

7-1-2020

Discrimination against Minorities

Andrew Koppelman
Northwestern University

Althea Nagai
Center for Equal Opportunity

Patrick Strawbridge

John Yoo
U.S. Court of Appeals

James C. Ho

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Koppelman, Andrew; Nagai, Althea; Strawbridge, Patrick; Yoo, John; and Ho, James C. (2020)
"Discrimination against Minorities," *University of Dayton Law Review*. Vol. 45: No. 3, Article 6.
Available at: <https://ecommons.udayton.edu/udlr/vol45/iss3/6>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

DISCRIMINATION AGAINST MINORITIES

The following is a transcript of a 2018 Federalist Society panel entitled *Discrimination Against Minorities*. The panel originally occurred on November 16, 2018, during the National Lawyers Convention in Washington, D.C. The panelists were: Andrew Koppelman, John Paul Stevens Professor of Law, Northwestern University School of Law; Dr. Althea Nagai, Research Fellow, Center for Equal Opportunity; Patrick Strawbridge, Partner, Consovoy McCarthy Park PLLC; and John Yoo, Professor of Law, University of California, Berkeley. The moderator was the Honorable James C. Ho of the United States Court of Appeals for the Fifth Circuit.*

[RECORDING BEGINS]

GAIL HERIOT: Welcome everyone. Welcome, including to our livestream audience. Welcome. My name is Gail Heriot, and I am chair— [Applause] That’s not that great a name. I am Chair of the Civil Rights Practice Group, and I’m up here for two reasons. One is to tell you that you too can be a member of the Civil Rights Practice Group. If you’d like to be, just speak to me or speak to Dean Reuter or shoot us an email, whatever you’d like. And my second task up here is to introduce our moderator, the Honorable James Ho. I take particular pleasure in this introduction because I have actually known Judge Ho since before he went to law school.

Now, you might notice there’s a bit of an age gap between the two of us. So, I had been practicing law. I had been a member of the law—the bar for fifteen years at that point. But since then, Judge Ho has gone to the University of Chicago Law School, clerked for Judge Jerry Smith, was a Special Assistant to the Assistant Attorney General for Civil Rights, was an Attorney Advisor in the Office of Legal Counsel, worked for the Senate Judiciary Committee under Senator Cornyn, clerked for Judge Clarence Thomas, was Solicitor General of Texas, and was the Co-Chair of the Litigation and Constitutional Law Practice at Gibson, Dunn & Crutcher before being confirmed by a vote of 53-43—that’s pretty good these days. [Applause] That’s a landslide—to the United States Court of Appeals for the Fifth Circuit. And I have one thing to say to you, Judge Ho, and that is “You sure know how to make a girl feel old.” So, take it away.

HON. JAMES C. HO: Thank you, Gail. That was very, very

* The footnotes contained herein have been added by the University of Dayton Law Review for reference.

generous and kind. My name is Jim Ho, and I am profoundly honored to moderate today's very interesting panel. And I want to apologize at the outset if my voice is a little weaker than is normal for me. The good news is my introduction will, therefore, have to be relatively short.

Twenty-eight years ago, a high school student, a senior who had emigrated from Taiwan to the United States, started to apply for college. His admissions advisor told him that his grades, SAT scores, the rest of his application were all quite strong, and, in theory, strong enough to get him into his top choice of schools but for one thing: his race. Three decades later, The Federalist Society has invited that former high school senior to moderate this panel. I am delighted to do so because it means that I finally get to ask this amazing panel of experts about the advice I got way back in 1990. And I have basic questions that I hope our panelists will answer for us. First of all, is it true? The title of today's panel, rather provocative: "Discrimination Against Minorities." Is it true that some of our nation's colleges and universities are engaged in discrimination against minorities? And second, if it is true, is it justified? Is it legal under current judicial precedents, and is it legal under the plain text and original understanding of our Constitution and various statutes?

Our first speaker today will be Patrick Strawbridge. He's a Partner at the law firm of Consovoy McCarthy Park, one of the law firms who's playing a leading role in the current case against Harvard University.¹ He'll give us an update—up-to-date, very recent news, on the trial that just finished, as I understand it. And so, he'll give us a great update on the Harvard litigation—the complaint, the discovery hopefully, and the recent trial proceedings just over these past few weeks.

Next, we will hear from Dr. Nagai. Althea Nagai, a Research Fellow at the Center for Equal Opportunity, who will talk about various, statistical studies that she has done, analyzing these various educational admissions policies and their effects on minorities—particularly the Asian American community.

We will then have two distinguished law professors, who will take, what I predict, will be opposite stands on the merits of these suits. We'll see how good I am at predicting. We have with us Professor Andrew Koppelman, the John Paul Stevens Professor of Law at the Northwestern University School of Law. And John Yoo, Professor of Law at the University of California at Berkeley. He is here under my protest, and so I am a very loyal to Stanford Law.

I'm going to invite each speaker to begin with some opening statements, and then I'll invite some dialogue between the panelists. I expect

¹ See generally *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

we'll have an interesting clash of ideas. I certainly hope we will. And then we will certainly try to leave ample time for members of the audience to ask questions. And, again, *to ask questions*. We'll be policing that particular Federalist Society policy with the full letter of the law. We'll begin with Mr. Strawbridge.

PATRICK STRAWBRIDGE: Well, thank you, Judge. And I just want to take the opportunity to thank The Federalist Society. Panels like this are one of the reasons why a lot of us joined The Federalist Society and [we] look forward to this. And it's a real honor to be invited on behalf of the firm to present a little bit on this case, which you may not have heard about, but it has gotten a little bit of press coverage, especially over the last year or so.

I'm going to do my best to set the table, kind of describe briefly as I can the background of the case, how we got to where we are, and in particular, culminating in what was a three-week bench trial that was held in the District of Massachusetts last month in October. And then I'll talk a little bit where the case is likely to head next, and then that'll frame some of the discussions I imagine we're going to have for the next couple of hours.

So these cases were filed almost four years ago—it's like four years ago next week, I think—on behalf of Students for Fair Admissions.² There was a case that was filed against Harvard, and there was a case that was filed against the University of North Carolina at the same time.³ Students for Fair Admissions is an association, a non-profit, 501(c)(3) organization that is opposed to the use of race in college admissions.⁴ It currently has more than 20,000 members, many of whom have contributed financially or in other ways.⁵

And using an association like Students for Fair Admissions is a long, established way to pursue civil rights litigation in particular.⁶ By suing for an association, you are able to avoid some of the difficulties that come from how some of these affirmative action cases have been litigated in the past, which is on behalf of an individual applicant, who then has to demonstrate some kind of damages or entitlement to relief.⁷ An association that seeks injunctive relief, which is what these claims seek, they just simply seek to limit or end the use of race in the college admissions process, allows you to bring the

² See generally *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015), *aff'd*, 807 F.3d 472 (1st Cir. 2015); *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017).

³ *Harvard*, 308 F.R.D. 39; *Univ. of N.C.*, 319 F.R.D. 490.

⁴ *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> (last visited June 15, 2020).

⁵ *Id.*

⁶ See generally *Int'l Union v. Brock*, 477 U.S. 274 (1986); Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. PENNUMBRA 237, 262–63 (2008).

⁷ See Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. L.J. 1, 94 (2006).

litigation on behalf of the organization.⁸ We do have members—the Harvard complaint mentions one particular Asian American member.⁹ We have a number of other members who you can rely upon for standing. They all applied to Harvard and were rejected under the *Grutter* and *Gratz* cases.¹⁰ Those individual members would have standing if they can demonstrate that they were denied a fair opportunity to compete in the admissions process, in part because the admissions process itself uses race. And so does the individual injury that some of our members have. But because we only seek injunctive relief, the members are not actually necessary to pursue the claims. The organization can assert the claims on behalf of them.

So Students for Fair Admissions filed its lawsuit in November of 2014.¹¹ The complaint against Harvard included six counts.¹² All of these counts are under Title VI of the Civil Rights Act, which prohibits—I can read you the text since I know the text is of some passing interest to the people in this room.¹³ “No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”¹⁴ And so for everyone who’s wondering why a private school is subject to this lawsuit, the answer is Harvard takes tens of millions of dollars in federal money in a variety of different ways: research grants, an enigma of certain educational programs, and that is what subjects them to the requirements of Title VI.¹⁵

So, the six individual counts. The first one, which has obviously been the focus of this case, will probably be the subject of a lot of our discussion today, alleges that Harvard is intentionally discriminating against Asian American applicants and has been for a number of years.¹⁶ I’ll just run through the counts, and then I’ll circle back and talk a little bit about what the evidence on these counts—how that has developed.

The second count is basically an allegation of racial balancing, apart from an individual discrimination against Asian American applicants, just generally Harvard is engaged in what’s known as “impermissible racial balancing,” attempting to achieve a certain level of racial representation

⁸ *Id.*

⁹ Complaint at ¶¶ 15–16, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

¹⁰ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹¹ Complaint, *supra* note 9, at ¶ 1.

¹² *Id.* at ¶¶ 428–05.

¹³ *Id.* at ¶ 1.

¹⁴ 42 U.S.C. § 2000d (2012).

¹⁵ Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 789 (1995); see generally *Race and National Origin Discrimination Frequently Asked Questions*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/oct/frontpage/faq/race-origin.html#racedisc3> (last modified Sept. 25, 2018).

