

# Interest Convergence, Negative Action, and *SFFA vs. Harvard*

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## I. INTEREST CONVERGENCE: THE FULL REALIZATION

In 2009, my collaborator Amy Liu and I started writing a paper on Asian Americans and affirmative action that eventually became our paper “Interest Convergence or Divergence? A Critical Race Theory Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debates.”<sup>1</sup> In that paper, we argued that any effort to adopt Asian Americans into the anti-affirmative action cause represented interest convergence, a term that originated within Critical Race Theory.<sup>2</sup> Interest convergence describes how it is unlikely for the White majority to adopt the interests of people of color unless there is a clear way that Whites would benefit—in other words, when there is a convergence of interests.<sup>3</sup>

When we started writing, there had not been any high-profile cases challenging affirmative action featuring Asian American plaintiffs although, in 2006, Jian Li filed a complaint against Princeton University alleging discrimination. Still, at the time of writing, we were not too far removed from the 2003 University of Michigan *Grutter v. Bollinger* and *Gratz v. Bollinger* cases and had yet to undergo the two *Fisher v. University of Texas* Supreme Court cases, all of which featured White female plaintiffs.<sup>4</sup>

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1. 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. OF HIGHER EDUC. 36 (2014).

2. *Id.*

3. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20 (Kimberlé Crenshaw et al. eds., 1995) (detailing the phenomenon of “interest convergence”).

4. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003);

Given the very slow process of publication, the paper was not released until 2014, the same year that Students for Fair Admissions (SFFA) filed its lawsuit against Harvard University, alleging intentional discrimination against Asian Americans. Finally, after years of advancing White plaintiffs with less than stellar academic records, Edward Blum, who was also behind the *Fisher* lawsuits, had recruited some more sympathetic plaintiffs: straight As, volunteer work for NPR, a perfect ACT score, perfect scores on two SAT II Subject Tests. Oh, and yes, Asian American. How could Harvard have said no?

Well it did, and largely because Harvard says no to about 95 percent of applicants these days.<sup>5</sup> However, the SFFA lawsuit confirmed that our predictions surrounding interest convergence between the anti-affirmative action movement and a subset of the Asian American community. The prediction came true: In particular, the contemporary anti-affirmative action movement has attracted some recent immigrants from China, perhaps reflecting misunderstanding about how selective admissions works in the US. Asian Americans have become the new poster children for the anti-affirmative action movement.

As the Harvard lawsuit unfolded in the media, we saw numerous forms of misunderstanding and misinformation spread. In particular, the finding that Asian Americans had scored lower on the “personal rating” infuriated many.<sup>6</sup> The personal rating was reduced to cringe-worthy soundbites like Wesley Yang’s *New York Times* column “Harvard is Wrong that Asian Americans Have Terrible Personalities.”<sup>7</sup>

This news became misleading with headlines like “Harvard scored Asian Americans lower on personality, when they, the admissions committee, had never even met these students!” Generally ignored were the facts that (1) almost all applicants of all races and ethnicities receive a personal rating score without meeting a Harvard admissions reviewer in person; (2) the personal rating is not a simple figure that represented an assessment of the applicant’s personality, but a score that encompasses numerous components, some quantifiable and others not, including a student’s essay, teacher recommendations, and contextual factors; (3) Harvard has gone on record stating that race is not considered during the

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*see also* *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198, 579 U.S. \_\_\_\_ (2016).

5. For more on why the plaintiffs accomplishments at face value may not be particularly exceptional, see Julie J. Park, *Asian Americans at Harvard: Welcome to Campus*, INSIDE HIGHER ED. (Sept. 4, 2018), <https://www.insidehighered.com/admissions/views/2018/09/04/harvards-admissions-policies-are-being-distorted-lawsuit-charging-anti> [<https://perma.cc/5E7F-8FWH>].

6. *See* Statement of Undisputed Material Facts in Support of Defendant’s Motion for Summary Judgment at 8, *Students for Fair Admissions, Inc. v. Harvard College*, No. 1:14-cv-14176 (D. Mass. June 14, 2018).

