

Asian Americans and Affirmative Action— Again

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Asian Americans at last have been introduced to the civil rights movement, but in the awkward role of potential spoilers apparently opposed to the interests of African Americans and other people of color. Asian Americans now are the plaintiffs in the ongoing attacks on affirmative action and diversity more generally, in lieu of whites depicted as innocent victims in a spoils system. This informal Essay, based on the keynote address at 2019 symposium on Asian Americans and Affirmative Action,¹ presents ten points in an effort to provoke people to think for themselves, not to persuade them to think as I do.

These issues are not new. Asian Americans were involved in the traditional civil rights movement, in a manner not customarily recognized. They have occupied an uneasy position with respect to affirmative action since before the *Bakke* decision, mentioned in an earlier case since forgotten.² I have been working on these issues since I started my career and published on the subject 32 years ago in a newspaper op-ed.

I have argued on behalf of equal, fair, and just treatment of Asian Americans and in the advancement of bridge building with others who historically have been excluded. I continue to believe it possible to advocate for Asian Americans as well as universal principles that are needed to sustain a diverse democracy.

I offer these thoughts to honor the late Chancellor Chang-lin Tien, who led the University of California, Berkeley (Cal) with distinction. As the first Asian American to head a research university in the States, he was a champion of academic excellence and affirmative action as complementing one another.³ What do we want Berkeley to look like? Who belongs here? And to whom does it in turn belong? The University of California (UC) system is a public good. It is the engine of economic growth.

DOI: <https://doi.org/10.15779/Z38FQ9Q585>

1. This symposium, which took place at the University of California, Berkeley, School of Law campus on February 12, 2019, was co-sponsored by Berkeley's Asian American and Asian Diaspora Studies (AAADS) Department and the Asian American Bar Association of the Greater Bay Area (AABA), and the *Asian American Law Journal* (AALJ). These opinions are my own and do not represent any institution with which I am affiliated.

2. See *DeFunis v. Odegard*, 416 U.S. 312 (1974).

3. Karen W. Arenson, *Chang lin-Tien, 67, Affirmative-Action Steward at Berkeley*, N.Y. TIMES, Oct. 31, 2002, at A25.

I care more about Cal than Harvard. It is a flagship public school. I am withholding judgment regarding Harvard until we have all the evidence. We all should do that. We need the evidence. This is a statistical case. It is about regressions you run to look at legacy preferences for alumni children and other issues. Although I am prepared to conclude that Harvard is engaged in anti-Asian American practices, I do not want to make such a claim without it being based on the evidence. I'm also prepared to conclude the contrary. Both are plausible.

First, to frame matters, Asian Americans should be included. This is a simple factual assertion about concrete demographics; it is neither ideological nor abstract. Asian Americans are the nation's fastest-growing racial minority, and they constitute a sizable proportion of the enrollment in higher education, including at campuses of all types. Asian Americans, in the aggregate and on average, also are not the same as either whites or blacks, as to education, income, housing segregation, or any of numerous measures; the differences are not disputed, but the causes are. It is thus impossible to present an accurate picture of admissions to selective colleges without Asian Americans.

Second, these issues are controversial, making it all the more important to set the terms of the conversation. In the Supreme Court, the initial challenge is to determine the question presented, and, accordingly, 1L students are taught to take up that task initially in a brief. You have to argue about what the issue is before you argue about the issue. The party that wins on the question has just about won on the answer. The common question is, "Should we abolish affirmative action?" People become angry, regardless of which side they happen to be on. They become so agitated by discussion that they can hardly control themselves to consider the data. Instead of debating whether affirmative action is beneficial or constitutional, or detrimental and immoral, there is an alternative. Affirmative action itself was initially a remedy for a problem (though it has since become a distributive norm to achieve goals prospectively). That suggests it is better to consider the original point.

My proposal is that we ask different questions. First, we should try to answer the following question: "What do we wish our institutions of higher education, especially those that are both publicly supported and elite, to look like?" Next, we must ask, on the basis of a consensus, "How do we produce such a result in practical terms?" "What should we do about racial discrimination that continues? And racial disparities that cannot be disputed?" People of all backgrounds and political preferences state that they oppose racial discrimination and wish for us to address racial disparities. I take them as meaning that.

Third, our divisions are revealed by the assumption that we act out of raw self-interest, choosing sides based on our respective identities. I have received the most interesting reactions from people who are aware my career has been primarily at Howard University, the nation's leading historically

black college/university (HBCU). They have accused me (an Asian American). They say, “You’re just on the side of blacks. You must like them more than your own people.” I am proud to have taught at Howard. It has a mission. I learned as much as I taught. I had to acknowledge the prejudices I held without being conscious of them and appreciate the privileges I enjoyed without having earned them. Our thoughtful participation in public life should not be a matter of choosing sides in such a manner. There must be principles beyond our own preferences. Perhaps we can be in favor of civil rights. That is my hope for us, individually and collectively. The same solicitude should be extended to those who oppose diversity: they want what almost all people want, what is best for them.

