

Footnotes to Forefront

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What exactly do the Asian American members of the plaintiff in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*¹ want? They wish to be treated fairly in their applications to Harvard, of course, per the name of the organization of which they are card-carrying members.² But life is not always fair, and not everyone can get into Harvard, even if they—identified as “Applicant” in the complaint—graduated first in their class of 460 students from a top, nationally ranked high school, scored a perfect 36 on the ACT, played varsity tennis (and was captain of the team), and served as a volunteer for local, national, and international organizations, among other credentials in an impressive application.³ Perhaps even less fair is the experience of Asian American students with similar credentials who are denied admission to Harvard when others with lower credentials but who are *not* Asian-American are admitted.⁴ Qualified students being turned away because of their race or ethnicity evokes not only considerations of fairness but also of law. Americans of Asian descent, like all other Americans, are entitled to “the equal protection of the laws.”⁵ And Harvard is not above the law. Specifically, as a recipient of federal financial assistance, Harvard may not exclude from participation, deny benefits, or discriminate on the ground of race, color, or national origin.⁶

The essence of SFFA’s complaint is that Harvard has intentionally discriminated against Asian American applicants based on their race and

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¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (U.S. Jan. 24, 2022) (No. 20-1199).

² *Students for Fair Admissions, Inc.’s (SFFA) original board of directors had three self-appointed members: Edward Blum (President), Abigail Fisher (Secretary), and Richard Fisher (Treasurer)*. 980 F.3d at 164. When SFFA commenced its action, it had forty-seven “affiliate members,” which included Asian American members who applied to, and were rejected by, Harvard. *Id.* Recent membership also includes prospective applicants and parents of prospective and rejected applicants. Complaint at 7, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB).

³ Complaint, *supra* note 2, at 8.

⁴ Anemona Hartocollis & Stephanie Saul, *Affirmative Action Battle Has a New Focus: Asian-Americans*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/affirmative-action-battle-has-a-new-focus-asian-americans.html> [<https://perma.cc/C5C2-FWVA>].

⁵ U.S. CONST. amend. XIV, *quoted in* Complaint, *supra* note 2, at 94.

⁶ *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d.

ethnicity⁷ by artificially limiting their number who are offered admission,⁸ and making it far more difficult for them than for any other racial and ethnic group of students to gain admission.⁹ “Harvard admits Asian Americans at similar or lower rates than whites, even though Asian Americans receive higher academic scores, higher extracurricular scores, and higher alumni-interview scores.”¹⁰ SFFA argues that Harvard’s purported “holistic” review of applicants was formulated for the specific purpose of discriminating against disfavored minority groups¹¹ (beginning with Jewish applicants in the past¹²), and is now used to hold Asian Americans to a higher standard than other applicants.¹³ In reality, SFFA avers, “race or ethnicity is the defining feature of the application.”¹⁴

For its part, Harvard maintains that it does not discriminate against Asian American applicants,¹⁵ does not have a quota for Asian American admissions,¹⁶ and does not engage in racial balancing.¹⁷ Harvard states that it considers race as a plus, flexibly and consistent with applicable case law,¹⁸ including Justice Powell’s opinion for the Court in *Regents of the University of California v. Bakke*, which gave the legal landscape the “Harvard Plan” and allowed colleges to consider race as a plus factor in admissions,¹⁹ and *Grutter v. Bollinger*, which pronounced that diversity at a university setting is a compelling interest that can justify the narrowly tailored use of race.²⁰ After a fifteen-day bench trial, the district court ruled in favor of Harvard.²¹ Although Harvard’s admissions program is “not perfect,” the court said, it survives strict scrutiny.²² On appeal, the Court of Appeals for the First Circuit affirmed.²³ Currently pending before the Supreme Court, *SFFA v. Harvard* is the latest

⁷ Complaint, *supra* note 2, at 43, 44, 46, 49, 100.

⁸ *Id.* at 43; *see id.* at 35.

⁹ *Id.* at 44.

¹⁰ Brief for Petitioner at 30, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, Nos. 20-1199 & 21-707 (U.S. May 2, 2022).