¹⁶ Complaint, *supra* note 9, at ¶¶ 428–42.

through its admissions process.¹⁷

The third is a claim that is using race for more than a plus factor, which is the language from *Grutter*, is the current governing standard for when race can be used in the admissions process.¹⁸

The fourth count basically asserted that Harvard was not simply using race to fill the last few seats in the class as a tie breaker, which is what was taken from the *Bakke* decision—and it was just a determination, which, frankly, is not contested in this litigation.¹⁹ But that is not how Harvard was using race.

There was also a count that was based on the fact that Harvard has race-neutral alternatives available to it that could achieve the educational benefits of diversity without actually using race as part of the admissions decision-making process.²⁰ That is a claim I think that was front and center in the *Fisher* litigation, and the future of that claim or the future of what the standard is for race-neutral alternatives count I think was left a little unsettled by the *Fisher II* decision, but was still something that was an active part of the applicable constitutional test.²¹

And then the sixth claim is that in any event, *Grutter* should be overruled if Harvard's not liable under these other counts.²²

The complaint makes for good reading. It is very lengthy. The complaint was filed in 2014.²³ Harvard elected not to move to dismiss the complaint, and I think a motion to dismiss would have been futile, but it is still interesting that they did not at least attempt a motion to dismiss. They answered the complaint, and one does wonder being on the other side of the “V,” I can only speculate here, but one does wonder whether they realized what they were buying with their answer in terms of the level of discovery that we were going to seek in this case because, although no one has ever told me this, I think they may have assumed this was going to be like the *Fisher* case, maybe a 36(b) deposition, maybe some limited discovery. Instead, Students for Fair Admissions came in and we wanted to see the files, we wanted to see the records, and that is where the case really began to heat up.

I'll talk a little bit about the scope of discovery and then talk about the evidence that was developed through that discovery. We ended up—there

¹⁷ *Id.* at ¶¶ 443–55.

¹⁸ *Id.* at ¶¶ 456–65.

¹⁹ *Id.* at ¶¶ 466–76.

²⁰ *Id.* at ¶ 478.

²¹ See generally *Fisher v. Univ. of Tex.* (“*Fisher I*”), 570 U.S. 297 (2013); see also *Fisher v. Univ. of Tex.* (“*Fisher II*”), 136 S. Ct. 2198 (2016).

²² Complaint, *supra* note 9, at ¶¶ 489–05.

²³ *Id.* at ¶ 10.

was a stay in this case that kind of slowed it down for about a year and a half.²⁴ There was partial discovery while *Fisher II* was being granted and considered by the Supreme Court.²⁵ But, ultimately, Students for Fair Admissions obtained six years of individualized level applicant data. Names were redacted and certain identifying information was redacted, but we had access to Harvard's admissions database covering a six-year period. And that included everything about extracurricular activities, their academic accomplishments in high school, Harvard's internal ratings for the applicants as they went through the process, and of course, the disposition of their application.²⁶

We received tens of thousands of pages of documents, including some very interesting internal reports that Harvard's admissions office had been involved in, if not actually assisted in preparing. We took more than twenty depositions of Harvard admissions employees, Harvard administrators, and/or third parties. And, ultimately, both sides obtained experts, the primary expert battle in this case was between a couple of economists.²⁷ SSFA retained an economist from Duke, Peter Arcidiacono, who has written a lot on the use of race in college admissions, and Harvard retained David Card, an economist at Berkeley, who is also somewhat renowned in the field.²⁸ And they—I think Dr. Nagai will talk a little bit about the statistical evidence as we get into it.

We also had an expert on race-neutral alternatives. SSFA retained Rick Kahlenberg, and if anyone's familiar with Rick Kahlenberg's work, he has for twenty or thirty years been probably the foremost writer and thinker on socioeconomic preferences in general, but alternative use of race in the admissions process.²⁹ And Rick Kahlenberg is a progressive ThinkTank representative. He's been a senior fellow at the Century Foundation, and I think was a very compelling witness precisely because he does not necessarily share the goals with respect to the use of race in college admissions that members of the organization do, or other folks do in this area.³⁰ But he firmly believes and presented testimony that there are ways to achieve a comparable level of racial diversity without actually using race in the admissions process.

²⁴ See generally Plaintiff's Supplemental Memorandum in Opposition to Stay, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

²⁵ *Id.*

²⁶ See generally *Documents Released in Admissions Lawsuit*, THE HARVARD GAZETTE (June 17, 2018), <https://news.harvard.edu/gazette/story/2018/06/documents-released-in-admissions-lawsuit/>.

²⁷ Eric Hoover, *Dueling Economists: Rival Analyses of Harvard's Admissions Process Emerge at Trial*, THE CHRONICLE OF HIGHER EDUC. (Oct. 30, 2018), <https://www.chronicle.com/article/Dueling-Economists-Rival/244964>.

²⁸ See *id.*

²⁹ Exhibit A, Expert Report of Richard D. Kahlenberg at 2, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018); Adam Harris, *The Harvard Case Is About the Future of Affirmative Action*, THE ATLANTIC (Oct. 15, 2019), <https://www.theatlantic.com/education/archive/2018/10/harvards-affirmative-action-trial-gets-underway/572989/>.

³⁰ Exhibit A, Expert Report of Richard D. Kahlenberg, *supra* note 29, at 56.

And we'll talk a little bit about those options as well.

Fact discovery closed at the end of 2017. Expert discovery went for basically another eight months on top of that. We then arrived at a decision point in the case, which was that the parties had always assumed, and there was baked into the schedule, a summary judgment proceeding. We showed up for a conference to discuss how summary judgment was going to proceed, and Harvard—represented very ably by WilmerHale, Seth Waxman, and Bill Lee, the former managing partner of the firm, a number of other very talented and excellent lawyers—showed up to that hearing and proposed that we not file summary judgment, that we go directly to trial, which was a little unusual and, frankly, I think was an attempt to see if they could use their resource advantage. And I think this was an interesting decision point in this case because our firm, Consovoy McCarthy Park, was a start-up firm. We work very hard, but we do not have the resources of WilmerHale, and it was, I think, a recognition by that, an attempt to basically say, “Why don't we skip summary judgment and go straight to trial.”

Well, the good news was that caused us to rethink our strategy, although we were ultimately successful in filing summary judgment and getting the court's permission, which we had to request, to file a summary judgment motion, it did cause us to think, “Well, maybe we should look and see if anyone would be willing to help us.” And so a very small trial firm by the name of Bartlit Beck volunteered to help us, and that was a huge boost to us as we headed into the trial.³¹ And I'm going to talk a little bit about it in a minute, but that was a very interesting decision point in the case. If they had not been so aggressive in pushing us to trial, it may not have actually come out that way. But, thankfully, Bartlit Beck was there.

Both sides filed summary judgment.³² That all came out in June. It was the first time most of the evidence in the case reached the public light. There was an awful lot of press coverage, most of it surprisingly favorable. For the first time, I eagerly awaited the publication of the *New York Times* to see if—[Laughter] It's very unsettling to wake up and realize the *New York Times* is writing favorable stories about our case.³³ But it was no less welcome.

³¹ Vivian Chen, *Meet the Lawyers Fighting Harvard Over Admissions*, THE AM. LAWYER (Dec. 10, 2018, 1:58 PM), <https://www.law.com/americanlawyer/2018/12/10/meet-the-lawyers-fighting-harvard-over-admissions/?slreturn=20190829223129>.

³² See Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018); see also Memorandum in Support of Defendant's Motion for Summary Judgment on All Remaining Counts, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

³³ 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>.

The summary judgement was comprehensive to say the least. Our statement and material fact featured 900 paragraphs. It was 195 pages long. There was a lot to say, and we certainly said it all. Harvard vociferously opposed summary judgment, and I think as the court had largely telegraphed to the parties back and the first hearing, to no surprise shortly before the scheduled trial in October, the court denied summary judgment.³⁴ It said there are a lot of fact issues here that I need to dig into.

And so, we went to trial. Trial started on October 15th in Boston.³⁵ We were in front of Judge Allison Burroughs, who was a long-time Assistant U.S. Attorney in Boston, had been on the bench for five or six years, and was appointed by President Obama in his second term. Judge Burroughs, I'll say this. Judge Burroughs has been an exceedingly fair judge, and I think has issued some written decisions. There were disputes over standing and discovery issues early on, and I think we very much feel like the court has given us more than a fair shake and given us the chance to develop a record that we can take up. And she was very diligent at the trial—this was a bench trial; there was no jury. And so, we sat there in her courtroom in Boston for three weeks. Basically, there were more than a dozen live witnesses, not counting the expert witness. Each side put on two expert witnesses. There were some amici who came in, and current people who claimed that they're the beneficiary of the use of race that Harvard provides.³⁶ And they were allowed a day in court to testify about what they view is the advantage of going through the process.

As I mentioned, Bill Lee, Seth Waxman, Felicia Ellsworth, a number of very talented lawyers on the Wilmer side—no surprise in a Boston courtroom that they would be flexing their muscle. But I have to put in just a very brief plug for the trial team, in addition to myself, Mike Connolly and Will Consovoy for our firm. We had the dynamic Adam Mortara—if anyone has ever had the pleasure of meeting Adam, dynamic is a good way to describe him—as well as John Hughes from Bartlit Beck, their partners, Scott McBride and Katherine Hacker, as well as associates Meg Fasulo and Krista Perry. And they were phenomenal lawyers. If you ever have the opportunity to hire that team or Bartlit Beck, I strongly endorse it, unless, of course, we're also in the mix for the work in which case you have no choice but to hire both of

³⁴ Memorandum and Order on Cross-Motions for Summary Judgment at 2, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

³⁵ Crimson News Staff, *Here's What Happened in the Harvard Admissions Trial Today*, THE HARV. CRIMSON (Oct. 16, 2018), <https://www.thecrimson.com/article/2018/10/16/what-happened-today/>.

