will be forced to confront the inequitable histories and social contexts affecting racial minorities on these facially neutral metrics.[297]

Third, public deliberations might bring us to the conclusion that eliminating certain admissions criteria is not preferred based on the valid interests they serve. Then we will have publicly settled that these criteria do not warrant the label, negative action, and may be left alone. In these circumstances, the public deliberative process could help inspire conversations within the Asian American community about alternative actions we can take to increase our chances of admission, despite the disparity-inducing effect of certain facially neutral criteria. For example, we might discuss how aspiring to careers in which we are underrepresented can mitigate the effect of the intended career interest criterion on Asian American admissions.[298] This also serves the laudable goal of diversifying the arts, social services, and government, which stand to benefit from our underrepresented perspectives. Even if we conclude a criterion does not warrant the label of negative action, we may deliberate about how components of the criterion can be reformed to make them fairer for Asian American applicants. That is, perhaps we might label subcomponents of a criterion as unfair and thus producing negative action that warrants intervention.

Finally, an added benefit to invigorating public discourse about the admissions criteria in Part II and subjective ratings, is that the conversation can expand to other criteria that sustain admissions disparities between white and Asian American applicants. Chief among those criteria that should be subjected to vigorous public debate are ALDC preferences. Given how the statistical analysis in *SFFA v. Harvard* was structured, I could not analyze ALDC preferences in the way that I analyzed parental occupation, declared career interest, and admissions staff interviews.[299] However, the fact that

296. *Cf.* Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 L. & Soc. Rev. 179, 182 (2000) (discussing how attending to the social meaning of behavior in the domain of the criminal legal system does not require evidence that conforms to prevailing research norms).

297. Some success for this approach can be found in how SFFA's advocacy about the unfairness of the personality rating contributed to the district court's decision to address statistical analyses excluding the personal rating for weighing the admission scheme's harm to Asian American applicants. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 129, 161–62, 173, 194 (D. Mass. 2019). Thus, claims-making about the unfairness of facially neutral criteria based on their social and historical context can elicit some substantive concessions from integral decision makers.

298. *See* Zhou & Lee, *supra* note 255, at 8–9.

299. Statistical models of the marginal effect of Asian American ethnicity (compared

nearly a third of admitted white applicants would not have been accepted without these preferences[300] suggests that ALDC tips likely have an outsized role relative to parental occupation, declared career interest, and additional preferences for legacy applicants in preserving admissions disparities between white and Asian American applicants.[301] While legacy preferences have been subjected to extensive critique,[302] tips for children of faculty, applicants on deans' lists, or recruited athletes have not.[303] The fairness of these tips should be prioritized in future conversations, balancing their harms to Asian American applicants against the institutional interests they may serve. Then, we can work to address those criteria deemed unfair. Further, public conversations may include unaddressed criteria at other selective institutions that preserve admissions disparities between Asian American and white applicants. Historically, selective institutions have guarded their admissions' processes and data from scrutiny but given the current reality in which their alumni have significant influence on public life,[304] we should demand greater transparency of how their admissions processes can reproduce injustice and exclusion.

In sum, the complexity of determining fairness of admissions criteria that produce disparities between Asian American and white applicants

to white applicants) on admissions probabilities appear to integrate variables that account for the tips that ALDC applicants receive from the outset. *See SFFA*, 397 F. Supp. 3d at 174 ("Additionally, the tips that only ALDCs receive, for example for being recruited athletes, can be adequately accounted for through the inclusion of variables for those characteristics."). In contrast, Card's sequential changes to Arcidiacono's model demonstrated that accounting for parental occupation, declared career interest, and staff interview ratings attenuated the statistical disparity between white and Asian American applicants, which allowed for explanations of why these factors contribute to the disparity. *See* Card Rebuttal Report, *supra* note 195, ¶¶ 105–06. Here, in contrast, I do not have a statistical model that demonstrates the marginal effect of Asian American ethnicity on admissions including ALDC applicants that is subsequently modified to control for the ALDC preferences in order to understand how ALDC preferences contribute to the disparity.