¹¹ Complaint, *supra* note 2, at 11.

¹² *Id.* at 4, 103.

¹³ *Id.* at 4.

¹⁴ *Id.* at 108.

¹⁵ Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts at 35–45, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB).

¹⁶ *Id.* at 19.

¹⁷ *Id.*

¹⁸ *Id.* at 21–22.

¹⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–20 (1978) (Powell, J., announcing judgment).

²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

²¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126, 205 (D. Mass. 2019).

²² *Id.* at 204.

²³ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157, 204 (1st Cir. 2020).

case involving the vexing question of the permissible consideration of race in higher education admissions. The outcome will decide whether, to quote the college song, “*Fair Harvard holds sway.*”²⁴

Traditional affirmative action programs allowed consideration of minority applicants’ race in light of past (and contemporary) societal discrimination.²⁵ How do Asians fit in this setting? In *Bakke*, Justice Powell raised the question, but mostly in the footnotes.²⁶ Then in *Fisher v. University of Texas at Austin (Fisher II)*, they—now, “Asian Americans”—leapt prominently to the text, albeit in the Court’s dissenting opinion.²⁷ In disagreeing with the majority (of four Justices²⁸) that the University of Texas’ (UT) admissions plan survives strict scrutiny, Justice Alito, joined by two others, declared, “[T]he UT plan discriminates *against* Asian-American students.”²⁹ The dissent also castigated the majority for “act[ing] almost as if Asian-American students do not exist.”³⁰ “Perhaps the majority finds discrimination against Asian-American students benign, since Asian-Americans are ‘*overrepresented*’ at UT.”³¹

Such language was a virtual blueprint for a fresh complaint by Asian American applicants alleging discrimination by a university. Edward Blum, “a one-man legal factory with a growing record of finding plaintiffs who match his causes,”³² and with connections to wealthy conservative donors who could finance expensive litigation,³³ was already at work. Blum formed SFFA and recruited aggrieved Asian American applicants to join.³⁴ In selecting Harvard as a defendant, Blum went after the eponymous home of the Harvard Plan, and a behemoth in the higher education landscape.

²⁴ A. PUTNAM, TEN THOUSAND MEN OF HARVARD (1918), <https://www.harvardband.org/music> [<https://perma.cc/WE4U-H7QN>] (emphasis added).

²⁵ See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 46–48 (2002).

²⁶ For a thorough discussion, see Claire Jean Kim, *Are Asians the New Blacks? Affirmative Action, Anti-Blackness, and the ‘Sociometry’ of Race*, 15 DU BOIS REV. 217, 222–24 (2018).

²⁷ *Fisher v. Univ. of Texas at Austin (Fisher II)*, 579 U.S. 365, 389 (2016) (Alito, J., dissenting).

²⁸ Justice Kagan did not participate in the decision. *Id.* at 367. Justice Scalia died before the case was decided.

²⁹ *Fisher II*, 579 U.S. at 410 (Alito, J., dissenting); see *id.* at 413, 414.

³⁰ *Id.* at 411.

³¹ *Id.* at 412 (quoting *Fisher v. Univ. of Texas at Austin (Fisher I)*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 570 U.S. 297 (2013)).

³² Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He’s Taking on Harvard.*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> [<https://perma.cc/39VV-V7AX>].

³³ See Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES, <https://www.nytimes.com/2019/08/28/magazine/where-does-affirmative-action-leave-asian-americans.html> [<https://perma.cc/CS37-2LLF>] (July 29, 2021).

³⁴ See *infra* note 57 and accompanying text.

I am curious to see how much of SFFA’s submissions—some of which advance basic lessons of the Asian American Studies subject—will earn mention in the Court’s ultimate decision and in the pages of U.S. Reports. (This could be quite a coup for a demographic that comprises less than 6.5% of the American population.³⁵) These lessons include:

- the societal perception of Asian Americans as “perpetual foreigners”;³⁶
- the common stereotypes of Asian Americans as “passive,”³⁷ “interested only in math and science,”³⁸ and “the model minorit[y]”;³⁹
- the great diversity within the “Asian Americans” group, in countries of origin, religions, cultures, backgrounds, and perspectives;⁴⁰
- but who are often classified together.⁴¹

I note that SFFA did not include among the stereotypes and common perceptions of Asian Americans that they do not suffer from discrimination.⁴² But perhaps it was not necessary to do so, given Harvard’s “invidious discrimination against Asian Americans”⁴³ and “appalling” mistreatment of Asian American applicants.⁴⁴

For each of the above lessons—should the Court choose to include them in its opinion—the Justices might further elaborate on SFFA’s brief entreaties.