³⁶ *Amicus Filing: 25 Harvard Student And Alumni Organizations In Support Of College Admissions That Foster Diversity*, LDF (Aug. 30, 2018), <https://www.naacpldf.org/our-thinking/ldf-blog/educational-equity/amicus-filing-25-harvard-student-alumni-organizations-support-college-admissions-foster-diversity/>; see Press Release, Lawyers' Comm. for Civil Rights Under Law, *Students Will Be Allowed to Testify in Defense of Harvard's Affirmative Action Program in Major Federal Court Case* (Oct. 4, 2018), <https://www.commondreams.org/newswire/2018/10/04/students-will-be-allowed-testify-defense-harvards-affirmative-action-program>.

us. But they did a fantastic job. Obviously, we're playing in Harvard's home court with WilmerHale, and they did a phenomenal job presenting this case, presenting the case in a manner that, I think, could speak to the district judge and certainly gives us the best opportunity to win that case. It was just a phenomenal lesson as a lawyer to sit there and work alongside those lawyers and see how they presented the case, and we're very happy with it.

The trial had a little bit of everything, including some surprise testimony in the middle of trial that necessitated some emergency, in-trial discovery and allowed us to recall some witness to have them correct testimony on behalf of Harvard that they had given that turned out not to have been accurate in the middle of trial. I'll talk a little bit about that. But that's always fun when you get that in the middle of trial. Closing arguments were on November 2nd.³⁷ There's going to be an exchange of proposed findings of fact and conclusions of law over the next couple of months and a second closing argument once all the legal briefing is done in February. I would anticipate a decision sometime probably this summer, realistically, given the size of the record in this case. That's where I'll go.

I will very briefly just try to talk about the evidence that is most interesting. I'm sure we will circle back to it and revisit it at various points in time. With respect to discrimination, there's really three key pieces of evidence on the intentional discrimination claim. The first of which is a series of reports which were conducted by Harvard's Office of Institutional Research.³⁸ This is their internal statistics group. They prepare reports when Harvard is up for accreditation. They prepare reports for Harvard's reporting to the federal government. They provide reports to the governing board of Harvard about any issue that needs statistical analysis.

When some attention had come to light in the popular press about potential discrimination against Asian Americans in higher education in late 2012, discovery turned out that they had embarked on a quest to determine whether in fact the admissions process disadvantages, or in some drafts, was biased against Asian Americans.³⁹ And they produced some very interesting findings that, frankly, I think were strong evidence that, yes, not only did Asian Americans appear to be suffering disproportionately from various factors that were used in the admissions process, but specifically this question of the fact that Harvard has these ratings that they assign to applicants.⁴⁰

³⁷ Collin Binkley, *Harvard Bias Suit Now in Judge's Hands*, AP NEWS (Nov. 2, 2018), <https://apnews.com/430b85d0bcdb4655bc32132dd7e177af>.

³⁸ See generally Exhibit 145, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018); Althea Nagai, *Harvard Investigates Harvard: "Does the Admissions Process Disadvantage Asians?"*, CTR. FOR EQUAL OPPORTUNITY, <https://www.ceousa.org/attachments/article/1237/CEO%20Study%20Harvard%20Investigates%20Harvard.pdf> (last visited June 15, 2020).

³⁹ See generally Nagai, *supra* note 38.

⁴⁰ *Id.*

One of them is academic, which is based on some assessment—some objective, some subjective—as to the academic accomplishments of the student.⁴¹ They have an extracurricular rating, which is clubs and leadership positions and activities that you do outside of the classroom.⁴² They have an athletic rating, which is largely used to identify recruited athletes.⁴³ It has a somewhat less significant role with respect to your athletic accomplishments, but there's a way to signal some involvement in high school athletics. And then they have what they call the “personal qualities rating,” and the personal qualities rating is, according to the testimony in the case, used to measure whether someone is particularly effervescent or would be a good roommate or has courage or has good character.⁴⁴ A very rigorous standard, which could be applied neutrally. And there was a tremendous amount of guidance, which is to say there was no guidance on how to provide this rating.

And the OIR reports demonstrated what became a key issue in the fact, which is that Asian Americans were certainly overrepresented in terms of high performance in the academic category.⁴⁵ And Asian Americans in the pool, relative to the rest of the pool, also did better on extracurricular activities than everybody else.⁴⁶ Athletic was a bit of a wash. As I said, the athletic rating is simply just not as important in the admission decisions that Harvard makes once you're not one of the 200 or so recruited athletes that Harvard is recruiting for their sports teams.⁴⁷

And then you have this personal rating. And these OIR reports demonstrated that especially compared to everybody, but particularly compared to White applicants, Asian Americans were routinely and significantly marked lower on the personal rating.⁴⁸ And this was in stark contrast to much smaller differences that were seen with respect to the personal ratings that were assigned or based upon the evaluations from teachers and guidance counselors and alumni interviewers at the Harvard process.⁴⁹ It was the personal rating assigned by the admissions office that showed a significant, negative effect for being Asian American versus any

⁴¹ Complaint, *supra* note 9, at ¶¶ 13, 16.

⁴² *Id.*

⁴³ *Id.*; Nagai, *supra* note 38, at 24.

⁴⁴ See *As Trial Loomed, Harvard Changed Guidance for Admissions Officers*, USA BREAKING NEWS (Oct. 29, 2018), <https://www.usabreakingnews.net/2018/10/as-trial-loomed-harvard-changed-guidance-for-admissions-officers/>.

⁴⁵ Nagai, *supra* note 38.

⁴⁶ See *id.*

⁴⁷ See Jim Jump, *Ethical College Admissions: The Harvard Admissions Case*, INSIDE HIGHER ED (June 25, 2018), <https://www.insidehighered.com/admissions/views/2018/06/25/harvard-admissions-data-raise-questions-dont-demonstrate-discrimination>; see generally William L. Wang, *Filings Show Athletes with High Academic Scores Have 83 Percent Acceptance Rate*, THE HARV. CRIMSON (June 30, 2018), <https://www.thecrimson.com/article/2018/6/30/athlete-admissions/>.

⁴⁸ Hartocollis, *supra* note 33.

⁴⁹ Nagai, *supra* note 38, at 15.

other racial group.⁵⁰

It turns out that the statistics also revealed that African Americans and Hispanics were generally rated as having higher personal qualities than Whites or Asians in a way that actually mirrors what one would expect for the use of racial preferences by Harvard.⁵¹ And that becomes a key part of the case.

The second part of the case, besides—well, I'll just say one more thing about the OIR. The evidence was that OIR essentially produced this information, gave it to the admissions office, and the admissions office said, "Thank you very much," tucked it away in a drawer and never told anyone ever about it again. There was no follow up to see what was happening here—why were the personal ratings so low, are we, in fact, biased against Asian Americans? The reports were basically stuck in a desk drawer. Not even most of the admissions office was ever alerted to those findings.⁵²

The statistical evidence compiled by the experts, I think, basically confirmed that this personal rating did tend to disadvantage Asian Americans. To some extent, Harvard does not even contest that. They agree that compared to White, Asian Americans do worse on this personal qualities rating.⁵³ They just simply offered up a number of explanations as to why that may be so.⁵⁴ And, frankly, there was evidence presented at trial by Harvard—this still surprises me, although I guess the statistics said what they said so there needed to be some explanation—there was statistical evidence presented by Harvard at trial that the Asian applicants are just not as multidimensional as the White applicants.⁵⁵

And one of the keys to this argument, that they were not as multidimensional, was basically based on the personal rating. They get lower personal ratings, so they must not be as well balanced as the other applicants. And I think that there's a lot of grounds upon which to dispute that. But that is one of the key things in the case. The reason why that is a key dispute in the case is because when you do a statistical analysis to determine the effect of race, everybody agrees that if a variable is directly affected by race, not just associated with race, but race is going into a reading in this case, then you have to take that rating out of your statistical analysis to determine what effect race is having. And both experts basically agreed that if you take the personal rating—if you exclude the personal rating as a control in these 200 variable

⁵⁰ Complaint, *supra* note 9, at ¶ 22.

⁵¹ See Nagai, *supra* note 38, at 9.

⁵² See Delano R. Franklin & Samuel W. Zwickel, *Internal Harvard Review Showed Disadvantage for Asian Applicants*, THE HARV. CRIMSON (June 25, 2018), <https://www.thecrimson.com/article/2018/6/15/admissions-internal-report/>.

⁵³ See Nagai, *supra* note 38, at 9.

⁵⁴ Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html>.

⁵⁵ See *id.*

models that both experts constructed, both experts, including Harvard's expert, agree that there is a statistically significant discriminatory effect in the admissions process against Asian Americans.⁵⁶ So, proving that the personal rating is affected by race and that it has to be excluded from the statistical model is the key statistical dispute in the case.