7. Wesley Yang, *Harvard is Wrong that Asians Have Terrible Personalities*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/opinion/harvard-asian-american-racism.html> [<https://perma.cc/PCS9-VN3X>].

formation of the personal rating;<sup>8</sup> and (4) teachers, school counselors, and alumni interviewers were more likely to give White students a better personal rating on evaluations than Asian American students, particularly when comparing students of similar academic backgrounds, and these evaluations are a key component of the personal rating.<sup>9</sup> In other words, Asian Americans generally are evaluated lower than Whites by the people who have actually met them in person, which helps account for the lower personal rating. (Note: This phenomenon does not mean that overall Asian Americans have subpar personal characteristics. As one study suggests, Asian Americans are more likely to report wanting to attend an institution like Harvard even if they know that they are a less competitive applicant, which could broaden or dilute the overall quality of the pool.<sup>10</sup> In addition, due to the high prevalence of standardized test prep in the Asian American community, the Asian American applicant pool at Harvard may have a higher concentration of students with high academic achievements who may not score exceptionally high on the personal rating.)<sup>11</sup>

In my observations, reactions to the lawsuit ranged along a spectrum. On one end were those who had a clear misunderstanding of how highly selective admissions works. For instance, in his column, Yang notes, “if the university selected its students on academic criteria alone, the Asian share of the Harvard student body would leap from 19 percent to 43 percent.”<sup>12</sup> Missing is the understanding that highly selective institutions do not admit solely on the basis of standardized academic criteria (e.g., GPA and SAT) because (1) places like Harvard could easily fill their classes ten times over with students such as National Merit Semifinalists (there were over 16,505 in 2017 and a Harvard class is generally 1600–1700 students)<sup>13</sup> and (2) scores on such metrics, while impressive, do not represent the entirety of a student’s achievements and potential. A place like Harvard is invested in selecting a diverse class that will make exceptional contributions to society. While being a valedictorian or a perfect test taker is a nice accomplishment, it doesn’t necessarily guarantee that a student will be exceptional in other matters. On the contrary, Harvard’s current policies open the door for an Asian American

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8. Statement of Undisputed Material Facts, *supra* note 6, at 11.

9. Report of David Card, Ph.D. at 48–49, *Students for Fair Admissions, Inc. v. Harvard College*, No. 1:14-cv-14176 (D. Mass. filed Dec. 15, 2017).

10. Kaidi Wu, Stephen M. Garcia, & Shirli Kopelman, *Frogs, Ponds, and Culture: Variation in Entry Decisions*, 9 SOC. PSYCHOL. & PERSONALITY SCI. 99, 100 (2017).

11. Julie J. Park, *It Takes a Village (or an Ethnic Economy): The Varying Roles of Socioeconomic Status, Religion, and Social Capital in SAT preparation for Chinese and Korean American Students*, 49 AM. EDUC. RES. J. 624, 626 (2012).

12. Yang, *supra* note 7.

13. National Merit Scholarship Corporation, *National Merit Scholarship Corporation 2017–18 Annual Report*, 4 (2018), [https://www.nationalmerit.org/s/1758/images/gid2/editor\\_documents/annual\\_report.pdf?gid=2&pgid=61](https://www.nationalmerit.org/s/1758/images/gid2/editor_documents/annual_report.pdf?gid=2&pgid=61) [<https://perma.cc/X4DE-VAXY>]. See, e.g., Admissions Statistics: A Brief Profile of the Admitted Class of 2023, <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/THL6-Y9Y4>] (reporting 1,650 students enrolled in class of 2023 at Harvard College).

student like Jeremy Lin, whose SAT scores were estimated to be somewhere in the 1400s, but who has undoubtedly contributed to society in unique ways.<sup>14</sup>

On the other end of the spectrum more nuanced responses voiced support for race-conscious policies but worried that what was really going on was “negative action.” Negative action is a term coined by Jerry Kang to describe a problematic phenomenon where Whites were more likely to get into elite schools than Asian Americans with near-identical academic credentials.<sup>15</sup> I too warned of the prospect of negative action in our 2009 article as the more relevant potential threat to equity in admissions for Asian Americans, as have others.<sup>16</sup>

## II. THE COMPLEXITIES OF NEGATIVE ACTION IN 2018

Since our 2009 article, my thinking on negative action has shifted as admissions cases have become more complex due to increased competition at highly selective institutions. In Kang’s original piece, his primary proposed example of negative action was a scenario where an institution sought to cap the Asian American student enrollment using the proportion of Asian Americans in the national population as a baseline (at the time, approximately 3 percent).<sup>17</sup> In the hypothetical “Look Like America” program, no group could have representation in a university that exceeded three times their national representation; thus, Asian American enrollment was hypothetically capped at 9 percent.<sup>18</sup> Looking back, this example seems almost quaint given the current controversy. In 2018, Harvard’s Asian American enrollment surpasses 20 percent, and other elite institutions have similarly high enrollments of Asian American students that surpass the percentage of Asian Americans in the national population (5.6 percent).<sup>19</sup>

In 2018, diagnosing negative action at a place like Harvard is much more complicated than it was in 2005, when Kang’s article was published. At that time, some highly competitive institutions (especially state flagships like the University of California system and the University of Michigan, Ann Arbor) relied more on formulaic approaches which assigned point values to grades, test scores, accomplishments, and the like. In such a system, the calculation and identification of negative action was much easier because the odds of admissions were more tightly linked to a student’s accumulation of points.