- Asian Americans are *perpetually* viewed as perpetual foreigners, regardless of their citizenship, length of residence stateside, or detachment from their country of origin.⁴⁵

³⁵ See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/FW7Q-JNNB].

³⁶ Brief for Petitioner, *supra* note 10, at 25; Petition for Writ of Certiorari at 31, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. Feb. 25, 2021).

³⁷ Brief for Petitioner, *supra* note 10, at 25; Petition for Writ of Certiorari, *supra* note 36, at 31.

³⁸ Brief for Petitioner, *supra* note 10, at 63; Petition for Writ of Certiorari, *supra* note 36, at 31.

³⁹ Brief for Petitioner, *supra* note 10, at 25; Petition for Writ of Certiorari, *supra* note 36, at 31; Complaint, *supra* note 2, at 65.

⁴⁰ Complaint, *supra* note 2, at 87–88.

⁴¹ See Brief for Petitioner, *supra* note 10, at 15 n.1.

⁴² See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1247 n.11 (1993).

⁴³ Complaint, *supra* note 2, at 4.

⁴⁴ Petition for Writ of Certiorari, *supra* note 36, at 3.

⁴⁵ Jun Xu & Jennifer C. Lee, *The Marginalized “Model” Minority: An Empirical Examination of the Racial Triangulation of Asian Americans*, 91 SOC. FORCES 1363, 1367 (2013).

- Some Asian Americans have apparently shed the shy, passive, and withdrawn stereotype, enough to organize and mobilize to oust school board members not to their liking,⁴⁶ and commence their own lawsuits alleging discrimination against their kids.⁴⁷ Asian Americans are also beginning to arm themselves. Literally.⁴⁸
- As one commentator argues, the “Asians are good at math” narrative is false.⁴⁹
- The “model minority” designation, initially made by Whites to deflect Black complaints about racial disadvantage, is in reality, a myth.⁵⁰
- The great diversity within the Asian Americans group also includes tensions between certain nationalities,⁵¹ and sometimes within those from the same national origin.⁵² “Asian Americans” should be better viewed as a coalition of interests rather than a monolith.

Asian Americans have come to the forefront. But perhaps *SFFA v. Harvard* is more than merely a civil action designed to protect Asian Americans against intentional discrimination in higher education admissions. Note Professor Claire Jean Kim’s ground-breaking work, advancing the “racial

⁴⁶ See Thomas Fuller, *In Landslide, San Francisco Forces out 3 Board of Education Members*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/san-francisco-school-board-recall.html> [<https://perma.cc/YH64-499S>]; Jay Caspian Kang, *What Happens When Angry Asian American Parents Get Organized*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/2022/02/17/opinion/school-board-recall.html> [<https://perma.cc/Y6LD-8KQL>].

⁴⁷ See, e.g., Lee Hawkins, *Asian-American Parents Sue New York City Schools Alleging Harassment, Racial Bias*, WALL ST. J. (Apr. 14, 2021), <https://www.wsj.com/articles/asian-american-parents-sue-new-york-city-schools-alleging-harassment-racial-bias-11618406410> [<https://perma.cc/HQS8-AJSK>].

⁴⁸ See Sabrina Tavernise & Richard A. Oppel Jr., *Spit on, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES, <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/L8VN-7HRQ>] (May 5, 2021) (“Gun shop owners in the Washington, D.C., area said they were seeing a surge of first-time Chinese-American buyers. . . . [One owner] said he was stunned by the flow of Chinese customers . . . that began earlier this month, a group that rarely patronized his shop before. ‘It was just nonstop, something I’ve never seen,’ he said.”).