There was also a number of emails and application files that suggested that there was, in fact, evidence that stereotyping—I'm not going to get into any of the details. I've probably spoken too long as it is. But I just want to run through a little bit more of the key evidence. But there was certainly phrases like "standard strong" that appeared to disproportionately pop up in notations on Asian American applicant's files—that sort of confirmed this view that Asian Americans may be lumped into a category that made them less attractive to Harvard as part of its admissions process.⁵⁷

There was evidence of racial balancing. I'm just going to briefly touch upon the other claims in the case. Harvard would generate reports that their admissions office would use when they were in their meetings.⁵⁸ They do a two or three-week meeting process to admit—to whittle down and decide who's getting admitted and who's not getting admitted.⁵⁹ They do it once for the early action process and once for the regular action process.⁶⁰ There's evidence that the admission's office received on a regular and sometimes every day or every other day reports that included a breakdown by the racial composition and specifically compared it to the prior racial year's composition.⁶¹

And this coincides with what the complaint acknowledged, and what I think is really not controversial, which is that across the Ivy League there is a shocking—maybe not shocking—there is a remarkable stability in the Asian American representation at the Ivy League schools that basically runs between 18 and 20% over the last ten years; never higher, never less.⁶² And the natural comparator to that, as I'm sure others are going to talk about, is in California, for example, where racial preferences are not permitted, Asian Americans make up about 40% of the elite college campuses.⁶³ So it didn't seem like that was pure chance, especially if this was truly a holistic process,

⁵⁶ See Exhibit A, Expert Report of Peter S. Arcidiacono, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018); see generally Exhibit A, Expert Report of Richard D. Kahlenberg, *supra* note 29.

⁵⁷ See Memorandum and Order on Cross-Motions for Summary Judgment, *supra* note 34, at 28.

⁵⁸ See *id.* at 8–9.

⁵⁹ See generally Plaintiff's Statement of Undisputed Material Facts at ¶¶ 124–25, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, Case No. 1:14-cv-14176-ADB, 2014 WL 6241935 (D. Mass. 2014).

⁶⁰ See *id.*

⁶¹ See *id.* at ¶¶ 239–45.

⁶² See Complaint, *supra* note 9, at ¶ 213.

⁶³ *Colleges With the Highest Percentage of Asian Students*, COLLEGEXPRESS, <https://www.collegeexpress.com/lists/list/colleges-with-the-highest-percentage-of-asian-students/2361/> (last visited June 15, 2020).

making individual judgments that it would remarkably come out to this level of racial stability, particularly for the Asian American numbers. It seems like more of a coincidence and that's certainly evidence to support racial balancing.

There's the *Grutter* sort of more than a plus factor. What I'll say on that is both experts actually don't disagree that with respect to African Americans and Hispanics, there are sizable racial preferences being employed.⁶⁴ Harvard's own expert witness conceded that if you are Hispanic, it amounts to all other things being equal, a 200% increase in your chance of admission. And if you're African American, it's a 300% increase in your chance of admission. Whether or not those are significantly high percentages that they overrule what the standard under *Grutter* is will have to be decided by both the district court in the first instance, and ultimately the later court. But I don't think there's any question that there are significant racial preferences that are being used here.

And then I'll briefly talk about the race-neutral alternatives evidence. There was evidence presented, and really not disputed by Harvard, that Harvard—if it got rid of certain other admissions practices, and that would include if they got rid of legacy preferences—if they stopped giving preferences to donors and people who appear on the Dean's List, which is a special list to track people of high interest to Harvard for reasons other than the normal application factors—if they got rid of preferences for the children of faculty and staff and if they increased socioeconomic preferences and the benchmark for what was presented at trial—was if you gave a preference for low socioeconomic status, that was roughly half the size of the preference that was given to recruited athletes.

You could generate a class, a hypothetical admitted class—and again these statistics are not really disputed—that would feature an overall representation of Hispanic and African American students that would be the equivalent of what they have now. It would be slightly more Hispanic students—there'd be 19%—and slightly less from 14% to 10%, but still at 10% African American class, which was what the size of the admitted African American class was at Harvard at the beginning of the Obama administration. So not that long ago, that was a sufficient level of racial diversity, at least through Harvard's process at the time. And then you would, also not surprisingly, see a class that decreased with the percentage of White—it was 3% White, and it would be 31% Asian American under those circumstances as opposed to the 19, 20, 22% that we have today.

I'll be happy to jump in and explain. That is basically a very brief summary of what is a lot of evidence developed in this case. But it is going

⁶⁴ See Exhibit A, Expert Report of Peter S. Arcidiacono, *supra* note 56, at 27–30; Exhibit A, Expert Report of Richard D. Kahlenberg, *supra* note 29, at 27.

to be a fun one to watch as it moves through Judge Burroughs's court and then ultimately the First Circuit, and perhaps down to I First Street.

HON. JAMES C. HO: Thank you. Dr. Nagai?

DR. ALTHEA NAGAI: Okay. I'm going to pick up where he left off. I'm going to talk about two reports, basically, that we've done at the Center for Equal Opportunity. They can be found at www.ceousa.org.

The first one is a comparative study of three universities. We did this in May: Caltech, MIT, and Harvard.⁶⁵ And it's in the context of whether or not these schools ask, "Are there too many Asian Americans?" And we look at it over time because my idea was, look, the only way you can really see if they're discriminating is first of all, do we have a ceiling appear? And the reason for this is there's been incredible growth in the Asian-American population, and there's been explosion in the growth in Asian Americans attending college.⁶⁶ Okay. So, you had this—it curved from about 1980—and in '60 to '80 it's small and then you have this exponential growth.⁶⁷

Now, what we see with Harvard, MIT, and Caltech is until about the 1990s you see the three schools parallel back exponential growth.⁶⁸ At Caltech and MIT, the percentage of Asians making up the undergraduate class increases.⁶⁹ And in the early 1990s something very interesting happens at Harvard. It goes from about 21%, and then all of the sudden, it drops to about 17%.⁷⁰ And it kind of stays like that for the next few decades.⁷¹ All the while, the percentage of Asian Americans attending college, taking the SATs, just keeps growing and growing.⁷²

MIT increases and then it just sort drops a little bit, and at some point, MIT said, "We've stopped using alumni preference" in their admission process but did admit to using race. Caltech is the only one in our case study that used neither alumni preference, nor did they use race.⁷³ Caltech, in 2015, according to the federal statistics, had an undergraduate population of roughly 43% Asian American.⁷⁴ This parallels the percentage of Asian Americans at

⁶⁵ Nagai, *supra* note 38, at 9.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.*

⁷⁰ *Id.* at 13.

⁷¹ *Id.*

⁷² See generally *id.*

⁷³ *Id.* at 9; Max Larkin & Mayowa Aina, *Legacy Admissions Offer An Advantage — And Not Just At Schools Like Harvard*, NPR (Nov. 4, 2018, 11:00 AM), <https://www.npr.org/2018/11/04/663629750/legacy-admissions-offer-an-advantage-and-not-just-at-schools-like-harvard>.

⁷⁴ Scott Jaschik, *A Look at the Data and Arguments about Asian-Americans and Admissions at Elite Colleges*, INSIDE HIGHER ED (Aug. 7, 2017, 3:00AM), <https://www.insidehighered.com/print/admissions/article/2017/08/07/look-data-and-arguments-about-asian-americans-and-admissions-elite>.

the UC elite public universities, something in the low forties.⁷⁵ Harvard, on the other hand, kind of stayed the same.⁷⁶ It didn't really budge, and then I guess the last year it kind of went up to 22 after you guys filed the lawsuit. [Laughter]

But I don't know if Harvard's counting Asians in the same way for public admissions versus what they have to report to the feds. I've noticed some discrepancy, and I think it was Stuart Taylor that pointed out their different rules of counting. So, my statistics are basically for enrollment figures. I take them off the U.S. government statistical database.

Keeping that in mind, now Caltech goes up, undergrad's general Asian-American population goes up, MIT goes up and just kind of goes down, trickles down. And Harvard goes up until 1990 and then just goes down to 17 and just stays there.⁷⁷ Okay. Because they filed their lawsuit, we found out what they were doing, and I want to thank you guys for that *SFFA v. Harvard* lawsuit because the summary judgment, the material facts up there, it is an unbelievable wealth of statistical data.⁷⁸ And I don't care what Harvard says about that OIR report, those reports coming out of their Office of Institutional Research are a goldmine. Basically, it was an absolute—it was what we would've done had we had access to that data, but only better because they have tons of information. They have information on athletics data, legacy, race, everything.⁷⁹

And these are not working papers. This was not a guy practicing logistic regression, blah, blah, blah. He did a whole bunch of runs. He made over twenty, maybe close to fifty charts in different formats.⁸⁰ There were PowerPoint presentations. Okay, he had a typo here, typo there, which I guess plaintiff attorneys—I guess Harvard pointed out that, "Oh yeah, he had typos." And they didn't come to a conclusion, which is usually not the role of the statistician. There was no disagreement as to how they modeled what they did. And they had some incredible data.

What I want to focus on is their statistician's decision to try to look at what the entering class would be like if they used only academics. And he compared Whites and Asians. If they used only academics, Asians would be 43%, just like Caltech.⁸¹ Gee, what do you know? Oh, and by the way, Caltech is not just a math, nerdy school. They have a medium verbal score of

⁷⁵ Sunita Sohrabji, *Asian Americans Comprise the Majority of Incoming Freshmen Across UC Campuses*, INDIWEST (July 13, 2017), https://www.indiawest.com/news/global_indian/asian-americans-comprise-the-majority-of-incoming-freshmen-across-uc/article_90652bd2-6743-11e7-b717-af64161b0091.html.