300. *See* Arcidiacono, Kinsler, & Ransom, *supra* note 10, at 16–17, 31.

301. *See* Gelman, Ho & Goel, *supra* note 9 ("Much, though not all, of the observed disparity in acceptance rates between Asian American and white applicants stems from Harvard's open preference—which it shares with many elite colleges—for strong athletes and the children of alumni, faculty, and donors, all groups that are disproportionately white in Harvard's pool of applicants.").

302. *See, e.g.*, Allred, *supra* note 87, at 63–64; Chang, *Reverse Racism!*, *supra* note 126, at 1124; Ho, *supra* note 126, at 85–86; Leong, *supra* note 6, at 95–96; Liu, *Affirmative Action & Negative Action*, *supra* note 93, at 416–18.

303. *See* William C. Bowen & Sarah A. Levin, Reclaiming the Game: College Sports and Educational Values 63–78 (2005) (analyzing the large preferences given to recruited athlete applicants in 1999, particularly at selective universities, and noting the absence of a conversation surrounding these preferences compared to tips given to racial minority applicants); Tsuang, *supra* note 63, at 670–71 (discussing that the purported benefit of athletic programs inducing alumni donations may be outweighed by the perception that universities are beholden to alumni and sport coaches, harming the image of a "meritocratic" admissions program).

304. *See* Arcidiacono, Kinsler & Ransom, *supra* note 10, at 3, 3 n.4.

necessitates public, deliberative engagement with Asian Americans, other underrepresented minorities, and communities suffering from economic injustice. Such renewed discourse can produce a variety of attendant benefits that we may deem desirable.

### B. *Possibilities for Reforming Criteria Deemed Negative Action*

This Subpart details how universities' admissions offices could institute certain reforms after taking cues from an evolving public conversation about the unfairness of selective admissions programs with respect to Asian American applicants. Namely, these reforms could be instituted should public deliberations deem the use of intended career, personal ratings, and parental occupation, or components of any criterion, as unfair (negative action). I do not examine criteria that magnify tips for legacy applicants because it seems clear that there are no countervailing considerations that could justify the use of a criterion that reproduces the racially exclusionary effect of legacy preferences above and beyond those preferences themselves. Thus, I believe a fair implication is that, at the very least, admissions offices should eliminate criteria which build on these preferences. However, all of my suggestions for potential reforms, including for criteria magnifying legacy preferences, are merely recommendations, as I believe the public deliberative process should be afforded primacy in coming to specific conclusions of unfairness.

Labeling the use of applicants' intended careers as unfair, in its entirety or in certain respects, and thus producing negative action, requires weighing several factors. On one hand, all applicants have complete agency in declaring their career interests and selective institutions have a strong interest in maximizing their contribution to society and preserving intellectual diversity by admitting applicants with a variety of career interests. On the other, there are structural causes that undergird the differential profile of career interests between whites and Asian Americans originating, in part, from the United States' restrictive immigration regime, perceived barriers to employment in other fields, and internalized stereotypes.[305] If public deliberation leans toward concluding that the intended career of applicants is an unfair metric of admission because its harm to Asian American applicants outweighs its valid uses, we might advocate that universities reduce the magnitude of weight given to this criterion while accounting for their departments' capacity limitations. This may be more feasible than pushing for eliminating the criterion entirely.

Alternatively, if these public deliberations conclude that the harm to Asian Americans is only outweighed to the extent that the institution wants to maximize its contribution to a variety of disciplines, we might conclude that declared career interest is only unfair to the extent that it does not reflect students' post-graduate occupations.[306] In this scenario, admissions offices could

