

LEGAL MEMORANDUM

No. 236 | SEPTEMBER 20, 2018

Racial Discrimination at Harvard University and America's "Elite" Institutions

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Abstract

More than 50 years after the passage of the Civil Rights Act of 1964, recent studies, complaints filed with the U.S. Department of Education, and lawsuits filed against Harvard University and the University of North Carolina at Chapel Hill reveal that many academic institutions are engaging in blatant racial discrimination by gaming the system, denying admission to Asian American students who would otherwise be admitted based on their qualifications and credentials. In the case of Harvard University, this invidious discrimination is eerily similar to the discrimination unashamedly practiced by Harvard University in the 1920s—to limit the number of Jewish students.

More than 50 years after the passage of the Civil Rights Act of 1964, recent studies, complaints filed with the U.S. Department of Education, and lawsuits filed against Harvard University and the University of North Carolina at Chapel Hill reveal that many academic institutions are engaging in blatant racial discrimination by gaming the system, denying admission to Asian American students who would otherwise be admitted based on their qualifications and credentials. In the case of Harvard University, this invidious discrimination is eerily similar to the discrimination unashamedly practiced by Harvard University in the 1920s—to limit the number of Jewish students.

This discrimination is a violation of the Civil Rights Act of 1964. It is also a morally repugnant policy that hurts students who have worked hard throughout their academic careers to try to get into some of the best schools in the country—only to be denied admission solely due to the color of their skin. It is just as wrong to discriminate against an Asian American student today on the basis of

KEY POINTS

- The race-based discrimination currently practiced by Harvard and other "elite" institutions is a violation of the Civil Rights Act of 1964.
- It is just as wrong to discriminate against an Asian American student today on the basis of the student's race as it was in 1964 when universities were discriminating against black students or in 1930 when Harvard was keeping qualified Jewish students off its Cambridge campus.
- By so doing, universities are teaching students who have applied themselves diligently throughout elementary, middle, and high school that at elite universities like Harvard the color of their skin is more important than dedication, hard work, and character.
- The universities use "diversity" as an excuse for what is, in reality, reprehensible discrimination at America's academic institutions.

This paper, in its entirety, can be found at <http://report.heritage.org/lm236>

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that student's race as it was in 1964 when universities were discriminating against black students or in 1930 when Harvard was keeping qualified Jewish students off its Cambridge campus.

What makes it especially offensive is that, although they try to obscure what they are doing, university administrators like William Fitzsimons, the Dean of Admissions at Harvard, are unapologetic about their behavior. They use "diversity" as an excuse for what is, in reality, reprehensible discrimination at America's academic institutions.

Harvard's Prior Discrimination Against Jewish Students

Almost 100 years ago, A. Lawrence Lowell, president of Harvard from 1909 to 1933, "wrote to a Harvard philosophy professor to explain that enrolling a high number of Jewish students would 'ruin the college' by causing elite Protestant students to attend other schools."¹ He wanted to cap the number of Jewish students enrolled in the college at 15 percent. He was concerned because the percentage of Jewish students had risen from "7 [percent] of freshmen in 1900 to 10 [percent] in 1909, 15 [percent] in 1915, 21.5 [percent] in 1922, and 27.6 [percent] in 1925."²

Lowell knew that setting a quota on the admission of Jews would trigger opposition and resistance from Harvard's faculty and governing boards. Lowell got what he wanted by changing the admissions process so that the "motive was less obvious on its face, by giving to the Committee on Admission authority to refuse admittance to persons who possess qualities described with more or less distinctness and believed to be characteristic of the Jews."³ Thus, in order to hide what the university was doing, in 1926 it quit relying strictly on academic qualifications and switched to what came to be known as the Harvard Plan: "evaluating potential students on a number of qualifiers meant to reveal their 'character' and 'fitness.'"⁴

It was this type of highly subjective analysis—what admissions officers today euphemistically call a "holistic" approach—which allowed Harvard for the next three decades to bar Jewish students (who were highly qualified academically) because they supposedly did not show the "character and fitness" necessary to matriculate at Harvard.⁵ Keeping Jewish students out was also one of the reasons that universities like Harvard started using legacy admissions (giving preferences to the children of alumni) at about the same time.⁶

The Harvard Plan, which is still in use today, was "born out of one of the most shameful episodes in the history of American higher education in general, and of Harvard College in particular."⁷ It was specifically created to discriminate against Jewish applicants. It "legitimated an admissions process that is *inherently* capable of gross abuse and that...*has in fact been deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions."⁸

Federal Law

Under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has held that in the college admissions context, racial "classifications are constitutional only if they are narrowly tailored to further compelling government interests."⁹ In another case, the Supreme Court applied that same interpretation to Title VI of the Civil Rights Act.¹⁰

Title VI of the Civil Rights Act provides that no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" on the "grounds of race, color, or national origin."¹¹ As President John F. Kennedy said in 1963, "Simple justice requires that federal funds, to which all taxpayers of all races contributed, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."¹²

According to a 2014 lawsuit filed by Students for Fair Admissions against Harvard University, although Harvard has an endowment of over \$36 billion, it accepted more than \$13.4 million in federal funds in 2013. Harvard also "accepts substantial indirect federal financial assistance by, among other things, enrolling students who pay, in part, with federal financial aid directly distributed to those students."¹³ Thus, although Harvard University is a private institution, it is subject to the prohibitions of Title VI.