⁷⁶ Nagai, *supra* note 38, at 13.

⁷⁷ *Id.*

⁷⁸ *See generally* Memorandum and Order on Cross-Motions for Summary Judgment, *supra* note 34.

⁷⁹ Exhibit 145, *supra* note 38, at 11.

⁸⁰ *See id.*

⁸¹ *Id.*

750, so you know, don't stereotype there.⁸²

So if they used only academics, Asian Americans would be 43%, Whites would be 38%.⁸³ When they introduced the variable of legacy and D-1 athlete/recruited athlete, White went up to 48%, Asian Americans dropped to 31%.⁸⁴ So, right there you had a 12% drop. When they introduced the extracurricular and those notorious "personal ratings," Asian Americans dropped even more to 26%.⁸⁵ Whites at that point went up to 51%.⁸⁶

The problem was they still had very few Blacks and Hispanics, so they introduced race as a factor. So, what happens is when you introduce all these other factors instead of race, it doesn't significantly increase the number of African Americans or Hispanics. When you introduce all these factors, plus race, then Blacks increase from 1 to 2%, they go up to 11%; Hispanics go up to about 10%.⁸⁷ That's his model. The model for each of these groups is off by 1% of the actual enrollment figures.⁸⁸

To put it in perspective, if we had presidential candidates that had statewide models like this, they would not have skipped Wisconsin. This is a really—you would die for percentages like this. This is a good model.

Then what they did, the statistician decided, oh, let's see what it would look like if we took out all the athletes who got in and all the legacies because those are factors beyond the control of the candidates, and he said, okay, you have to control for them, so why don't we just eliminate that. When he looked at just Whites and Asians on all these other factors besides—instead of legacy and athletes, he found Asians doing better statistically than Whites on all the academic factors, slightly better on extracurriculars. They kind of evened out on recommendations.

But on the personal ratings done by the admissions officer, which by the way, the admissions officer I don't believe ever interviewed any of the candidates, they just came up with this personal assessment that you're trustworthy, or you have good character, whatever. They don't have to see you. They just look at your portfolio. And based on that, there was a statistically significant difference in favor of the White candidate.⁸⁹ And this is not legacy; this is everyone who's not a legacy, not a donor, and not an athlete. So, here we're talking strictly Asian and White comparison.

And statistically, this is exactly what the expert witness for the

⁸² *Caltech Requirements for Admission*, PREPSOCIAL, <https://www.prepscholar.com/sat/s/colleges/Caltech-admission-requirements> (last visited June 15, 2020).

⁸³ Exhibit 145, *supra* note 38, at 11.

⁸⁴ *Id.* (Model 2).

⁸⁵ *Id.* (Model 3).

⁸⁶ *Id.* (Model 3).

⁸⁷ *Id.* (Model 4).

⁸⁸ *See generally id.* (Models 4 & 5).

⁸⁹ *Id.* at 6.

plaintiff also did. So, again, they were doing duplicate things, somewhat different variables, combining them in somewhat different ways, but coming to the same result. Basically, no matter how you cut it, no matter what variables you use—you can introduce income; they used first generation going to college; they introduced gender as a variable; they cut it in different ways.⁹⁰ OIR consistently found that being Asian was a negative, not a plus factor in admission.⁹¹ And this was all statistically significant.

Okay. One of the problems of this is Harvard—the personal decision, I have to add this as a second comment—is Harvard is also the main site where they do a lot of implicit bias research. So, there’s this social science—they’re *nationally known* for their implicit bias research in psychology.⁹² And it never occurred to anybody, “Gee,” maybe when this was all done in 2013, maybe they might want to have their notorious workshops and all the things they subject all the employees to, but I don’t think they ever did any of that. I don’t think they talk anything about unconscious bias against any candidates, despite the fact they have all of this information that’s just crying for that kind of intervention. But the intervention’s only, I guess, for students and faculty and not for the admissions committee. On that, thank you and thank you for all the work you guys did.

HON. JAMES C. HO: Thank you, Dr. Nagai. Professor Koppelman?

ANDREW KOPPELMAN: Okay. I’m very grateful to The Federalist Society for having me here. The affirmative action controversy is tediously familiar. It’s a ubiquitous part of American life. I am a beneficiary of affirmative action myself because I am the token liberal on this panel. [Laughter]

Now, for many years American conservatives have proposed to interpret *all* civil rights laws, including Title VI of the Civil Rights Act of 1964, to prohibit it.⁹³ Now, it’s a commonplace of semantics that the exact same action can have different meanings in different contexts. So, the suit, *Students for Fair Admission v. Harvard* presents itself as a blow against racial tribalism.⁹⁴ What I’m going to do here is worry that in context, this could make tribalism worse.

So, I’m going to begin by wishing a plague on both your houses—the

⁹⁰ See Exhibit A, Expert Report of Richard D. Kahlenberg, *supra* note 29, at 15–42.

⁹¹ See generally Exhibit 145, *supra* note 38.

⁹² Jadranka Gvozdanovic & Katrien Maes, *Implicit Bias in Academia: A Challenge to the Meritocratic Principle and to Women’s Careers – And What To Do About it*, LEAGUE OF EUROPEAN RES. U. (Jan. 2018), <https://www.leru.org/files/implicit-bias-in-academia-full-paper.pdf>.

⁹³ See generally Aaron Brenner, *The Politics of Affirmative Action*, SOLIDARITY (June 1992), <https://solidarity-us.org/atc/38/p5219/>.

⁹⁴ See 346 F. Supp. 3d 174 (D. Mass. 2018); Adam Serwer, *America’s Problem Isn’t Tribalism—It’s Racism*, THE ATLANTIC (Nov. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/racism-not-tribalism/575173/>.

opponents of affirmative action and also its defenders. And, of course, being here, you guys have pride of place. I'm going to start with the opponents.

Chief Justice Roberts writes an often quoted sentence that, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁹⁵ His claim is that the essence of racism is classification.⁹⁶ And the familiar liberal objection to this is that this implies that Black Americans can be without jobs, have their children in all-Black, poorly-funded schools, have no opportunities for decent housing, and have very little political power without any violation of anti-discrimination law.⁹⁷ And to this one might add mass incarceration with its devastating effects on families and communities. And if you're conservative and you're concerned about intermediate associations and all the values of local communities, you ought to care about that. But on this account, if the problem is classification, and if that's the whole problem, then for Black people to think that these disadvantages stamp them with a badge of inferiority is solely because they choose to put that construction upon it.

So, I'd start by saying effects matter. Today a large class of Americans remain disadvantaged because their ancestors were slaves. And the causation is clear—and so aggregate racial effects matter. You know, Patrick said that when he said that it's possible to achieve a comparable level of racial diversity without using race. The implication is that racial diversity matters. And it matters which goals are permissible to pursue.

So, one of the narratives at the beginning of this, I have to say, fabulously well-written complaint that was filed in this case, is the story of how Harvard figured out how to lower the number of Jews in the entering class in the early 20th century without an explicit quota.⁹⁸ And that was not okay. But, evidentially, take using non-racial means for the purpose of increasing the number of Black members of the entering class is okay. I think that that's an important difference.

Now, you can say all of that. And you can say that the numbers matter without defending affirmative action because it doesn't remedy any of the pathologies I just described. It benefits the most privileged minority applicants. It did help create a large Black middle class, which is a great accomplishment.⁹⁹ But it doesn't address the most damaging consequences

⁹⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

⁹⁶ *See id.* at 746.

⁹⁷ *Id.* at 793–98; *Racial Justice*, ACLU, <https://www.aclu.org/issues/racial-justice> (last visited June 15, 2020).

⁹⁸ Complaint, *supra* note 9, at ¶¶ 47–124.

⁹⁹ *See generally* Sharon M. Collins, *The Making of the Black Middle Class*, 30 SOC. PROBLEMS 369 (1983).

of slavery and segregation.¹⁰⁰ It is racial justice on the cheap.

It creates the illusion of equality. And the importance of illusion is particularly transparent in Justice O'Connor's opinion in *Grutter v. Bollinger*.¹⁰¹ I'll just read what she wrote. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."¹⁰² So, this means that the entering class in places like Harvard is to be selected on the same principles as models in a United Colors of Benetton advertisement.

This obsession with appearances drives the demand for obfuscation, as for example when the Court says, you can use race as a plus factor but not use quotas, even though these are functional and mathematical equivalents.¹⁰³ And it also stokes racial resentment. So, for every Black student who was admitted to one of these schools, you generate 100 White ones who know to a moral certainty they're the ones who would've gotten in.

Speaking as a member of the left, I don't think that the left should settle for this. It should demand a lot more. I would cheerfully jettison affirmative action in favor of measures that would actually improve the condition of the worst-off people in American society, Black and White. I thought that that was what defined us as left. Maybe Congress could do it in a grand bargain that clarifies the Civil Rights Act while at the same time taking more concrete measures against racial subordination, but I have no illusions that that'll happen. The proposal that's on the table here is a proposal to abolish affirmative action and replace it with nothing at all.

Now, you don't need to love affirmative action—I hope that my lack of love is now clear—to worry about this lawsuit. I'm not going to try to adjudicate the merits of the lawsuit. The expert statisticians are in deep disagreement.¹⁰⁴ I will say, so in response to Judge Ho's question, "Is it true?"—some pretty damaging evidence has been offered here. I'm not going to adjudicate that. I'll just say it's a pretty damaging story. On the question of, is it legal? No. If Harvard has a ceiling on Asian Americans, if it is discriminating against Asian Americans, that's nasty. Stop that. Discrimination against an ethnic minority is exactly what the law aims to

¹⁰⁰ See generally Amy Spiniwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J. L. & POLITICS 183 (2006).