305. *See supra* Subpart C

306. Indeed, students in the 1980s objected to the notion that applicants' declared interests in premed could explain away disparities in the admissions of whites and Asian

initiate studies of random samples of its graduates to examine if they persist in their declared career interests over time. They could also examine whether there are significant differences between whites and Asian Americans in their post-graduate careers. If Asian Americans abandon their declared interests in high rates over time, they may be just as likely to contribute to a diverse array of fields as their white peers, and admissions officers would be justified in de-emphasizing the use of intended careers. However, if Asian Americans persist in those declared career interests, then we might accept universities' use of an applicant's intended career in an unmodified manner, even if it has a disparate impact on Asian American applicants. If the criterion is unchanged, we can help Asian Americans strive for careers in which they are underrepresented to mitigate its suppressive effect, which also serves the beneficial goal of diversifying those fields.[307]

Finally, I note that it may be possible to address the harm of the criterion of declared career interests to Asian Americans with minimal damage to the rational interests it serves. Perhaps admissions offices could put less weight on the declared career interests of Asian American applicants if they provide a non-racial rationale that comports with the racial indirection mandated by affirmative action jurisprudence.[308] For example, say the university examines students' majors as a proxy for declared career interests, and finds that there is a high attrition rate of students from health and medicine related majors. The university might posit that it should be able to deemphasize this criterion for applicants who declare these career interests because the criterion has less utility in predicting how many students will actually adhere to those interests. This is a universal rationale that could incidentally target the disparate impact of the declared career interest criterion on Asian Americans.

As for subjective ratings, public deliberations should consider how the rating provides insight into legitimate qualitative factors in applicants' letters of recommendation, personal statements, and experiences of hardship. These considerations should be weighed against how the rating may be tainted by negative stereotypes of Asian Americans[309] and school resource inequities harming the quality of recommendation letters for Asian American applicants.[310] It may be possible to address the harm of stereotyping with the tailored intervention of implicit bias trainings to address disparities in these

Americans because of the high attrition rate of Asian Americans from these majors. *See* Bryan Walpert, *Rogers Refutes UCS Statement Defends Asian Am. Admit Policy*, Brown Daily Herald (Oct. 21, 1986), https://www.brown.edu/academics/studying-asian-america/sites/brown.edu.academics.studying-asian-america/files/uploads/Rogers%20Refutes%20UCS%20Statement%20Defends%20Asian%20Am.%20Admit%20Policy_10211986_0.pdf [on file with journal].

307. *See* Zhou & Lee, *supra* note 255, at 8–9.

308. *See* Joshi, *supra* note 15, at 2564–65; Yuvraj Joshi, *Measuring Diversity*, 117 Colum. L. Rev. Online 54, 67–69 (2017).

309. *See* Chiu, *supra* note 106, at 476.

310. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 200 (1st Cir. 2020).

subjective ratings.[311] Some optimism for this strategy can be found in the fact that, after Stanford acknowledged unconscious biases accounted for the admissions disparity between Asian Americans and whites in the 1980s, it implemented trainings addressing this problem that mitigated the disparity.[312]

However, what happens if the disparity between Asian American and white applicants today cannot be resolved through such implicit bias trainings? The fact that teacher and guidance counselor recommendations may be worse for Asian American applicants compared to whites because Asian Americans are more likely to attend overburdened public schools, which in turn contributes to worse subjective ratings, suggests that implicit bias trainings will not wholly address the issue.[313] Further, implicit bias trainings solely within Harvard's admissions offices will not address such bias among high school teachers and guidance counselors who provide critical recommendation letters. To proceed, then, we must weigh the harm the criterion imposes on Asian Americans against its valid institutional interests through public deliberation. These public deliberations can illuminate that Asian Americans should be just as concerned about educational inequities that privilege white students with better resourced staff. It may also impel Harvard's admissions officers to investigate whether the disparity in teacher and guidance counselors' recommendations is due to implicit biases, and if so, provide guidance to recommenders to mitigate that impact. If a consensus appears to emerge that the harm to Asian Americans outweighs the institutional interests at stake, admissions offices might de-emphasize the criterion. A complicating factor to pursuing this choice is that decreasing the weight of the personal rating could increase emphasis on other criteria in the admissions system, such as academic ratings, which would harm underrepresented minorities.[314] Thus, admissions officers should be aware that changing the emphasis for this criterion may require recalibrating their admissions procedures to address these issues. Alternatively, we might conclude that the valid institutional interests at the heart of subjective ratings are so strong that we accept the disparity-inducing nature of the criterion for Asian Americans.