In order to meet the "compelling interest" requirement of the Equal Protection Clause, the Supreme Court has held that a university such as Harvard must show that its admissions policy "is narrowly tailored to achieve the only interest the Court has approved in this context: the benefits of student body diversity that 'encompasses a...broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"¹⁴ In other words, race can only be a "'plus' factor in the

context of individualized consideration of each and every applicant.”¹⁵ Racial preferences must be narrowly tailored to enroll a “critical mass of underrepresented minority students...so as to realize the educational benefits of a diverse student body.”¹⁶

In addition to narrowly tailoring its admissions policy to achieve this objective, a university must also show that it first engaged in “serious, good faith consideration of workable race-neutral alternatives.”¹⁷ Furthermore, it cannot impose a particular percentage or quota of minority students as its goal—as Harvard did, starting in the 1920s with Jewish students. A university cannot “specify the particular level of minority enrollment at which it believes that educational benefits of diversity will be obtained” because that is not “a goal that can or should be reduced to pure numbers.”¹⁸ Universities also cannot intentionally discriminate on the basis of race solely to achieve “racial balancing.” Intentional discrimination, the Court has declared, is “patently unconstitutional.”¹⁹

The Obama Administration issued a series of questionable guidance letters and documents from 2011 to 2016 that *encouraged* educational institutions to use race in ways that went beyond what the law allows. On July 3, 2018, under President Donald Trump, these guidance documents were withdrawn by the U.S. Department of Justice and the Department of Education.²⁰ The withdrawal letter stated that the prior guidance documents “advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI.” Moreover, they “prematurely decide, or appear to decide, whether particular actions violate the Constitution or federal law.” By “suggesting to public schools, as well as recipients of federal funding, that they take action or refrain from taking action beyond plain legal requirements, the documents are inconsistent with governing principles for agency guidance documents.”²¹

It must be pointed out that the “diversity” argument used by universities and sanctioned by the courts to justify taking race into account as one of the factors in college admissions decisions is based on a racially discriminatory stereotype that can appropriately be labelled as “group think.” College admissions officers are not actually looking for students with a wide diversity of opinions, viewpoints, life experiences, and academic knowledge. Instead, they believe they will achieve such diversity based solely on the races of the students they are admitting.

In other words, universities are assuming that an individual’s race and ethnic background determines how that person thinks about particular issues and what opinions he or she holds. They believe that students will bring different viewpoints to their campuses based on their skin color and/or membership in a particular group—not how they think as individuals. They are perpetuating the warped beliefs of the segregationists of 100 years ago that race determines your character, your thought processes, and who you are as a person.

Universities are engaging in the exact type of “odious” behavior that the Supreme Court warned against in 1993 in *Shaw v. Reno* when it said that classifying citizens on the basis of their race “threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”²²

Lawsuit Against Harvard University

In 2014, Students for Fair Admission (SFFA) filed a lawsuit against Harvard University under Title VI of the Civil Rights Act on behalf of Asian American students. SFFA is a “nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.” SFFA says “race and ethnicity should not be factors that either harm or help” a student gain admission to a competitive university.²³ The organization includes students “who applied to Harvard [and] were denied admission to Harvard” because of its system of using race and ethnicity in its admissions decisions.²⁴

The “Harvard Plan” Today. The lawsuit claims that the Harvard Plan is being used today by Harvard in the same manner it was used against Jewish students: “to discriminate against Asian Americans.” Harvard is utilizing the very same “character and fitness” code words “to discriminate for the same invidious reasons and it is relying on the same pretextual excuses to justify its disparate treatment of another high-achieving racial and ethnic minority group.”²⁵

The evidence of blatant discrimination by Harvard uncovered thus far through the litigation is quite stark—and even includes internal reports prepared by Harvard’s own Office of Institutional Research in 2013, which the university took steps to bury after it became aware of the reports’ conclusions. Suffice it to say that Harvard “never made the findings public or acted upon them.”²⁶

An expert for SFFA, Duke Professor Peter Arcidiacono, examined six years of admissions data, including more than 160,000 student records. Based on the rating system that the Harvard admissions office uses, Arcidiacono found that Asian American applicants are:

- Significantly stronger than all other racial groups in academic performance;
- Perform very well in non-academic categories and have higher extracurricular scores than any other racial group;
- Receive higher overall scores from alumni interviewers than all other racial groups; and
- Receive strong scores from teachers and guidance counselors—scores nearly identical to white applicants and higher than African Americans and Hispanics.²⁷