⁴⁹ Niral Shah, “Asians Are Good at Math” Is Not a Compliment: STEM Success as a Threat to Personhood, 89 HARV. EDUC. REV. 661, 661 (2019).

⁵⁰ See Chang, *supra* note 42, at 1260–65, 1275.

⁵¹ See, e.g., Choe Sang-Hun, *South Koreans Now Dislike China More Than They Dislike Japan*, N.Y. TIMES, <https://www.nytimes.com/2021/08/20/world/asia/korea-china-election-young-voters.html> [<https://perma.cc/N86J-UHZN>] (Mar. 8, 2022).

⁵² See, e.g., Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT’L & COMP. L. REV. 53, 58 (2008) [hereinafter Lee, *Korean Perception(s)*] (noting “intense regional factionalism” in South Korea); Ilhyung Lee, *Equivalence at Law (and Society): Social Status in Korea, Race in America*, 37 VAND. J. TRANSNAT’L L. 109, 112, 144 n. 199 (2004) [hereinafter Lee, *Equivalence at Law*] (noting societal division based on regional origin in the country).

triangulation of Asian Americans.”⁵³ As applied here, this triangulation occurs when Whites valorize Asian Americans relative to Blacks “on cultural and/or racial grounds in order to dominate both groups, but especially the latter.”⁵⁴ She writes:

Valorizing Asian Americans relative to Blacks via the model minority myth permits conservatives to pursue racial retrenchment without appearing racist. . . . When Whites then side with Asian Americans in an effort to push back Black political demands, they can come across as antiracist champions of the underdog rather than as acutely self-interested actors. This payoff is so rich that conservatives have actually manufactured conflicts between Blacks and Asian Americans in order to achieve it.⁵⁵

The triangulation entails the “conscript[ion]” of Asian Americans into the conservative war “of racial retrenchment while denying them genuine equality with Whites.”⁵⁶ SFFA’s leader Blum needed plaintiffs of Asian descent to advance his cause, and there were enough to sign up, on the harvardnotfair.org Internet site.⁵⁷ Perhaps more voluntary enlistees than conscriptees, Asian American members of SFFA have become willing pawns in the triangulation, all for the alluring prospect of getting into Harvard. For those who were previously denied admission, they “stand ready and able to apply to transfer if Harvard stops discriminating.”⁵⁸

SFFA shedding light on historic discrimination against Asian Americans and the predicament of Asian American applicants and their families is commendable. Yet the proceedings leading up to the Supreme Court seem to have a feel of *recreational* litigation, toward a bigger prize. At trial in the district court, not a single Asian American applicant who was allegedly rejected by Harvard due to her race offered testimony.⁵⁹ For all of SFFA’s outrage of unfair treatment of Asian American applicants, Asian Americans as

⁵³ Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105 (1999).

⁵⁴ *Id.* at 107.

⁵⁵ *Id.* at 122 (footnote omitted).

⁵⁶ *Id.* at 118. Some Asian American advocacy groups and organizations have resisted the conscription. See *infra* note 60 and accompanying text.

⁵⁷ See Kim, *supra* note 26, at 217, 237. The site is still active. *Harvard University Not Fair*, <http://harvardnotfair.org/> [<https://perma.cc/X8NF-9WL5>].

⁵⁸ Brief for Petitioner, *supra* note 10, at 17; see Petition for Writ of Certiorari, *supra* note 36, at 6; Complaint, *supra* note 2, at 9.

⁵⁹ See Anemona Hartocollis, *The Harvard Trial: A Double-Edged Sword for College Admissions*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/us/harvard-trial-college-admissions.html> [<https://perma.cc/23XT-EEXC>]; Colleen Walsh, *Final Arguments in Admissions Suit*, HARVARD GAZETTE (Feb. 14, 2019), <https://news.harvard.edu/gazette/story/2019/02/final-arguments-in-admissions-suit-against-harvard/> [<https://perma.cc/CYA2-PAGN>].