A public conversation about the parental occupation criterion and its fairness with respect to Asian American applicants may be the most contentious because of the factors it must weigh. On one hand, we must consider how the criterion results in admissions disparities with respect to Asian American and white applicants because of this country's restrictive immigration regime

311. The district court in *SFFA v. Harvard* recommended implicit bias trainings. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.) (*SFFA*), 397 F. Supp. 3d 129, 204 (D. Mass. 2019).

312. *See* Takagi, The Retreat From Race, *supra* note 32, at 49.

313. *SFFA*, 980 F.3d 157 at 200.

314. *See SFFA*, 397 F. Supp. 3d at 161 ("Among Expanded Dataset applicants, more than 60% of Asian American applicants received academic ratings of 1 or 2, compared to 46% of white applicants, 9% of African American applicants, and 17% of Hispanic applicants.").

and negative labor market dynamics.[315] On the other, we should also evaluate how the criterion is important to both underrepresented minorities and many Asian Americans, particularly Southeast Asian Americans, who lack wealth-based advantages because of racial subordination and/or the difficult circumstances of their migration. Further, we must also consider the critique that regardless of this country's restrictive immigration regime, more Asian American applicants may have had wealth-based advantages compared to white applicants.[316] Ultimately, in my view, the equities served by a preference for socioeconomically disadvantaged applicants sufficiently outweigh the harm to more advantaged Asian American applicants. First and foremost, this tip is a remedial program, albeit a limited one, for the economic injustice inflicted on disadvantaged persons. Second, eliminating this preference would grievously harm our educational institutions by losing the perspectives of those without wealth-based privileges. Thus, I believe the parental occupation criterion is just, and should not be removed or modified in a manner that would harm chances of admission for disadvantaged applicants.

We might also specifically examine the subcomponent of this criterion that gauges the remarkability of a candidate's accomplishments against their family's background. That is, does this distinct institutional interest remain valid given how this country's discriminatory regimes selected Asian Americans in particular occupations, which now systematically results in the undervaluation of Asian American applicants whose achievements are in those same fields? Perhaps after a salient deliberative process, we might view the use of parental occupation for weighting a candidate's accomplishments as unfair, but also conclude that it should be retained as a valid proxy for socioeconomic status. Thus, admissions offices might reform their programs to deemphasize the consideration of the remarkability of candidates' accomplishments in light of their parents' occupations. Doing so, however, may harm disadvantaged applicants who would no longer benefit from stronger evaluations for accomplishments made without the support of their parents' background. Alternatively, after the deliberative process, we might find that this criterion's beneficial uses sufficiently outweigh the harm to Asian American applicants and leave the criterion alone.

In sum, admissions officers can institute a variety of changes to admissions programs to mitigate harm to Asian American applicants depending on how public deliberations unfold. However, careful attention must be paid to the ramifications of these decisions for underrepresented minorities and socioeconomically disadvantaged applicants.

### C. *Strengths & Limitations of Admissions Offices Addressing Negative Action*

The strength of having admissions offices reform their admissions programs in response to evolving public conversations about supposedly facially

315. *See* Lee & Zhou, *supra* note 227, at 2317, 2319.
316. *See supra* Subpart II.B.

neutral criteria is that this approach does not face the barriers attendant to pursuing litigation. Without evidence of intentional discrimination within admissions programs, the courts will never accept Asian American applicants' claims of unfair treatment compared to white applicants.[317] For example, in dicta, the district court in *SFFA v. Harvard* noted that it would have applied the standard for facially neutral policies in evaluating claims of discrimination solely between Asian Americans and whites because Harvard does not provide meaningful racial tips to either group; this would easily have resulted in a judgment in Harvard's favor because SFFA could not prove discriminatory intent or purpose in the admissions scheme.[318] Further, there is reason to be more optimistic that admissions offices will adopt some reforms. The substantial legal threat to universities' affirmative action programs, in light of *SFFA v. Harvard*, may encourage administrators to take more seriously calls to remedy inequities affecting Asian American applicants.