¹⁰¹ See generally 539 U.S. 306, 311–44 (2003).

¹⁰² *Id.* at 332.

¹⁰³ See generally *id.*

¹⁰⁴ See, e.g., *Discrimination in College Admission*, ASIAN AM. COAL. FOR EDUC., <http://asianamericanforeducation.org/en/issue/discrimination-on-admissions/> (last visited June 15, 2020); *The Realities of College Admissions Discrimination*, STUDENT RES. FOUND. (July 12, 2018), <https://www.studentresearchfoundation.org/blog/college-admissions-discrimination/>; Jon Marcus, *Facts About Race and College Admission*, THE HECHINGER REP., <https://hechingerreport.org/facts-about-race-and-college-admission/> (last visited June 15, 2020).

prohibit.¹⁰⁵ On the other hand, it's confused to say that Asians have any special stake in eliminating affirmative action for African Americans. Even if you were to have a quota for African Americans, if you had a rigid, numerical quota, 10% of the entering class for African Americans, that doesn't say anything at all about what you do with the remaining slots. They're unrelated questions.

Now, I think that there has been confusion here, which I think this is where some of the mischief is in Justice Powell's opinion in *Bakke*, which talked not at all about history, not at all about the history of racial injustice, which is what everyone had in their minds, and said, "Well, alright, you admit some flute players, and you admit some people from Montana, and oh, yeah, maybe you'll admit some African Americans, too."¹⁰⁶ And so, it opens the door for ceilings. It opens the door for jiggering the numbers throughout the class. I think it would've been better to just say that given the terrible history of mistreatment of African Americans, it's okay for the university to respond specifically to that. Diversity is just the wrong frame to think about how to respond to that past injustice. A person who I think was the strongest on the Court in suggesting a backward-looking approach to affirmative action was Justice Stevens. He's no longer on the Court.

Now, this litigation is generally understood to aim to beat a path to the Supreme Court and to persuade the Court to discard the decades-old understanding of Title VI that came out of *Bakke* in favor of an absolute ban on any consideration of race.¹⁰⁷ And the consequence if you did that—assuming that Harvard is not going to take the alternative means, they're not going to get rid of donor preferences. They're not going to get rid of preferences for children of alumni. Neither one of those preferences violates any law. At many universities, it's going to produce a significant reduction in the number of Black students. So, this may be the opening wedge for more lawsuits to come. It is reported that the Trump administration is preparing to redirect resources of the Justice Department's Civil Rights Division toward investigating and suing universities over affirmative action admission policies that are deemed to discriminate against White applicants.¹⁰⁸

So, what's it going to mean? I'm just going to ask you as a cultural matter. You're members of American culture as much I am. For a Republican Justice Department to start investigating colleges for telltale signs that there are too many African Americans, it fits, I think, quite neatly into a really dangerous narrative that I think is a matter of division within the Republican

¹⁰⁵ See generally *Bell v. Maryland*, 378 U.S. 226 (1964).

¹⁰⁶ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (paraphrasing).

¹⁰⁷ See generally *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174 (D. Mass. 2018).

¹⁰⁸ Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>.

Party. So, one recent poll tells us that only 27% of Republicans think that Black people experience a lot of discrimination today, whereas 43% think that there's a lot of discrimination against White people.¹⁰⁹

So, this litigation promotes a narrative, whatever the intentions are of the litigators—I'm not saying anything about them—in which incompetent and undeserving Black people are taking desirable spots from deserving Whites. So this frightens me. Chief Justice Roberts worries about racial tribalism, and he writes, also in *Parents Involved*, "Government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility,' 'reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,' and 'endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.'"¹¹⁰

Now, I note again there's not a word about subordination. Racism divides groups that are in other respects imagined to be on an equal footing. The problem is Chief Justice Roberts understands it is thinking about ourselves in tribal terms. But stipulate that that's right and look at what this litigation does, again, to the extent that its target is all racial classification. To the extent that you're trying to get rid—if Harvard has a quota on Asian Americans and you're trying to get rid of that, I am all for you. But to the extent that it is understood by left and right to being an effect to enlist Asian Americans to form a bloc with Whites to resist the claims of Blacks, it promotes the politics of racial hostility. Thank you.

HON. JAMES C. HO: Thank you, Professor. Professor Yoo?

JOHN YOO: I want to thank the Civil Rights Practice Group for inviting me to leave smoke-enclosed California and fly here. Usually the smoke is because of marijuana, but now it's because our forests are on fire. And I was barely able to fly out of San Francisco airport yesterday and had to reroute to Philadelphia where, being a native of Philadelphia, I picked up lunch. Any other Philadelphians here, you're welcome to join. I got a whole rack of soft pretzels up here.

So, I'm trying to figure out why I was asked to be on this panel. [Laughter] So, it could be so that we could have 60% Asians on the panel, but we don't believe in quotas for Asians. But I will note, if Harvard didn't use race in its applications, this is probably the proportion of Asians in the freshman class. [Laughter] It could've been just because of the Ricochet *Law*

¹⁰⁹ Robert Jones, *Republicans More Likely to Say White Americans—Rather Than Black Americans—Face Discrimination*, PRRI (Aug. 2, 2017), <https://www.prri.org/spotlight/republicans-white-black-reverse-discrimination/>.

¹¹⁰ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (internal citations omitted).

Talk, and since Richard Epstein's here, I have to be here too. You should know a variety of hosts tried out to be Richard's co-host on *Law Talk*. I was the only one who could interrupt him and stop him from speaking for forty-five out of the sixty minutes of the podcast [Laughter]. I got him back. Let the record show I got him down to forty-four minutes. [Laughter]

And then I thought, I must have been invited too so I could make fun of Jim Ho. [Laughter] So let me engage in this favorite sport of mine. Just two quick comments. So, I had the pleasure of working with Jim in the Office of Legal Counsel, and I was a little older than him. And so, he came into my office one day and said, "I want to seek career advice. I have a very important question to ask you." So, he came into my office—I used to love screwing around with Jim—so he came into my office and so I said, "Jim, don't tell me. You have an illegitimate child."

That was the first and last time I have ever seen Jim speechless. [Laughter] Then I said, "Well, what is it really, Jim? What do you want to talk to me about?" He goes, "I have an offer to go work for Senator Cornyn as his chief counsel. Do you think I should take the job? I'm really torn about it. I love working in the Justice Department. Should I go over there?" I said, "Jim, you're Asian, so you're supposed to be smart, but you have no personality. If you don't take that job, you are so stupid that I'm going to fire you from OLC and then you'll have to take the job anyway." I will not say which result ended in him moving over to the Senate, but he made the right career choice.

And then, lastly, I figured out this is why I'm on the panel as opposed to all these other University of Chicago graduates. All of them hate Harvard. I'm the only one who actually went to Harvard on the panel. [Laughter] I'm sure the president of Harvard asked for there to be representation, for someone to defend the University. Unfortunately, I don't think I'm going to be able to help out there.

So actually, I think the reason I'm on this panel, seriously, is because I wrote an *L.A. Times* piece when news of this lawsuit came out. I'm not going to read it to you, although I've been reading it, and it's a great piece. [Laughter] And I'm currently trying to find a co-author to write the book version, which I have decided to entitle, "Why Are Asians so Dumb?" We are really good at taking tests. There's no one better at taking tests than Asians, clearly. But we do not know squat about politics. And the reason why is because Asians continuously, by huge majorities, vote for the Democratic Party.¹¹¹ It's not really a partisan thing, but it happens to be the Democratic Party, which nominates justices and judges to the Supreme Court

¹¹¹ John Yoo, *Op-Ed: Asian Americans Need to Wise Up and End Our Blind Loyalty to the Democratic Party*, L.A. TIMES (June 24, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-yoo-asian-american-bias-harvard-20180624-story.html>.

who have never voted to strike down an affirmative action policy. And let me give you the numbers.

In the 2012 election—first of all, Asians used to be one of the most loyal minority groups to the Republican Party.¹¹² In 1996, Asians voted for Bob Dole.¹¹³ Nobody voted for Bob Dole. [Laughter] But we voted for Bob Dole. Realizing the error of our ways, Asians have voted reliably for the Democratic Party ever since. Just take some recent numbers: in 2012—and I'm living up to Professor Koppelman's worry about tribalism here, I'm sorry. In 2012, Asians voted for Barack Obama by 73%.¹¹⁴ In 2016, that went down. Asians voted for Hillary Clinton by 66%.¹¹⁵ Still in both cases, the only demographic group that voted more for the Democratic candidate were African Americans.¹¹⁶ So in both cases Asians are voting for the Democratic nominee more than Hispanics, more than single mothers—all the cartoons that the White House made up back in those days about people who need to vote Democrat, Asians voted more than all them.

And then after news of Patrick's lawsuit came out, after all the facts about Harvard's affirmative action policies, after the news of the mayor of New York City deciding to try to reduce the number of Asians who are getting into the magnet schools in New York City on a race-neutral test—Stuyvesant and Bronx High, you might have heard of some of these schools.¹¹⁷ I actually have a special love for Stuyvesant because my wife went to Stuyvesant. My wife was not particularly wealthy. Had she not gone to Stuyvesant, I never would've met her. On the other hand, she couldn't have been that smart and still gone to Stuyvesant because she married me.