Yet Harvard admissions officers consistently assign Asian American students the lowest *personal* rating of any racial group. This is a purely subjective assessment of whether the applicant has a “positive personality” and “others like to be around him or her”; has “character traits” such as “likability...helpfulness, courage, [and] kindness”; is an “attractive person to be with”; is “widely respected”; is a “good person”; and has good “human qualities.”²⁸

The obvious discrimination of the admissions officers in their subjective ratings is shown by the fact that alumni interviewers who actually meet the applicants also provide such a personal rating—and they “rate Asian Americans, on average, at the top...comparable to white applicants and higher than African-American and Hispanic applicants.”²⁹ In other words, according to alumni interviewers, Asian Americans are just as “helpful,” “courageous,” and “kind” as white applicants—just not in the eyes of admissions officers who are charged with keeping down the numbers of Asian American students at Harvard. Admissions officers are playing to one of the most false but “enduring stereotypes about Asians in America...that we are book smart, but lacking in social skills, creativity, and independent thought,” according to Cory R. Liu, a 2015 graduate of Harvard Law School.³⁰

Respondent’s Logical Quandary. The only expert witness Harvard relied on to try to refute the evidence of its discriminatory admissions practices

is Professor David Card, an economist at the University of California, Berkeley. He has testified that Harvard admission officers are correct in their personal ratings that Asian American applicants have weaker “personal qualities” based on “individualized ‘unobservable’ factors that cannot be quantified by a statistical mode.”³¹ How does he know? Because Card said he asked Dean Fitzsimmons in a telephone conversation if “race was involved in the personal rating...and he said no.”³²

In other words, Harvard’s expert based his opinion that no discrimination is occurring on an assurance from his client—who has been accused of engaging in discrimination—that no discrimination is actually occurring. That is the logical equivalent of relying on the false assurances of A. Lawrence Lowell³³ in 1926 that Harvard was not discriminating against Jews. Taken at face value, Card seems to accept, according to SFFA, the premise that Asian Americans suffer in the admissions process not because of discrimination, but because “white applicants have better personalities.”³⁴ This is the worst kind of “gross racial stereotype[s] or anecdotal generalizations[s]” that defendants occasionally rely upon in court cases.³⁵

Racial Breakdown. This is also the kind of odious and offensive stereotyping that caused the director of college counseling at Stuyvesant High School in New York, one of the top high schools in the country, to break down in tears during her deposition in this case. Stuyvesant is a feeder school for Harvard, yet the data uncovered by SFFA shows that white students from Stuyvesant have a much better chance of getting into Harvard than the Asian American students, who constitute *70 percent* of the student body, at the school. The director rejected any notion that Asian American students at Stuyvesant were somehow less well-rounded than white students at the school.³⁶

Moreover, when asked during their depositions whether Asian American students are less “well-rounded” than other students, as Harvard’s admissions officials consistently find in the applications process, every Harvard official denied that was the case, and not a single one would testify in support of Professor Card’s assumption that Asian Americans have weaker personal qualities. It seems clear that these officials do not want to be on the record approving the pernicious stereotyping that is secretly being used by the admissions staff acting under their supervision, direction, and control to keep eminently qualified Asian Americans out of Harvard.

Harvard admissions officers also give Asian Americans the lowest *overall* scores of any group of applicants. Like the personal rating, this, too, is a subjective score, according to Professor Arcidiacono. In contrast, alumni interviewers give Asian American applicants overall scores that are virtually identical to those of white applicants. Nonetheless, Asian Americans are *less likely* to be admitted than any other racial group. SFFA contends that if they were treated like white applicants, “an average of approximately 44 more Asian-Americans per year would have been admitted to Harvard over the six-year period the experts analyzed.”³⁷ In fact, assuming similar credentials, an Asian American with a 25 percent chance of admission to Harvard would see his chances rise to 35 percent if he were white, 75 percent if he were Hispanic, and 95 percent if he were black.³⁸

Harvard’s OIR Reports

Three internal reports prepared by Harvard’s Office of Institutional Research (OIR) in 2013, which Harvard was forced to disclose during the litigation, reached similar findings to those of Professor Arcidiacono: Harvard’s admissions process discriminates against Asian Americans. *Only* Asian Americans saw “negative effects” according to the reports.³⁹ An analysis of these reports by Dr. Althea Nagai of the Center for Equal Opportunity showed that “year after year,” Harvard “adjusted” its admissions numbers “using various factors, not just race, in order to limit the number of Asian admits and to construct the entering class it wanted.”⁴⁰