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14. JULIE J. PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 86 (2018).

15. 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 (1996).

16. See, e.g., Adrian Liu, *Affirmative Action & Negative Action: How Jian Li’s Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391 (2008) (describing the phenomenon of negative action); see also William C. Kidder, *Negative action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605 (2006).

17. Kang, *supra* note 15, at 14–15.

18. *Id.*

19. Park & Liu, *supra* note 1, at 51.

In contrast, in current times, all highly selective institutions engage in holistic review of students, where individual applicant's files are read with great attention to detail. While Kang maintained that negative action was possible to diagnose at institutions that used more holistic review policies, his original article was unclear on how such a diagnosis would occur other than identification of an explicit cap or ceiling on Asian American students.<sup>20</sup> As for Harvard, as stated in the Statement of Material Facts filed in the SFFA case, while each student receives scores for various parts of the application (e.g., extracurricular, academic, personal, athletic, and overall),<sup>21</sup> each score is not a simple computation of the elements that contribute to a score, nor are final decisions made only on the tabulation of scores. The overall rating is not a computation of the other sub-ratings.<sup>22</sup> The personal rating, which has caused much misunderstanding and angst among public and media commentators, does not equate to a simple personality score, nor is it a computation of the numerous factors that contribute to the score, which include the essay, teacher recommendations, and contextual factors. A specific sub-score is not assigned to the essay, a part of the application that can play a significant role in shaping an admissions officer's assessment of a student. Nor is race or ethnicity assigned any sort of point value, a practice which has been illegal since the Supreme Court's ruling in *Gratz v. Bollinger*.<sup>23</sup> Finally, while a student's scores—academic, personal, extracurricular, athletic, and overall—are the strongest predictors of admissions, they are not necessarily deterministic of a particular outcome. It should be noted that the profile ratings also “explain a much larger proportion of the variability in admission outcomes than race.”<sup>24</sup> Additionally, “[f]actors such as College Board high school and neighborhood variables, parental occupation, and intended career explain more of the variability in admissions outcomes than race.”<sup>25</sup>

All of this makes diagnosing negative action more difficult now than in times and contexts when college admissions were more formulaic. However, it is not impossible. In the SFFA case, both sides employed statistical experts to weigh the data and identify potential cases of bias. In my reading of both reports,<sup>26</sup> the experts disagree most over the composition of their baseline datasets. The analyses run by Professor David Card, which included all applicants, did not find that Harvard admitted Asian Americans at significantly lower rates than Whites.<sup>27</sup> The analyses run by SFFA's expert, Professor Peter Arcidiacono, argued that Asian Americans were admitted at

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20. See Kang, *supra* note 15.

21. Statement of Undisputed Material Facts, *supra* note 6, at 8–11.

22. *Id.* at 12.

23. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

24. Statement of Undisputed Material Facts, *supra* note 6, at 20.

25. *Id.*

26. Report of David Card, Ph.D., *supra* note 9; Rebuttal Expert Report of Peter S. Arcidiacono, *Students for Fair Admissions, Inc. v. Harvard College*, No. 1:14-cv-14176 (D. Mass. filed June 15, 2018).

27. See Report of David Card, Ph.D., *supra* note 9.

significantly lower rates than Whites; however, he omitted students who receive special consideration in the process (legacies, recruited athletes, members of a special Dean's List, or children of faculty/staff) from his baseline sample.<sup>28</sup> These students are disproportionately White.<sup>29</sup> Both sides have their own rationales for their approaches, and both were backed by amicus curiae filed by prominent economists.

It should be noted that while I and others (e.g., Nobel Laureate economists George A. Akerlof and Robert M. Solow)<sup>30</sup> believe that Card's expert analyses on its own provides sufficient statistical evidence that Asian Americans are not getting into Harvard at a significantly lower rate than Whites once all relevant variables are controlled for, neither Card's nor Arcidiacono's model fully can predict the likelihood of admissions. Like most statistical analyses, there is generally a portion of the outcome that is unexplained by the variables in even the most robust models.