I acknowledge that leaving to admissions officers the ultimate responsibility of remedying negative action in response to an evolving public conversation about the fairness of various admissions criteria has two significant limitations: (1) it is unlikely to completely eliminate the admissions disparity between white and Asian American applicants and (2) it centers too much power in the hands of admissions officers who may refuse to act because of their university's interests. First, this approach to reform ultimately does not seek the elimination of most admissions criteria that have a disparate impact on Asian American applicants. All holistic, individualized review admission schemes are likely to integrate measures of applicants' financial hardship, subjective traits, and career interests. Such integration is logical given universities' interests in obtaining financial equity in their admissions process, measuring talents beyond those reflected by applicants' academic background, and maximizing intellectual diversity and their contribution to various disciplines while respecting departmental capacities. As described previously, these measures will have a disparate impact on Asian American applicants' admissions chances because of the sociohistorical treatment of the racial group in this country.

317. *See* Ho, *supra* note 126, at 97.

318. *Id.* at 47, n.56. Without a showing of discriminatory intent, challenging the holistic admissions system as a facially neutral policy that is applied in a discriminatory manner would likely be unsuccessful. Because Title VI integrates standards from the Equal Protection Clause, the applicable standard likely derives from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially neutral policy of licensing laundries was unconstitutional because it denied all applications by Chinese individuals but approved all non-Chinese licenses, except one). *See* Feingold, *supra* note 126, at 727. The Supreme Court has suggested that such challenges are rarely meritorious, requiring a high degree of disparity to succeed. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). Thus, the predicament Asian Americans face in addressing negative action exemplifies how "political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems." *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2742, 2749 (2014).

In an ideal world, admissions officers could engage in explicit, categorical examinations of white and Asian American applicants to adjust for unjust sociohistorical treatment of Asian Americans and resolve the admissions disparity. This would leave unaffected the beneficial effects of these criteria for underrepresented minorities who are also constrained by legacies of subordination. However, it is clear that such explicit, class-wide solutions to address general, sociohistorical mistreatment, as opposed to discrimination perpetrated by an individual admissions office, are barred by the Supreme Court's current affirmative action jurisprudence.[319] Perhaps a radically different admissions system from holistic, individualized review could eliminate the disparity-inducing effect of facially neutral criteria on Asian American applicants compared to whites.[320] Though I support these reforms if they would make admissions programs more equitable, I suggest possible reforms by admissions officers because they may be easier to institute in the near future.

A second limitation is that this approach to reform places disproportionate power in the hands of admissions officers. Ultimately, it makes them the primary decision makers for deciding whether public, deliberative conversations have labeled these criteria unfair in certain respects, such that changes should be made to admissions schemes. Given that there may be conflicting collective judgments in various discursive spaces and difficulty assessing whether an emerging consensus has labeled a criterion unfair, this approach may provide admissions officers with an excuse not to modify their admissions regimes. However, we may be able to discern indicia of collective judgment similar to how Takagi documented that conservatives had changed the terms of debate surrounding the Asian American Admissions Controversy by 1989 in linking the issue to affirmative action.[321] For example, we might look to how the media generally reports on the issue. Further, we should also attend to developing judgments about unfairness in selective admissions in the discursive spaces for public deliberation mentioned above. These include online forums frequented by Asian Americans, such

319. *See supra* note 283.

320. One such proposal could be a lottery process using the same application materials. If admissions officers determine many candidates can perform at an adequate level within an institution, why not distribute the coveted opportunity randomly? *See* Sturm & Guinier, *supra* note 168, at 1012, 1018. In Harvard's case, Professor Card cites a statistic from the institution's Interview Handbook suggesting that "[p]erhaps 85 percent of [Harvard's] applicants are academically qualified." Card Rebuttal Report, *supra* note 195, ¶ 23. Thus, if a large swathe of an admissions pool could be deemed qualified, it would be possible to use a lottery process among these qualified applicants, displacing the outsized influence of facially neutral criteria that disparately affect Asian American applicants. However, even if a lottery process were instituted, it could be modified to integrate the facially neutral factors that disparately impact Asian American applicants. *See* Sturm & Guinier, *supra* note 168, at 1018 ("Concerns about a lottery's insensitivity to particular institutional needs or values could be addressed by increasing the selection prospects of applicants with skills, abilities, or backgrounds that are particularly needed by the institution. A weighted lottery may indeed be the fairest and most functional approach for some institutions.").