First Report. The first report showed that Asian Americans comprise a little under 19 percent of the freshman class at Harvard. Yet OIR found that they would comprise 43.4 percent of the class based on academics alone; their share would be 31.4 percent taking into account the university’s preference for athletes and legacy admissions; it would be 26 percent, even after accounting for the applicants’ extracurricular and personal ratings. According to SFFA, “Asian-American admissions rates should be substantially higher even accepting the personal rating at face value.”⁴¹

Second Report. In its second internal report, OIR compared the admission rates of Asian Americans with similarly credentialed white applicants who were not athletes or legacies. OIR found that over a 10-year period, the admittance rates of Asian Americans “were lower than white admit rates.” In fact, as SFFA has pointed out in one of its court filings, being “Asian American actually *decreases* the chances of admissions.”⁴²

Harvard’s OIR could not explain why being Asian American penalized applicants, nor could it explain why, of the four racial groups it examined—white, Hispanic, African American, and Asian American—only Asian Americans had “this negative association with admissions chances.” Most tellingly, this OIR report left blank a section labelled “Conclusions,” as well as a section labelled “Possible Explanations.”

Third Report. The third report produced by OIR looked at the admission rates of low-income applicants. It found that among this demographic, once again, “Asian high achievers have lower rates of admission.”⁴³ And once again, OIR had no explanation for why being Asian had a negative effect on the likelihood of being admitted to Harvard University.

Collective Amnesia. What did Harvard do with these reports? According to depositions and e-mail communications obtained by SFFA during the discovery process, Harvard “killed the study and quietly buried the reports.”⁴⁴

Harvard officials “asked no questions, sought no additional analysis, and did not discuss the reports with anyone” else at the university.⁴⁵ At his deposition, Dean Fitzsimmons developed “amnesia” about the reports, as did the associate provost and the assistant director of the Office for Institutional Research, Erin Driver-Linn and Erica Bever, respectively, whose office conducted the study and prepared the reports. Driver-Linn claimed she did not know anything about the study, and Bever said she was drawing “a complete blank on this particular topic.”⁴⁶

In a case of collective amnesia, these university officials claimed not to remember anything about these reports that showed, without question, that Harvard was intentionally, blatantly discriminating against Asian American applicants. Yet another former Harvard employee of OIR, Mark Hansen, who worked on the studies, testified that he discussed the findings with people in the admissions office, including Fitzsimmons and others on multiple occasions.⁴⁷ When Hansen was asked in his deposition whether he had any explanation “other than intentional discrimination” for what was happening to Asian American students, he said “I don’t.”⁴⁸

All of this statistical data constitutes strong evidence of Harvard’s discriminatory admissions policy, but so do the actual admission files of specific Asian American applicants that were reviewed by Professor Arcidiacono. During the discovery process, Harvard produced summary sheets on specific applicants,

which are short documents with applicant information including race. The admissions office uses the classification “Standard Strong” to describe an applicant who has strong qualities but not strong enough to merit admission. Arcidiacono found that the university applied the Standard Strong label disproportionately to Asian American applicants who were substantially more qualified academically than Standard Strong applicants from any other racial group.⁴⁹

The summary sheets, according to SFFA, showed that admissions officers consistently labelled Asian American applicants as “smart and hardworking[,] yet uninteresting and indistinguishable from other Asian-American applicants.” Moreover, admissions officers routinely labelled the race/ethnicity of African Americans and Hispanics as a positive factor and a reason to admit the applicant, while rarely seeing the race of Asian Americans as a positive factor. An alumni interviewer testified that the admissions office told alumni that African American and Hispanic candidates “were of special interest to Harvard, and that we should make every effort to recruit and convince those candidates to matriculate to Harvard.” No “such directive, instruction or guidance” was ever given for Asian American students.⁵⁰

When asked whether she believes there is a problem with Harvard’s admissions policy that needs to be addressed, Drew G. Faust, who was the president of Harvard from February 11, 2007, until July 1, 2018, answered, “No, I don’t.”⁵¹ Harvard remains unapologetic about its admissions policies in the face of seemingly overwhelming evidence of its discriminatory practices and impact. Not surprisingly, during her deposition, Faust even refused to acknowledge Harvard’s anti-Semitic history, even though the university itself finally admitted in 2015, *during her tenure as president*, what Lowell had done to limit the admission of Jewish students during his tenure as president.⁵²

Dean Fitzsimmons also refused to acknowledge that there is any problem, claiming that there is no cause for concern because it is supposedly “impossible to abuse” Harvard’s admission process.⁵³ According to SFFA:

That answer is a farce. The process is readily subject to manipulation, as history and the data amply demonstrate. The data showed massive discrimination against Asian Americans—and Harvard knew it. However, Harvard’s response (unlike its aggressive response to concerns other minority

TABLE 1

Percentage of Harvard’s Admitted Class by Race

	2014	2015	2016	2017
Asian American	18%	18%	20%	20%
African American	11%	12%	10%	11%
Hispanic	10%	12%	11%	11%
Native American	3%	2%	2%	2%
White	48%	49%	52%	53%

SOURCE: *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al.*, Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 34, <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Doc-413-Memo-in-Support-of-MSJ.pdf> (accessed September 14, 2018).