Fourth, it is possible to stand up and speak out on behalf of Asian Americans without attacking African Americans, Latinos, and even other Asian Americans. The students who have done so well, who want what others want, deserve to be celebrated. I am on the side of the students, their parents, and their families. Applicants should be considered for admission to Harvard, Cal, or whatever school is their dream, in an appropriate manner. Yet there is no need to blame African Americans and other people of color. So the remainder of the talk is about how to do this.

Fifth, a disclaimer. As we know from the hit movie *Crazy Rich Asians*, Asian Americans and Asian foreigners are not the same.⁴ It is so important to establish that we are discussing Asian Americans—real Americans. This is not about foreign nationals, though some schools are said to have exaggerated their diversity by adding foreign Asians in their numbers.⁵ Asian Americans have the shared experience, even if native born, of being treated as if they are perpetual foreigners. They are accorded no standing and are told to go back to where they came from. There are sixth generation Asian Americans whose ancestors built the transcontinental railroad that united the nation. There are Asian Americans who are adoptees. There are Asian Americans whose forebears sailed with Christopher Columbus. That is possible due to high rates of intermarriage—Anglo-Asians may have on one side of their family lineage entitling them to join the Daughters of the American Revolution. There are Afro-Asians and Latino Asians. There also are many Asian Americans who are not the so-called “model minority” with ultra-high net worth, parents with doctorates, and so on; there are those from Chinatown or broken homes, or who are refugees. (Foreign nationals are a separate category for legal purposes. There are separate issues about fair treatment of foreign nationals during a period of hostility between the United States and China. They are not being treated right either.⁶ That is for another

4. *Crazy Rich Asians*, dir. Jon M. Chu. (Warner Bros. 2018).

5. The United States Civil Rights Commission expressly noted inflation of statistics by counting foreign Asians. U.S. Civil Rights Commission, *The Economic Status of Asian Americans*, 86 (1988).

6. “Almost every student” from China is a spy, according to the President. See Elizabeth Redden, *Did Trump Call Most Chinese Students Spies?*, INSIDE HIGHER ED (Aug. 9, 2018), <https://www.insidehighered.com/news/2018/08/09/politico-reports-trump-called-most-chinese-students->

day.)

Sixth, the Jewish example is often mentioned by commentators and it serves as a great reference. People say this is similar to the anti-Semitic quotas after World War II. There is no dispute about the facts. The Ivy League schools and others capped the number of Jewish students in that time period.⁷ Jews were not excluded altogether. They were limited to avoid a school becoming “too Jewish.” So Jewish students were rejected for no reason other than that they were Jewish. Here is why this precedent is significant. If you had said, “Well, Harvard has to turn away Jews to admit blacks,” people would have laughed. It is clear that Jewish quotas are anti-Semitic. They were regular discrimination, not reverse discrimination. There is no causal relationship to any effort to help blacks. The schools were not displacing Jews to welcome blacks. It would be a *non sequitur* to attribute Jewish quotas to affirmative action since the concept had not yet even been developed. There is a parallel here. Anti-Asian bias is anti-Asian bias. It is wrong. But it is not motivated by pro-black bias. This is straightforward discrimination. Logically, when you are trying to help a group that historically has been excluded, there is nothing that says you have to find another group that also historically has been excluded—as Asian Americans were—and mistreat them.

Seventh, the Lowell case in San Francisco also is useful.⁸ There is a secret hidden in the open. In other cases, such as Lowell, Asian Americans had to score better than whites. In other words, the preference was for whites, not blacks (since there are many more whites than blacks, the cumulative effect of favoring the former is much greater than the cumulative effect of favoring the latter). Lowell was, and is, the top high school in San Francisco. There was a school desegregation consent decree. Chinese Americans brought a “collateral attack” (as in *Martin v. Wilks*, 490 U.S. 755 (1989)). Chinese Americans were forced to meet a higher standard than whites to gain admission to Lowell. My colleague Jerry Kang wrote an article about “negative action” explaining this phenomenon.⁹ What is weird is that nobody calls out this problem. People do not say, “Wait, this is regular discrimination, not reverse discrimination.” It’s for whites. (Harvard might or might not be similar.)

Eighth, math matters. Asian Americans apply to colleges at higher rates than any other racial group.¹⁰ There also is research suggesting Asian

us-spies [<https://perma.cc/E7F6-A69D>] (last visited Sept. 5, 2019).

7. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (Mariner Books 2006).

8. S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (approving consent decree); S.F. NAACP v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999) (approving settlement); S.F. NAACP v. S.F. Unified Sch. Dist., 2001 WL 1922333 (N.D. Cal. Oct. 24, 2001).