Anyway, after all the news of these policies came out, in the midterm elections, Asians voted for Democratic congressional candidates by 77%.¹¹⁸ And this makes no sense. This is why I think Asians are dumb at politics. Asians, you would think, based on all the other demographic qualities they have, would vote Republican, vote conservative. So, Asians are the—and also, I should note, it's weird to put Asians all in one group because we represent so many different countries, most of whom hate each other back in the old country. So, it's strange to have Indians and Pakistanis in the same racial group and Koreans and Japanese in the same racial group—well, actually, most everybody hates the Japanese back in Asia. [Laughter] But

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Eliza Shapiro, *Racist? Fair? Biased? Asian-American Alumni Debate Elite High School Admissions*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/nyregion/nyc-specialized-high-school-test.html>.

¹¹⁸ Li Zhou, *Trump Could Be Turning Asian Americans into Reliable Democratic Voters*, VOX (May 13, 2019), <https://www.vox.com/policy-and-politics/2019/5/13/18308137/asian-american-voters-immigration-democrats-donald-trump>.

it's very strange to lump us all into one demographic group. But if you take them as a collective, they are the most economically successful, or wealthiest, if you want to call it that, of the different racial groups; the most highly educated; the most likely to run a small business; the most religious; the lowest divorce rates.¹¹⁹ So, you would think if there were a party that Asians would support, it would be the Republican Party.

And then to add on to that, it's the party which consistently nominates judges and justices who oppose affirmative action for the most part. I'd say 95 to 98% of the judges Republicans have appointed have opposed affirmative action. And Asians consistently tell pollsters that the one issue they care about more than anything else is getting a fair shake in higher education admissions.¹²⁰ But you would think that because of Republican deregulation policies, low tax cuts, and so on and so forth, Asians would vote Republican.

So, for me the interesting thing about all of this is why don't they, given all the evidence that Patrick has laid out. I don't think it's even hard to reach the conclusion that Harvard is discriminating against Asians on the basis of race. I'm a university professor, unfortunately. I've been one since before Prop 209 passed in California, which Dr. Nagai mentioned. It was the case at Berkeley before Prop 209 passed, that Asians were roughly about 18 to 20% of the population of the undergraduate body every year. Prop 209 went away, and it's now 40%.¹²¹ And that's with a lot of cheating, don't get me wrong. Berkeley also uses a holistic admission process.¹²² I think it has a lot to do with what Professor Koppelman said. There's a lot of self-illusionary behavior going on with our admissions officers, who have a lot of nice rhetoric, but I think everyone involved in higher education knows what is going on. And that is there's a lot of racial balancing in admissions, even if they won't admit it.

And I don't think it's a hard question that I think the Supreme Court has gone down the wrong path here. Whether you're conservative or liberal, the idea that—diversity used to be a means to some end, but now it's an end. It used to be the means, now it's the end. I think that is the biggest change I've seen on this issue over the last thirty years at the Supreme Court. And why is diversity an end, in and of itself? What human good does it produce?

¹¹⁹ See, e.g., Young Kim, *Minorities in Higher Education*, AM. COUNCIL ON EDUC. (Oct. 2011), https://diversity.ucsc.edu/resources/images/acc_report.pdf; Michael McManus, *Minority Business Ownership: Data from the 2012 Survey of Business Owners*, OFF. OF ADVOC. (Sept. 14, 2016), <https://cdn.advocacy.sba.gov/wp-content/uploads/2016/09/07141514/Minority-Owned-Businesses-in-the-US.pdf>; Nathan Yau, *Divorce Rates for Different Groups*, FLOWINGDATA, <https://flowingdata.com/2016/03/30/divorce-rates-for-different-groups/> (last visited June 15, 2020).

¹²⁰ Jump, *supra* note 47.

¹²¹ *Overview of UC Berkeley Undergraduate Demographics and Experiences*, BERKELEY (Aug. 2013), <https://opa.berkeley.edu/sites/default/files/UndergraduateDemographics.pdf>.

¹²² See *Selection Process*, BERKELEY OFF. OF UNDERGRADUATE ADMISSIONS, <https://admissions.berkeley.edu/selection-process> (last visited June 15, 2020).

According to Justice O'Connor on the Supreme Court, I guess racial diversity produces ideological—this is the logic of the case—ideological diversity, which produces a better education. I don't know if that's true at Berkeley because none of my students seem very ideologically diverse except for the teacher. I think we do a pretty good job in class arguing—I do a good job arguing with all those liberals all the time.

But I still find it extremely offensive and stereotypical to say, “Oh if we have racial diversity, we will have ideological diversity”—because to me that assumes that particular races share particular ideologies, which I just think cannot be true. And I think it's quite insulting, actually, to all of us, not just racial minorities.

So, putting all of the easy stuff aside, to me, the hard question is why do Asians consistently vote Democratic? So, I started to do some research. There's this well-known book I highly recommend to all of you by Norman Podhoretz called, *Why are Jews so Liberal?*¹²³ A lot of the same demographics I read out about Asians were true of Jews, and Jews also, historically, and to this day, vote Democrat by large numbers.¹²⁴ Although, I'll note they voted, I think—almost the majority voted for Nixon. So, after that they learned their lesson, and so they've never gone back to the Republican Party, I suppose. But Podhoretz famously said, Jews—how did he put it—Jews live like Episcopalians but vote like Puerto Ricans.¹²⁵ So I wonder what he would say about Asians. He'd probably say something—Podhoretz would probably say, “Asians live like Episcopalians or they live like Mormons, but they vote like Puerto Ricans,” I suppose.

So, what explains this? So, Podhoretz's argument about Jews was that Jews are liberal because they fear Christians.¹²⁶ There has been such a long history of Jewish-Christian conflict, particularly with Evangelicals—I don't know if any of this is true. But that was Podhoretz's explanation. I think it's particularly untrue now. But when he wrote his book in the late '90s, early 2000s, that was his view. The interesting thing to me is that cannot possibly be true about Asians. Asians are actually highly religious. And actually, a large number of Asians are members of Evangelical Christian churches.¹²⁷ Let me tell you, I had to go to a bunch of these boring, religious ceremonies when I was a kid. I still don't understand what was going on.

So, I don't understand why Asians are so heavily supporting a party which puts into place judges and justices—and let's be clear, it's only the

¹²³ NORMAN PODHORETZ, *WHY ARE JEWS LIBERALS?* (1st ed. 2009).

¹²⁴ *Id.* at 259.

¹²⁵ “Jews earn like Episcopalians and vote like Puerto Ricans.” *Id.* (quoting Milton Himmelfarb).

¹²⁶ *See, e.g., id.* at 42.

¹²⁷ *Asian-American Children Are Members of a Diverse and Urban Population*, POPULATION REFERENCE BUREAU (Jan. 9, 2004), <https://www.prb.org/asianamericanchildrenaremembersofadiverseandurbanpopulation/>.

Supreme Court that can change our national policy on affirmative action—that consistently support a policy that harms their most dear interests. So, I’ve three explanations, none of which I know are true or not because I’m a professor. I’m not going to do research on this.

One, it could be urbanization. So, I think Asians do tend to be more urban, perhaps, than other immigrant groups at first. And I have to say, when was the last time you saw a conservative win a mayorship in a major city? I think conservatives, Republicans, whatever you’re going to call them, have given up competing for political office in major cities, so liberals control all the levers of power in any major city. So, if you’re an immigrant from another country, particularly one where you left an authoritarian government or socialist government, you don’t want to get in trouble with the authorities, you’re going to play ball with the liberals who run the city. Maybe that’s it. So maybe Asians over time will become more balanced as they leave the cities.

Two, it could be universities. I think this is a strange phenomenon I’ve noticed being a professor. Asians really respect higher education, as I said before. They tell pollsters—Asian families tell pollsters, “College university admissions is the most important thing to them.” Well, where is the ideology of racial diversity most deeply entrenched in our society? It is in the universities. And so, if Asians are sending their best and brightest to these schools with fancy names, where they are taught that there are too many of them and that racial balancing is okay, and there are all kinds of fancy theories about why different racial proportions should be held in society, well that’s what they’re going to learn at the universities.

The third one, and this is the only thing I can think of that would explain the strange increase in Asian support of the Democratic Party when that party would never appoint any judge who opposes affirmative action, after the facts of this lawsuit came out, and after the facts of what New York City’s going to do with the magnet schools, is Donald Trump and immigration. I think it’s got to be the case, I suppose, that Asians, like other minority groups, are reacting to the symbolism of the President’s immigration statements and some of the statements of people in the Congress, even though I don’t think those policies would have a big impact on them. I don’t think it’s because of the numbers or who’s coming in, from what countries—in fact, it’s quite clear that immigration policies since 1965 have been very favorable to Asians.¹²⁸ But I think it’s just because of the symbolism, some of the things Professor Koppelman was referring to. There’s this sort of symbolism involved with that. And that seems to me to be driving Asian Americans away from the conservative wing of our politics, even though that is the wing that

¹²⁸ *Asian Americans Then and Now*, CTR. FOR GLOBAL EDUC., <https://asiasociety.org/education/asian-americans-then-and-now> (last visited June 15, 2020).

has the policies that would most benefit them as a group.