a demographic overwhelmingly support affirmative action programs.⁶⁰ Make no mistake about SFFA's singular and less altruistic purpose, which is to overrule the Supreme Court's precedent in *Grutter* permitting higher education institutions to consider race as a factor in admissions. SFFA indicated this intention from the very beginning, in its complaint in the district court,⁶¹ and stated it more explicitly before the Supreme Court.⁶² According to SFFA, "Grutter was wrong the day it was decided,"⁶³ and "wrong in every way—historically, legally, factually, practically, and morally."⁶⁴

SFFA commenced its action in 2014 in the district court in Boston, with the Supreme Court as its ultimate destination. It could not have known then that eight years later, it would face a re-composed Court that appears willing to overturn decades-old precedents.⁶⁵ Thus, Justice Powell's opinion in *Bakke*, and the Court's rulings in *Grutter* and *Fisher II* are ripe for reconsideration and reversal. Likewise, when the action was first commenced, no one could have foreseen a global pandemic that would claim thousands of lives, hospitalize many others, paralyze societal operations, and disrupt the daily lives of millions. Arriving at the Supreme Court at this juncture, SFFA added to its list of continuing racial discrimination against Americans of Asian descent, the "modern scapegoating over COVID-19."⁶⁶ "Today," SFFA pleads, "Asian Americans continue to face explicit and implicit bias."⁶⁷

While the case is pending, I note some parallels between the experience of young Asian Americans applying to select colleges and that of Asian Americans generally. In the college admissions setting, per SFFA, due to "too many" Asian Americans⁶⁸ in the applicant pool and the intentional discrimination of qualified Asian Americans, college counselors are advising applicants to hide⁶⁹ or not indicate⁷⁰ their Asian identity, "emphasize personal

⁶⁰ See Anemona Hartocollis, *Harvard Does Not Discriminate Against Asian-Americans in Admissions, Judge Rules*, N.Y. TIMES, <https://www.nytimes.com/2019/10/01/us/harvard-admissions-lawsuit.html> [<https://perma.cc/G39W-T9RA>] (Nov. 5, 2019). A number of Asian American organizations filed amici curiae briefs in support of racial diversity in college admissions. See, e.g., Brief of Amici Curiae Asian American Legal Defense and Education Fund et al. in Support of Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, Nos. 20-1199 & 21-707 (U.S. Aug. 1, 2022).

⁶¹ See Complaint, *supra* note 2, at 101, 115, 118.

⁶² Petition for Writ of Certiorari, *supra* note 36, at i.

⁶³ Brief for Petitioner, *supra* note 10, at 50; Petition for Writ of Certiorari, *supra* note 36, at 22.

⁶⁴ Reply Brief for Petitioner at 5, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. May 24, 2021).

⁶⁵ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁶⁶ Petition for Writ of Certiorari, *supra* note 36, at 30–31.

⁶⁷ Brief for Petitioner, *supra* note 10, at 25.

⁶⁸ Complaint, *supra* note 2, at 57.

⁶⁹ *Id.* at 57–58.

⁷⁰ *Id.* at 62, 63.

characteristics that avoid Asian stereotypes,”⁷¹ or to look “less Asian”⁷² on their applications. All of this has taken a toll on Asian American youth. According to one observer, “Many Chinese-American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.”⁷³ This has led to Asian American applicants to suffer from higher rates of anxiety, depression, and suicide.⁷⁴

There appear to be similar happenings in the larger Asian American community. Writer Min Jin Lee relates Asian Americans’ “workarounds—the extra steps they have been taking to stay physically safe.”⁷⁵

[T]hey stay home instead of going out, and when they do go out, they take only the safest routes, carrying pepper spray or personal safety alarms. They walk on city streets only while accompanied by friends and exercise during the day. They wear hats, *try to look “less Asian,”* take taxis whether or not they can afford them. Some feel so threatened that they have nearly imprisoned themselves out of fear and distress.⁷⁶

Moreover, like Asian American applicants to colleges, their elders have also suffered from anxiety, depression, and poor mental health due to the fear of violence and hate crimes against those who appear Asian.⁷⁷ For some Asian Americans, seeking help poses a cultural challenge. “Mental health is heavily stigmatized among Asian Americans, whose older generations, like the older

⁷¹ *Id.* at 57.