321. *See* Takagi, The Retreat From Race, *supra* note 32, at 121, 133–36.

as WeChat, Asian American organizations, racial justice groups, and entities representing underrepresented minorities and communities affected by economic injustice. These can serve as proxies for understanding how a complex public conversation on this topic is unfolding. To the extent that similar judgments may materialize across a number of these forums, we might discern that public deliberation has come to specific conclusions with respect to certain admissions criteria and that admissions officers should take heed of these cues to make modifications to admissions programs. This is not a farfetched possibility. For example, after significant public deliberation, the abovementioned communities may unite in condemning how ALDC preferences reproduce social and historical inequities because they significantly harm both racial minority and disadvantaged applicants.

However, if conflicting judgments emerge across these forums, particularly between Asian American groups and entities representing other underrepresented minorities or socioeconomically disadvantaged communities, then I believe it is safer to leave the power to admissions officers to decide when to alter admissions schemes. These officers can recognize that a public consensus has not materialized and that acting on Asian Americans' claims of unfairness in a vacuum can unduly harm other marginalized groups. In these instances, it may be more equitable to refrain from changing admissions schemes. If admissions officers cabin their ameliorative efforts on the behalf of Asian Americans due to their institutional biases,[322] constituencies may be able to apply pressure to selective institutions to change, or expand on modifications to, their admissions schemes. This would parallel the efforts of Asian American student groups and community members during the 1980s to address admissions disparities between Asian Americans and whites.[323] I do not believe these constituencies should be solely composed of Asian Americans, since there should be due consideration for other marginalized communities. Instead, I would hope that solidarity with other communities in calling attention to the insufficiency of a university's admission reforms can persuade admissions officers to institute more far-reaching changes.

322. *See* Matsuda, *supra* note 127, at 153–54.

323. *See supra* Subpart 1. Admittedly, Asian American student groups had varying degrees of success in obtaining substantive concessions from universities. For example, periodicals from the 1980s indicate that administrators at Brown did not effectively redress the disparities Asian Americans faced in the wake of student advocacy. *See* Mary Ann Campo, *Asian-American Admissions: Fair or Discriminatory*, Brown Daily (Sept. 19, 1989), https://www.brown.edu/academics/studying-asian-america/sites/brown.edu.academics.studying-asian-america/files/uploads/BDH%2019890919.pdf ("[F]or example, the AASA released a report in 1983 that showed a discrepancy between Asian applications and admissions. Kim said administrators responded immediately, but then a year later, the Asian acceptance rate went down again."); Walpert, *supra* note 306 ("According to [Undergraduate Student Council President] Rivlin, Roger's statement that the Admissions Office has followed every Corporation recommendation on Asian American admission is 'just not true.'").

## Conclusion

*SFFA v. Harvard* is part of a nearly four-decade long story about the barriers Asian Americans face in selective admissions, a chapter that underscores how facially neutral criteria cannot be divorced from the treatment of Asian Americans throughout our nation's history. Because of the complex normative judgments required for deciding whether and how criteria are inequitable and the impracticability of resolving such concerns in the courts, I have advocated for a public deliberative process for examining the fairness of supposedly facially neutral criteria sustaining disparities between Asian Americans and whites. This can guide universities in instituting reforms to their admissions process. Though the Asian American Admissions Controversy has proven intractable for the past forty years, I am optimistic that radically shifting the terms of the debate and furthering needed discourse across communities will help craft equitable solutions for future generations of Asian American youth pursuing their aspirations.