LM236 heritage.org

groups raised) was to kill the investigation and bury the findings. Instead of taking this seriously, officials traded emails...referring to a letter [from an alumnus] pushing for “informal quotas” on Asian Americans as “thoughtful” because, like Lowell, they assumed no one would see their “personal correspondence.” And that was merely the evidence SFFA was lucky enough to uncover because Harvard’s email archive captured it.⁵⁴

The fact that Harvard engages in unlawful racial balancing by imposing unacknowledged quotas in its admission is also clear. The percentage of admitted racial groups is consistently the same every year. SFFA produced the following table based on the numbers it obtained from Harvard University:⁵⁵

SFFA contends that “no rational factfinder could accept that these numbers are the accidental byproduct of holistic review.”⁵⁶ It also seems more than coincidental that the percentage of Asian American students edged up slightly only after this litigation was filed in 2014—and Harvard was subjected to widespread adverse publicity about its discriminatory admissions practices.

SFFA apparently has uncovered a great deal of other evidence that shows that Harvard has a racial quota system. However, the federal judge overseeing the case, Allison D. Burroughs, an Obama appointee, has, at least for the moment, sealed that

evidence from public view. SFFA’s summary of this evidence on pages 34 through 38 of its memorandum supporting its motion for summary judgment looks like the kind of document intelligence agencies regularly produce in response to requests under the Freedom of Information Act—with large portions blacked out.

As an example, page 34 starts with this sentence: “Proving racial balancing can sometimes be complicated. But not here. Harvard admits that it [redacted]. In other words, Harvard has a desired racial balance and aims for that target.”⁵⁷

Finally, the evidence also appears to show that Harvard is *not* using race in the only way the courts have approved—to achieve a “critical mass” that provides educational benefits to a diverse student body. Based on the documentary evidence and depositions of Harvard employees, SFFA claims:

- “Harvard concedes that it is not using race to achieve the “critical mass” used in the context of admissions.”
- “The leaders of the Admissions Office and of Harvard College do not even know what critical mass means and they have never used it as part of admissions decisions.”
- “Harvard neither has its own definition of critical mass nor has it conducted any analysis of how it might obtain critical mass.”⁵⁸

The resolution of this case has been hampered because, as the *New York Times* said in its coverage of the lawsuit, “Harvard had fought furiously” to prevent public disclosure of its “closely guarded admissions process.”⁵⁹ The discovery process has been long and drawn out, but the trial is finally scheduled for October 15, 2018.

The Civil Rights Division of the U.S. Department of Justice is also investigating Harvard University over its admissions practices.⁶⁰ The Obama Administration failed to act on a complaint filed with the Department of Education in 2015 by a coalition of 64 Asian American associations.⁶¹ However, on April 6, 2018, the Justice Department notified the federal court of its interest in this litigation—and informed the judge that it “is currently conducting an independent Title VI investigation into whether Harvard’s admissions policy discriminates against

Asian-American applicants.” The Justice Department also criticized Harvard for its refusal to turn over admission records because “applicants to Harvard, their families, and the general public have a presumptively paramount right to access the summary judgment record in this civil rights case.”⁶²

On August 20, the Justice Department filed another brief with the court opposing the motion for summary judgment filed by Harvard, arguing that the university has “failed to carry its demanding burden to show that its use of race does not inflict unlawful racial discrimination on Asian Americans.” Instead, the “record evidence demonstrates that Harvard’s race-based admissions process significantly disadvantages Asian-American applicants compared to applicants of other racial groups—including both white applicants and applicants from other racial minority groups.”⁶³

Discrimination at Other Universities

Shamefully, the discrimination against Asian American students does not appear to be limited to Harvard. It seems that many Ivy League schools “have had similar ratios of Asian-American, black, white[,] and Hispanic students for years, despite fluctuations in application rates and qualifications, raising questions about how those numbers are arrived at and whether they represent unspoken quotas.”⁶⁴

For example, the enrollment rates of Asian Americans at Brown, Columbia, Cornell, Dartmouth, Penn, Princeton, and Yale Universities were almost identical at each school from 2007 to 2013.⁶⁵

These numbers strongly suggest that these universities are not using an individualized admissions process either. Instead, it appears that they have a quota system and “engage in aggressive racial balancing—a numerical-results-by-any-means-necessary approach to achieving a particular racial composition—and set a much higher standard of achievement for Asians to be admitted than students of other races.”⁶⁶

M.I.T. Sadly, even the Massachusetts Institute of Technology (M.I.T.) is apparently engaging in this type of unlawful discrimination. This is quite a contrast to when the author of this *Legal Memorandum* matriculated there in the late 1970s and early 1980s—and the school prided itself on accepting students based on merit regardless of race, ethnicity, or other extraneous factors.