⁷² Supplemental Brief for Petitioner at 8, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S. Dec. 22, 2021); Petition for Writ of Certiorari, *supra* note 36, at 31.

⁷³ Complaint, *supra* note 2, at 63 (quoting Lee Cheng, founder of the Asian American Legal Foundation).

⁷⁴ Supplemental Brief for Petitioner, *supra* note 72, at 8; Petition for Writ of Certiorari, *supra* note 36, at 31.

⁷⁵ Min Jin Lee, *Asian Americans Have Always Lived with Fear*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/asian-american-violence-fear.html> [<https://perma.cc/8FRB-7VH2>].

⁷⁶ *Id.* (emphasis added). The results of Lee’s informal survey are supported by a study from the Pew Research Center. See Luis Noe-Bustamante, Neil G. Ruiz, Mark Hugo Lopez & Khadijah Edwards, *About a Third of Asian Americans Say They Have Changed Their Daily Routine Due to Concerns over Threats, Attacks*, PEW RESEARCH CENTER (May 9, 2022), <https://www.pewresearch.org/fact-tank/2022/05/09/about-a-third-of-asian-americans-say-they-have-changed-their-daily-routine-due-to-concerns-over-threats-attacks/> [<https://perma.cc/YAT6-GXMK>].

⁷⁷ See Alyssa Lukpat, *Hate Crimes and Pandemic Lead More Asian Americans to Seek Therapy*, N.Y. TIMES, <https://www.nytimes.com/2021/10/15/us/asian-american-therapy-hate-crimes.html> [<https://perma.cc/U925-G3KF>] (Oct. 26, 2021).

generations of other cultures, tend to see therapy as undignified or a sign of weakness”⁷⁸

To believe news reports and the submissions by SFFA then, these are grave times for Asian Americans, who have been subjected to unfair treatment due to their race, leading to demonstrable injury and undue emotional strain. Perhaps the legal system could or should address the situation. Some Americans of Asian descent live in fear, wondering if or when they will be accosted, assaulted, or attacked because of their racial being;⁷⁹ others are fearful that their kids applying to Harvard might end up at Duke.

There may be a simple solution. I submit for consideration “Harvard Plan II” (or Plan II) with two versions therein, in which Harvard would invite those students to apply for undergraduate admission who, by the beginning of their senior year in high school, achieved perfect or near perfect GPAs *and* perfect or near perfect scores on either the ACT or the SAT. For purposes of discussion, let us say this field of applicants would include about 10,000 students per year. Under Plan II.A, Harvard would randomly choose from this applicant pool 2,000 students and offer them admission for the entering class in the fall of the following year. Under Plan II.B, qualifying students in the pool would take the newly created HEE—Harvard Entrance Examination (leaving no doubt as to its purpose)—and the top 2,000 students on the exam⁸⁰ would be offered admission.⁸¹ Save perhaps for a disqualifying criminal background check or a personal interview (in which the student, for example, volunteers her advocacy of the violent overthrow of the U.S. government) that Harvard may choose to include in the final process, there would be no other factors to consider in the admissions process.⁸² To be pellucidly clear, there would be no holistic review, no “tips,”⁸³ no “lop[s],”⁸⁴ and most of all, no credentializing of race. And no exceptions.

⁷⁸ *Id.*

⁷⁹ See Lee, *supra* note 75; Noe-Bustamante, Ruiz, Hugo Lopez & Edwards, *supra* note 76; Mitch Smith, *Decades After Infamous Beating Death, Recent Attacks Haunt Asian Americans*, N.Y. TIMES, <https://www.nytimes.com/2022/06/16/us/vincent-chin-anti-asian-attack-detroit.html> [<https://perma.cc/RXS4-HPD5>] (June 17, 2022).

⁸⁰ I trust that Harvard would be able to devise a test that can discriminate between the best test takers in the country.

⁸¹ Under this plan, it must be a cruel fate for the student who attains the 2,001st best score, but a different sense of cruelty than the one that befalls the 2,000th student, who must know that he is “the dumbest freshman at Harvard.”