In sum, if any negative action is occurring, it is via special consideration given to legacies and recruited athletes, who are disproportionately White. This issue has troubling implications for equity but is a markedly different phenomenon from the widespread intentional discrimination against Asian Americans that SFFA alleges.<sup>31</sup> Much has changed since Kang's seminal piece on negative action, but the need to diagnose and address negative action—as well as the need to distinguish it from race-conscious admissions and affirmative action—remains.

### III. CONCLUDING THOUGHTS

For better or for worse, interest convergence between the anti-affirmative action movement and a slice of the Asian American community is likely here to say. However, as Liu and I argued in our original piece,<sup>32</sup> today there is ultimately interest divergence between the anti-affirmative action movement and the broader Asian American community, wherein the system proposed by the anti-affirmative action movement (i.e., race-neutral admissions) is at odds with the interest of Asian Americans. An established body of work addresses the educational benefits that Asian American students experience from engaging in a diverse student body, and such

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28. See Rebuttal Expert Report of Peter S. Arcidiacono, *supra* note 26.

29. Julie J. Park, *The White Admissions Advantage at Harvard: Unfair but Different from Discrimination Against Asian Americans*, HUFFPOST (Mar. 25, 2015, updated May 24, 2015), [https://www.huffingtonpost.com/julie-j-park/the-white-admissions-advantage\\_b\\_6932670.html](https://www.huffingtonpost.com/julie-j-park/the-white-admissions-advantage_b_6932670.html) [<https://perma.cc/PC46-9DVW>].

30. Delano R. Franklin & Samuel W. Zwickel, *Former Fed Chair Janet Yellen Takes Harvard's Side in Admissions Lawsuit*, HARVARD CRIMSON (Sept. 7, 2018), <https://www.thecrimson.com/article/2018/9/7/yellen-amicus-brief-admissions-lawsuit> [<https://perma.cc/VF2F-LHNL>]. Amended Brief of Professors of Economics as Amici Curiae in Support of Defendant at 25, *Students For Fair Admissions, Inc. v. Harvard College*, No. 1:14-cv-14176 (D. Mass. filed Sept. 5, 2018).

31. Park, *supra* note 29.

32. Park & Liu, *supra* note 1, at 54.

campus communities are only possible via race-conscious admissions.<sup>33</sup> Further, Asian Americans continue to benefit from race-conscious policies that can, depending on context, provide direct or indirect benefits for them. For example, certain institutions might proactively recruit Asian Americans, as my own experience benefitting from an affirmative action-based scholarship shows.<sup>34</sup>

It is heartening to see that with the exception of some ethnic subgroups (e.g., Chinese Americans), support for affirmative action and policies specifically seeking to broaden opportunities for historically disenfranchised groups remain widespread within the Asian American population.<sup>35</sup> Misinformation around the policy is rampant, but it appears that at least for now, the majority of the Asian American community recognizes that race-conscious policies continue to benefit both society and our community.

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33. Julie J. Park, *Asian Americans and the Benefits of Campus Diversity: What the Research Says*, NAT'L COMM'N ON ASIAN AM. & PACIFIC ISLANDER RES. IN EDUC., [http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian\\_am\\_diversity\\_D4.pdf](http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf) [<https://perma.cc/8QWL-WT3M>].

34. Julie J. Park, *The Misleading Lawsuit Accusing Harvard of Bias against Asian Americans*, WASH. POST (Jan. 2, 2015), [https://www.washingtonpost.com/opinions/the-misleading-lawsuit-accusing-harvard-of-bias-against-asian-americans/2015/01/02/cc7a7c52-91e5-11e4-ba53-a477d66580ed\\_story.html?utm\\_term=.bc1089232520](https://www.washingtonpost.com/opinions/the-misleading-lawsuit-accusing-harvard-of-bias-against-asian-americans/2015/01/02/cc7a7c52-91e5-11e4-ba53-a477d66580ed_story.html?utm_term=.bc1089232520) [<https://perma.cc/3PAE-QJ94>].

35. Janelle Wong, Jennifer Lee & Van Tran, *Asian Americans' Attitudes toward Affirmative Action: Framing Matters*, DATA BITS: A BLOG FOR AAPI DATA (Oct. 1, 2018), <http://aapidata.com/blog/aa-attitudes-affirmative-action> [<https://perma.cc/DQX8-EWA7>].