According to another study by Dr. Althea Nagai of the enrollment data at M.I.T., the California Institute of Technology (Caltech), and Harvard, Asian

TABLE 2

Enrollment Rates of Asian Americans at Ivy League Schools

	2007	2008	2009	2010	2011	2012	2013
Brown	15%	16%	15%	15%	14%	12%	14%
Columbia	17%	17%	16%	16%	16%	16%	18%
Cornell	16%	17%	17%	16%	16%	16%	16%
Dartmouth	14%	14%	15%	15%	14%	14%	14%
Harvard	15%	17%	17%	16%	17%	18%	18%
Penn	17%	17%	18%	18%	18%	18%	18%
Princeton	14%	15%	16%	17%	18%	19%	17%
Yale	14%	14%	15%	15%	15%	16%	16%

SOURCE: Cory R. Liu, “Affirmative Action’s Badge of Inferiority on Asian Americans,” p. 333, citing *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al.*, Complaint, Table A.

LM236  heritage.org

Americans compose 43 percent of undergraduates at Caltech, which does not use racial preferences or quotas in its admission policies. M.I.T. apparently implemented such preferences and quotas in the 1990s because Nagai’s study showed that the admissions rate of Asian Americans at M.I.T. has “stalled at around 26 [percent].”⁶⁷

Caltech. The comparison between Caltech and M.I.T. is especially relevant because both schools are considered two of the top science and technology institutions in the country, if not the world. They have always had a friendly rivalry over which is the better school. They also attract students with similar engineering and science interests. And neither school has legacy admissions.

Specifically, Nagai found that the percentage of Asian American students at Caltech rose from 12 percent in 1980 to above 40 percent in 2016. According to Nagai, this “rapid increase at Caltech parallels both the swift rise in the number of Asian Americans between 18 and 21 years old and the number of Asian undergraduates nationally.”⁶⁸ In 1980, there were almost 250,000 Asian Americans attending college throughout the country. By 2015, that number had reached more than a million.⁶⁹

In contrast, the percentage of Asian Americans at M.I.T. rose from 5 percent in 1980 to a peak of 29 percent in 1995. But “then enrollment tapers off and gradually declines” to 26 percent in 2016, despite the “swift rise” of young Asian Americans attending college nationally.⁷⁰ So it seems clear that M.I.T.,

like Harvard, has implemented an upper limit on the number of Asian Americans it will admit, no matter their qualifications and credentials.

No surprise given that the former M.I.T. Dean of Admissions Marilee Jones exhibited the same type of racist stereotyping in admissions in which officials at Harvard have been engaging. Commenting on a Korean American applicant, Jones said he “looked like a thousand other Korean kids with the exact same profile of grades and activities and temperament...yet another textureless math grind.”⁷¹ Thus, to M.I.T.’s former chief admissions administrator, all Asians looked alike.

Nagai’s study shows that at Harvard University, the enrollment of Asian Americans rose to 21 percent by 1993 and then dropped to 17 percent and “stayed at roughly the same level for more than 25 years.”⁷² It has edged higher since the filing of this lawsuit.⁷³

This outright racial discrimination is so set in place among Ivy League schools that a study by two Princeton University professors concluded that in order to get accepted, Asian American students have to score 140 points higher on the SAT than white students; 270 points higher than Hispanic students; and 450 points higher than black students.⁷⁴

An Industry Standard? There seems to be a conspiracy of silence about this quota system amongst these schools. The SFFA lawsuit has revealed that representatives from Harvard and 15 other schools, including Columbia, Cornell, Dartmouth, M.I.T., Princeton, Stanford, the University of Pennsylvania,

and Yale, get together twice a year to compare their racial admission numbers. They “share with one another their non-public admission numbers by race from the current admissions cycle” by sitting around a large table and “reading aloud their school’s admissions numbers by race.”⁷⁵ The purpose of these meetings seems to be to coordinate the manipulation of admission decisions to ensure that all of the schools have approximately the same racial percentages of admissions and no university is statistically out of line with the others.

But they are unapologetic about wanting to use race in their admission decisions. Sixteen universities have filed friend-of-the-court briefs in SFFA’s litigation supporting Harvard, including “all seven other Ivy League institutions and Duke, Emory, George Washington, John Hopkins and Stanford universities.”⁷⁶ The universities make the offensive claim that “it would be an extraordinary infringement on universities’ academic freedom to decree that institutions of higher education cannot consider race” in their admissions decisions⁷⁷—paralleling the claims made by universities in Alabama, Mississippi, and other parts of the Deep South during the segregationist era.

Conclusion

There seems little doubt that elite universities like Harvard are discriminating against Asian Americans in the admissions process.⁷⁸ They are violating federal civil rights laws and the requirements the Supreme Court has outlined for the limited, permissible use of racial preferences in admission decisions, assuming there is no race-neutral alternative available that will accomplish the objective of achieving a diverse student body. Unlike Hispanics and African Americans, whose race or ethnicity makes it *easier* for them to get admitted, the race of Asian Americans makes it *harder* for them to get admitted.