⁸² I acknowledge that extracurricular and service activities are *not* considered under this proposed plan.

⁸³ See Hartocollis, *supra* note 60 (reporting the district court decision rejecting “the argument that ‘tips,’ or admissions advantages, received by some black and Hispanic students were unfair”).

⁸⁴ See Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html> [<https://perma.cc/P3YB-2GKP>] (“At the end of the admissions process, the class of applicants is fine-tuned through a so-called ‘lop list,’ which includes race.”).

The proposed plan may be an extreme one, but it is not beyond the pale. First, others have presented the idea of admissions by lottery, in varying forms.⁸⁵ Second, Asian Americans who insist on (strictly) merit admissions policies need only to look to the traditional college admissions policies in some of their native countries of origin for examples and variations of this proposal.⁸⁶ The main appeal of Plan II is that academic merit is the predominant or sole criterion for admission. Harvard would be able to maintain and even elevate its standing as an elite institution of higher education, with a very (and likely the most) selective admissions process in the country, and claim itself as the last bastion of meritocracy. The proposed plan may also be more in line with the views of a majority of the American public, namely, that grades and test scores should be the primary criteria for college admissions, and not race.⁸⁷

There would be consequences and concerns, however. Some of Harvard's alumni, faculty, and donors might be displeased with Plan II, perhaps enough to re-direct their children, talents, and money to other institutions. I daresay that the revised plan would affect Harvard's ability to field competitive intercollegiate teams, at least in some sports, likely to the befuddlement of some alumni, who may prefer a more sporting rather than a merely academic chance in its annual The Game against Yale, if the latter did not opt for a similar Yale Plan II. This is not to denigrate the academic qualifications of members of recent Crimson football or other intercollegiate teams, but only to raise the question of student-athletes' comparative exam scores in relation to the top 2,000 in the country. In this regard, note the baseball team at Seoul National University, traditionally regarded as the top university in South Korea,⁸⁸ which, since the team's inception in 1977, has recorded one win.⁸⁹

⁸⁵ See, e.g., MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD* 184-88 (2020); Cathy O'Neil, *College Admissions Shouldn't Be Trusted to Humans*, BLOOMBERG (June 3, 2021), <https://www.bloomberg.com/opinion/articles/2021-06-03/college-admissions-shouldn-t-be-trusted-to-humans-> [https://perma.cc/468K-39UB]; Alia Wong, *Lotteries May Be the Fairest Way to Fix Elite-College Admissions*, THE ATLANTIC (Aug. 1, 2018), <https://www.theatlantic.com/education/archive/2018/08/lottery-college-admissions/566492/> [https://perma.cc/R5LJ-LKK4].

⁸⁶ See, e.g., RUIQING DU, *CHINESE HIGHER EDUCATION: A DECADE OF REFORM AND DEVELOPMENT (1978-1988)* 76-78 (1992); MICHAEL J. SETH, *EDUCATION FEVER: SOCIETY, POLITICS, AND THE PURSUIT OF SCHOOLING IN SOUTH KOREA* 140-44, 171 (2002); Chul An Joo, *The Entrance Examination System*, in *HIGHER EDUCATION IN KOREA: TRADITION AND ADAPTATION* 89, 89-96 (2000).

⁸⁷ SFFA relies on a Pew study, as discussed in Vianney Gómez, *U.S. Public Continues to View Grades, Test Scores As Top Factors in College Admissions*, PEW RESEARCH CENTER (Apr. 26, 2022), <https://www.pewresearch.org/fact-tank/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/> [https://perma.cc/RA4X-LE84]. See Brief for Petitioner, *supra* note 10, at 66.