9. See 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. (1996).

10. The National Center for Education Statistics tracks college participation rates. As of 2019, Asian Americans showed enrollment of 58 percent of young adults, compared with whites at 42 percent.

Americans have stronger brand preference for prestigious institutions.¹¹ The stereotype has a germ of truth to it. Asian Americans are pursuing a seat at Harvard at higher rates and more aggressively.¹² This produces a consequence of a disparate effect. It is an artifact of these phenomenon. It is not about intentional discrimination. It is just math. Here is how it happens. Asian Americans, as a community, will feel disproportionate consequences from any decision in higher education. Suppose Harvard increased the class size. Or suppose they decreased the class size. Say a fire burned down a residence hall. So Harvard decides they cannot place incoming students in a hotel. They need to rebuild. They decide to reduce their enrollment modestly: they will have 100 fewer freshmen the next year. Due to the Asian American overrepresentation in the pool, Asian Americans will feel this to a greater extent. That is not racial discrimination. It is not even a racial disparity that is actionable. (Note any discussion of overrepresentation requires establishment of the right baseline. Asian Americans are overrepresented relative to how much they comprise of the overall population. That is not the best measure. The comparison ought to be to Asian Americans eligible for admissions. There is a separate political problem of Asian Americans complaining despite such seemingly strong numbers.)

Ninth, we all would be worse off evaluating people solely by grades and test scores. Look, I personally would be much better off, because my academic record was consistently in the top one percent. But society would face disaster if we set it up in such a manner: as an administrator in higher education, I rarely am impressed by the individuals with the perfect grades and test scores, because other traits make for better performance, ranging from grit or perseverance to a sense of humor and ability to work in a team. When you talk to people who want fairness, they describe holistic admissions. In other words, when you ask people who oppose affirmative action how they believe the system should work, they insist on looking beyond grades and test scores—which is affirmative action.

Tenth, do not be fooled. The plaintiff's lawyers in the Harvard case are good. They started off attacking affirmative action. They then adjusted. Their rhetoric was not working well. They switched to saying they were in favor of Asian Americans. They were smart. They did not want to look bad. They switched. They said they were not trying to abolish affirmative action. Read the complaint. It is online.¹³ It is odd. The last page of the complaint, of any

See Indicator 19: *College Participation Rates*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/raceindicators/indicator_REA.asp [<https://perma.cc/24XX-HSHZ>] (last visited Sept. 5, 2019).

11. Kaidi Wu, Stephen M. Carvia, & Shirli Kopelman, *Frogs, Ponds, and Culture: Variations in Entry Decisions*, 9 Soc. Psychological and Personality Science 99 (2018).

12. Camille G. Caldera, *Asian American, International Admits Accepted Harvard Admissions Offers at Highest Rates*, THE HARVARD CRIMSON (May 30, 2019), <https://www.thecrimson.com/article/2019/5/30/admissions-yield-analysis/> [<https://perma.cc/9SZB-UM36>] (last visited Sept. 5, 2019).

13. Complaint at 119, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard*

complaint, is the prayer for relief, also known as the request for the remedy. The whole front of the pleading is about Harvard allegedly discriminating against Asian Americans. The prayer should be for an end to anti-Asian bias. Yet the remedy has nothing to do with Asian Americans. It refers to only abolishing affirmative action. There is not even a mention of Asian Americans. The case is, at the end, not about Asian Americans. It is, instead, an attempt to use Asian Americans as a means to an end.

Finally, the remainder of the symposium deserves praise. I thank the other three speakers, and I adopt their points. I would like to highlight one aspect of each of their comments.

Julie Park, who has done extensive analysis of the numbers as a consultant to Harvard, pointed out that the issue here is about hyper competitive processes. Harvard is so selective that it rejects all but a few. Almost all Asian Americans angry about how Harvard treated them or their child would be angry even if the plaintiffs won. Ironically, people value admission to Harvard for the very reason that it is virtually unobtainable.

Vincent Pan was realistic about the politics. Asian Americans cannot fool others. If Asian Americans agitate for affirmative action in situations where they are included but attack it elsewhere, Asian Americans will have no allies. They will not have support from African Americans or Latinos when they march against hate crimes or bring other legitimate complaints.

Nkaug Iab Yang raised data disaggregation and the concerns of Asian Americans who are not elite Chinese Americans. Regrettably, some Asian Americans have appropriated the term even as they oppose data disaggregation that would reveal the truth about the population. They are leveraging the numbers of Asian Americans for their own benefit. Yet there are so many Asian Americans who have been helped and continue to be helped by affirmative action, whether at Harvard or elsewhere.

Thank you so much for the opportunity to discuss these issues. Asian Americans have a role to play. May it be constructive rather than divisive.