These same universities do everything they can to hide what they are actually doing under the rubric of “diversity.” When “confronted with evidence of [their] discrimination, [they] attempt to justify their unequal treatment of Asians by drawing directly on bamboo-ceiling stereotypes of Asians,” demeaning “their accomplishments and stamp[ing] them with a badge of inferiority.”⁷⁹

Taking into account race to negatively affect the admissions prospect of a student, as well as engaging in racial balancing by setting quotas or limits on the number of students admitted based on race or ethnicity, is both legally and morally wrong. Universities should be setting an example for their students of how society should treat individuals—without regard to race and ethnicity. As one person has noted regarding this controversy: “Part of that mission [of the American university] must surely be to help our students—and our country—transcend the racial barriers that exist between us, rather than amplify them.”⁸⁰

Instead, universities are teaching students who have applied themselves throughout elementary, middle, and high school to excel in academics, extra-curricular, and other activities, that at elite universities like Harvard, the color of their skin is more important than dedication, hard work, and character. That is a basic betrayal of the fundamental tenets upon which this country was founded and that we have been struggling for over 200 years to achieve—that all the citizens of this great nation are equal under the law and entitled to pursue their dreams and ambitions without being discriminated against.

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Endnotes

1. Peter Jacobs, "Harvard Is Being Accused of Treating Asians The Same Way It Used To Treat Jews," Business Insider (Dec. 4, 2014), <https://www.businessinsider.com/the-ivy-leagues-history-of-discriminating-against-jews-2014-12>.
2. *Id.*
3. Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Case No. 1:14-cv-14176-ADB (D.Mass.), Plaintiff's Statement of Undisputed Material Facts, para. 25, <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Doc-414-Statement-of-Material-Facts.pdf>.
4. Peter Jacobs, "Harvard Is Being Accused of Treating Asians The Same Way It Used To Treat Jews."
5. Yascha Mounk, "Is Harvard Unfair to Asian Americans?," New York Times (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/opinion/is-harvard-unfair-to-asian-americans.html>; see also Jerome Karabel, "The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton," Mariner Books (2006).
6. Peter Jacobs, "Legacy Admissions Policies Were Originally Created To Keep Jewish Students Out of Elite Colleges," Business Insider (Oct. 23, 2013), <https://www.businessinsider.com/legacy-admissions-originally-created-keep-jewish-students-out-elite-colleges-2013-10>.
7. Alan M. Dershowitz & Laura Hanft, "Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext," 1 Cardozo L. Rev. 379, 385 (1979), <https://dash.harvard.edu/bitstream/handle/1/34901212/1CardozoLRev379-2.pdf?sequence=3>.
8. *Id.* (emphasis in original).
9. Fisher v. University of Texas at Austin, 570 U.S. 297, 309-310 (2013).
10. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
11. 42 U.S.C. § 2000d. The Department of Education regulations governing this provision are at 34 CFR §§ 100.1-100.13.
12. "Overview of the Civil Rights Act of 1964," U.S. Dept. of Justice, <https://www.justice.gov/crt/fcs/TitleVI-Overview>.
13. Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Case No. 1:14-cv-14176-ADB (D.Mass.), Complaint, paragraphs 32, 33, <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/SFFA-v.-Harvard-Complaint.pdf>.
14. *Fisher*, 570 U.S. at 314.315.
15. *Grutter*, 539 U.S. at 318.
16. *Grutter*, 539 U.S. at 318.
17. *Fisher*, 570 U.S. at 312.
18. Fisher v. University of Texas at Austin, 136 S. Ct. 2198, 2210 (2016).
19. *Grutter*, 539 U.S. at 330.
20. Dear Colleague letter from Kenneth L. Marcus, Asst. Sec. for Civil Rights, U.S. Dept. of Education and John M. Gore, Acting Asst. Attorney General, U.S. Dept. of Education (July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>.
21. *Id.*
22. Shaw v. Reno, 509 U.S. 630, 643 (1993).
23. Students for Fair Admissions, <https://studentsforfairadmissions.org/about/>.
24. Plaintiff's Statement of Undisputed Material Facts, para. 3.
25. Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Case No. 1:14-cv-14176-ADB (D.Mass.), Complaint, para. 3.
26. Anemona Hartocollis, "Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says," New York Times (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html>.
27. Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 7, <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Doc-413-Memo-in-Support-of-MSJ.pdf>.
28. Plaintiff's Statement of Undisputed Material Facts, para. 90.
29. Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 8.
30. Cory R. Liu, "Affirmative Action's Badge of Inferiority on Asian Americans," 22 Texas Rev. of Law & Politics 325 (June 21, 2018).
31. Plaintiff's Statement of Undisputed Material Facts, para. 761-762.
32. Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 31.
33. Lowell is still honored at Harvard today. One of the undergraduate dormitories at Harvard, Lowell House, is named after his family; his portrait hangs in the dining hall, and his bust sits in the courtyard of the dorm. Lowell House, History, <https://lowell.harvard.edu/history>.
34. Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 28.