⁸⁸ See SETH, *supra* note 86, at 144; Jongchol Kim, *Historical Development*, in *HIGHER EDUCATION IN KOREA: TRADITION AND ADAPTATION*, *supra* note 86, at 7, 47; Richard Halloran, *Seoul Students Clash with Police As Anti-Park Protests Mount*, N.Y. TIMES

I doubt that Harvard would consider Plan II, for it is precisely what Harvard is not. Harvard demands academic credentials, and also demands a diverse student body. As first indicated in the original Harvard Plan introduced in *Bakke*, “if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and . . . the quality of the educational experience offered to all students would suffer.”⁹⁰ Instead, this institution has chosen to bring “many kinds of diversity” within its students while pursuing its chosen mission “to educate the citizens and citizen-leaders for our society.”⁹¹ As the district court noted, “The evidence at trial was clear that a heterogeneous student body promotes a more robust academic environment”⁹²

Thus, Harvard has apparently determined that its students must come from all parts of the country, including sparsely populated areas,⁹³ that approximately 15% of its students must be the first in their families to attend college,⁹⁴ and that at least 10% of the students are needed to staff competitive intercollegiate sports teams,⁹⁵ among other demographics toward diversity. This may not be *fair* to students who have superior admissions credentials, but who are not in those groups. Nevertheless, my view is that a university today should be allowed to have such and other diversity, in its considered judgment of what college experience it wishes to give its students. Ultimately, the Supreme Court in *SFFA v. Harvard* will dictate what and how much diversity the rest of America will be allowed to tolerate.

I readily concede that the college to which one wins admission at about eighteen years of age may be a significant indicator of merit and a life-long credential, and that decisions of such magnitude should be conducted thoughtfully, fairly, and under law. I also urge that, unlike some Asian countries where what college one attends is a critical determinant of one’s

(Nov. 16, 1973), <https://www.nytimes.com/1973/11/16/archives/seoul-students-clash-with-police-as-antipark-protests-mount-classes.html> [<https://perma.cc/C23Z-JUH2>].

⁸⁹ Kim Jaeseung, *SNU Baseball Team Demonstrates Healthy Sportsmanship*, https://en.snu.ac.kr/snunow/snu_media/news?md=v&bbsidx=72028 [<https://perma.cc/QH45-N6BM>]. The team won its first (and to date only) game in 2004, after registering one tie and 199 losses. *Id.* For a (mostly) inspiring video of the team, see SNU, *Seoul National University Baseball Team*, YOUTUBE (May 20, 2013), <https://www.youtube.com/watch?v=7AJYkUCs3RA> [<https://perma.cc/RP9D-5ZCL>].

⁹⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 321–22 (1978) (Appendix to Opinion of Powell, J. (“Harvard College Admissions Program”).

⁹¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126, 133 (D. Mass. 2019).

⁹² *Id.*

⁹³ See Kang, *supra* note 33.

⁹⁴ Jessica M. Wang & Brian P. Yu, *Makeup of the Class*, HARVARD CRIMSON, <https://features.thecrimson.com/2017/freshman-survey/makeup/> [<https://perma.cc/9H2N-7ND5>] (“First Generation”).

⁹⁵ *Id.* (“Athletes”).

status in a hierarchical society,⁹⁶ such that it largely *defines* the individual, it is less the case stateside.⁹⁷ This is perhaps one notable difference between the Chinese (or Japanese or Korean, for example) experience and the “Asian American” experience, the latter of which also includes daily life in a multi-racial society.

In all events, Asian Americans have come a long way, in both the affirmative action case law, and the developing field of Asian American jurisprudence. Embedded in the latter is the case from 1854 in which the California Supreme Court reversed the defendant’s murder conviction on the ground that the applicable statute did not allow witness testimony of Chinese persons.⁹⁸ The court explained that not only rules of statutory construction⁹⁹ but also “grounds of public policy”¹⁰⁰ demanded this result, fearfully describing those of Asian descent as “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.”¹⁰¹

⁹⁶ See, e.g., SETH, *supra* note 86, at 140, 248–49; Lee, *Equivalence at Law*, *supra* note 52, at 128–29.

⁹⁷ See generally FRANK BRUNI, WHERE YOU GO IS NOT WHO YOU’LL BE: AN ANTIDOTE TO THE COLLEGE ADMISSIONS MANIA (2015).

⁹⁸ People v. Hall, 4 Cal. 399, 399 (1854).

⁹⁹ *Id.* at 403.

¹⁰⁰ *Id.* at 404.

¹⁰¹ *Id.* at 404–05.