35. U.S. v. Green, 36 M.J. 274, 279 (C.M.A. 1993) (In a military court martial case, the trial counsel relied on a “gross racial stereotype” to defend his peremptory challenge of a potential juror).
36. Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 30.
37. *Id.* at 9-10.
38. *Id.* at 2.
39. Delano R. Franklin and Samuel W. Zwickel, “Internal Harvard Review Showed Disadvantage for Asian Applicants,” The Harvard Crimson (June 16, 2018), <https://www.thecrimson.com/article/2018/6/15/admissions-internal-report/>.
40. Althea Nagai, “Harvard Investigates Harvard: Does the Admissions Process Disadvantage Asians?” Center for Equal Opportunity (August 17, 2018), p. 4, <http://ceousa.org/attachments/article/1237/CEO%20Study%20Harvard%20Investigates%20Harvard.pdf>.
41. Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment, pp. 11-12.
42. *Id.* at 13.
43. *Id.* at 15.
44. *Id.*
45. *Id.* at 16.
46. *Id.* at 18.
47. *Id.*
48. *Id.*
49. Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 20.
50. *Id.* at 20-21.
51. *Id.* at 21.
52. *Id.* at 25.
53. *Id.*
54. *Id.* at 26.
55. *Id.* at 34.
56. Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment, p. 34.
57. *Id.*
58. *Id.* at 40.
59. Anemona Hartocollis, “Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says.”
60. Melissa Korn and Nicole Hong, “Harvard Faces DOJ Probe Over Affirmative-Action Policies,” Wall Street Journal (Nov. 21, 2017), https://www.wsj.com/articles/harvard-faces-doj-probe-over-affirmative-action-policies-1511260380?mod=article_inline.
61. Erik Ortiz, “Asian-Americans’ Complaint Against Harvard Could Get Dept. of Justice Review,” NBC News (August 3, 2017), <https://www.nbcnews.com/news/asian-america/asian-americans-complaint-against-harvard-could-get-dept-justice-review-n789266>.
62. Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Case No. 1:14-cv-14176-ADB (D.Mass.), Notice of Interest in Public Access to Summary Judgment Briefing and Materials, pp. 1-2, <https://www.scribd.com/document/375941125/2018-04-06-Justice-Dept-Letter-to-Burroughs>.
63. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., United States’ Statement of Interest in Opposition to Defendant’s Motion for Summary Judgement, p. 2, <https://www.justice.gov/opa/press-release/file/1090856/download>.
64. Anemona Hartocollis, “Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says.”
65. Cory R. Liu, “Affirmative Action’s Badge of Inferiority on Asian Americans,” p. 333, citing Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., Complaint, Table A.
66. *Id.* at 333.
67. Althea Nagai, “Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions,” Center for Equal Opportunity (May 22, 2018), <http://www.ceousa.org/attachments/article/1209/AN.Too%20Many%20AsianAms.Final.pdf>.
68. Althea Nagai, “Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions,” p. 11.
69. *Id.* at 7.
70. *Id.* at 12.
71. Yi Xhou, “Student’s Race Complaint Undecided For Princeton,” The Tech (March 9, 2007), <https://thetech.com/2007/03/09/affirmativeaction-v127-n10>.
72. Althea Nagai, “Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions,” p. 13.

73. A profile of the Class of 2021 claims an Asian American population of 22.2 percent. Harvard Admitted Students Profile, <https://college.harvard.edu/admissions/admissions-statistics>.
74. Cory R. Liu, "Affirmative Action's Badge of Inferiority on Asian Americans," p. 330; citing Thomas J. Espenshade and Alexandria Walton Radford, "No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life," Princeton University Press (2009), p. 92, tbl.3.5 (2009), <https://press.princeton.edu/titles/9072.html>.
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76. Melissa Korn, "Top U.S. Universities Back Harvard in Affirmative-Action Case," Wall Street Journal (July 30, 2018), <https://www.wsj.com/articles/top-u-s-universities-back-harvard-in-affirmative-action-case-1532977076>.
77. *Id.*
78. Harvard University has even started holding segregated commencement ceremonies, having its first separate "commencement for black graduate students" in 2017. Anemona Hartocollis, "Colleges Celebrate Diversity With Separate Commencements," New York Times (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/black-commencement-harvard.html>. Such ceremonies do not celebrate "diversity"; they serve only to "amplify" racial differences according to Ward Connerly, president of the American Civil Rights Institute. *Id.*
79. Cory R. Liu, "Affirmative Action's Badge of Inferiority on Asian Americans," p. 330.
80. *Id.* at 346.