So, let me close by just saying, what's the remedy? That's the thing I think is interesting in all of this affirmative action talk. Suppose Patrick wins, and the Supreme Court overrules *Grutter*. What are universities going to do? Are they going to go—do you think that they're really going to adopt a race-neutral process? Does anyone really think that? You're going to have enormous amounts of money spent by universities to try to figure out something that still produces the right results. They'll just come up with something else other than the personality score.

The personality score, by the way, is so ridiculous. It's just sort of—I mean, there's a billion and a half people in China.¹²⁹ None of them have personalities? It's just one of the most ridiculous things I've ever heard of, that Asians—that any racial group would have different scores on a personality factor. It seems kind of stupid and silly. [Laughter] But the problem I think for all of us as lawyers to think about is whether universities are still intent, which I'm certain they are, to produce a certain racial balance, not because of outside pressure. The bureaucrats inside universities just believe this is a good thing to achieve. They will come up with some other measure.

How are courts—because generally, we tend to be suspicious of judicial activism—how are we going to ask for—how are courts going to effectively monitor whatever universities come up with next by trying to determine whether there is racial animus behind it? I think that's going to be extremely difficult. So, I have no answer there. But I would love to hear—one thing is—I'll just throw this out—is it's just going to take lots of lawsuits every time they come up with something new. And maybe the burden of proof should shift to force universities to explain themselves. At least that's what happened here. And just watching Harvard trying to explain its own policies and how it worked showed how ridiculous they were.

So, thank you very much and I look forward to the questions and comments.

HON. JAMES C. HO: We're going to leave plenty of time for questions from the audience, but let me exercise at least a little bit of moderator prerogative. First, I want to invite everybody, if anybody wants to offer any sort of response to anything that's been said on the panel.

PATRICK STRAWBRIDGE: Yeah, I'll respond to a couple things, including something that Professor Koppelman said and something that Professor Yoo said. And that is just there's been a lot of discussion about the fact—and this has actually been very prevalent, I think, in some of the

¹²⁹ *China Population*, WORLDOMETERS, <https://www.worldometers.info/world-population/china-population/> (last visited June 15, 2020).

opposition to the lawsuit—is that nobody wants to own what Harvard is doing here. And so Will Consovoy, my partner and who really gets credit for the complaint, the driving force behind this lawsuit, he goes to these college campuses, and the first thing that happens when you get on these panels—and The Federalist Society is always very good about having a dissenting view on it—is everyone says, “I want to be clear. If what is happening in your complaint is fine, no one defends that.” But then we get these generalized expressions of concern about it being a wedging issue and it increasing racial tribalism. Well, the only people who are actually arguing that the lawsuit is having that affect, I think, are not—they appear to be the press and the concerns on the left. And so I don’t think that has to be the case and nor do I believe that this is an example of the lawsuit seeking to replace it with nothing.

As I mentioned, there are other—Berkeley still has a holistic review process.¹³⁰ There are a number of tried and true examples of universities, both in this country and states that have banned the use of race in the admissions process, as well as in other countries, including very elite universities Cambridge and Oxford, of getting rid of legacy preferences, of getting rid of other types of preferences, of actually increasing socioeconomic preferences.¹³¹ Which, I think everybody would agree that to the extent that African Americans in particular and other groups in this country, unfortunately, still face a legacy of economic challenges that arise from slavery and unlawful discrimination.¹³² The goal should be to help the people who are experiencing that legacy, not those who are fortunate enough to have been born into the middle-class advantages that other racial groups have enjoyed.

So, replacing it with a socioeconomic preference I don’t view as replacing it with nothing. And I think it’s much more in line with the professed goals of everybody. And certainly, one interesting fact that came out in the course of evidence, both from the OIR internal reports as well as from the statistical reports offered by the plaintiff’s expert was that Harvard’s admissions office gives a small tip for socioeconomic status right now.¹³³ It is not on the level of the tips they give for racial groups.¹³⁴ But they do give some bump for people from a low socioeconomic status.¹³⁵

But what was very interesting is if you are African American and you

¹³⁰ *Selection Process*, *supra* note 122.

¹³¹ *End Legacy College Admissions*, N.Y. TIMES (Sept. 7, 2019), <https://www.nytimes.com/2019/09/07/opinion/sunday/end-legacy-college-admissions.html>.

¹³² Angelica Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.

¹³³ *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 197 (D. Mass. 2018).

¹³⁴ *Id.* at 201.

¹³⁵ *Id.* at 197.

are in the Harvard applicant pool, you don't receive any additional bump beyond the bump you get for being African American, on average, across the pool.¹³⁶ This is not about specific individual applicants. You don't get any additional statistically significant bump by being low income if you're African American.¹³⁷ And what that essentially means is—I think what everybody says, is that Harvard's use of race is very effective for getting the sons of doctors, and lawyers, and corporate achievers into Harvard. But it's not doing much for actually reflecting a desire to lift up the people who are experiencing the legacies that Professor Koppelman is worried about. So, I don't think that a socioeconomic status process is nothing. And I don't think that it's—I think it is something that is an actual alternative.

HON. JAMES C. HO: If I may, before I turn to you, I wanted to ask a follow-up because you mentioned that there are certain alternatives that might be available. There's one alternative that you didn't mention, which is not taking federal funding. Is that—?

PATRICK STRAWBRIDGE: Ah, the Hillsdale model, right?

HON. JAMES C. HO: Exactly. Is that a plausible thing for schools or is that just a crazy idea that is not on the table?

PATRICK STRAWBRIDGE: I believe it was stipulated at trial, actually, that Harvard's rich. [Laughter]

HON. JAMES C. HO: I think it's on their website.

JOHN YOO: But they always want more. They're not rich enough. Don't forget to give to your class reunion. [Laughter]

PATRICK STRAWBRIDGE: There are colleges that have elected to decline federal funding so that they can do—I mean, certainly that would get you out of whatever constraints Title VI imposes on you. And so that would be optional.

JOHN YOO: Can I just mention on that, that would not be practical for most universities. So, University of California Berkeley, allegedly a public institution, receives more money from the federal government than the State of California now.¹³⁸ So, I don't think any of the major research universities could survive if they cut off all federal funds.

¹³⁶ *Id.* at 201.

¹³⁷ *Id.* at 202.

¹³⁸ See Samuel Stebbins, *How Much Money Does Your State Receive from the Federal Government? Check Out This List*, USA TODAY (Mar. 20, 2019, 8:34 AM), <https://www.usatoday.com/story/money/economy/2019/03/20/how-much-federal-funding-each-state-receives-government/39202299/>; Teresa Watanabe & Amina Khan, *UC Would Lose \$9 Billion for Research, Healthcare, Education If Trump Cut Federal Funds*, L.A. TIMES, (Feb. 3, 2017, 4:00 AM), <https://www.ppic.org/blog/federal-funds-californias-budget/>. But see Patrick Murphy, *Federal Funds and California's Budget*, PUB. POL'Y OF CAL. (Apr. 9, 2018), <https://www.ppic.org/blog/federal-funds-californias-budget/>.

ANDREW KOPPELMAN: Let me just say, if you're concerned about social class and non-race-based ways of responding to social class, then I think you've got to pull the camera back and stop looking at Harvard. There's just not that many slots at Harvard anyway. The big shift that's happened with higher education is the shift of financial aid money from need-based to merit-based financial aid.¹³⁹ And that's the big effect that keeps people trapped in the lower quartile of socioeconomic groups. And if you have class-based affirmative action at Harvard, that is another form of justice on the cheap. What you really want to do is make it possible for people who can't afford to go to their state university, and they're at the right educational level for their state university, to be able to go to that state university. But that's going to require a significant redistribution of resources in a way that's got nothing to do with race.

JOHN YOO: I totally agree with Professor Koppelman on this point that racial—if you really want some kind of racial justice or opportune society, then numbers at college are far too small to actually do anything about it. The real place you would do it would be K-12 education. But here, again, this goes back to my “which parties are supporting which policies?” I find it incredible, actually, that the efforts to introduce innovations and competition in K-12 education are all so systematically—I just don't understand why it's so systematically opposed by one political party that claims to be the most interested in racial justice, when the benefits of things like charter schools and vouchers and so on flow pretty predominantly to poor inner-city kids.¹⁴⁰

If you really wanted to do something about these outcomes, which I completely support, I would say by higher education, it's too late. But, why not pour more resources into trying to shake up elementary and secondary education, where we have large numbers of people trapped in inner cities who already have no chance of getting out because of—not because of resources—we have increased for primary, secondary education by incredible amounts just by the way we dysfunctionally organize those bureaucracies. So I would think that's where we could, maybe, reach a compromise of some kind, in terms of a forward policy as to “Let's get rid of the way we run our primary and secondary schools.” Anything, I think, would be better. But at least try to see if charter schools' scholarships and all this stuff work—vouchers work.

HON. JAMES C. HO: Dr. Nagai?

DR. ALTHEA NAGAI: My main comment has to be the change in the composition of the racial groups, insofar as immigration, I think, is

¹³⁹ *Need-Based Financial Aid*, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, <https://www.nacacnet.org/advocacy--ethics/initiatives/need-based-financial-aid/> (last visited June 15, 2020).

¹⁴⁰ Blakely Elizabeth Whilden, *K-12 Education Reform: Implications and Opportunities for Public Colleges and Universities*, AM. ASS'N OF STATE COLL. & UNIV. (Apr. 2011), <https://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/PM-K12Reform-BW-April2011.pdf>.

affecting the kind of applicants. I have been asked this question about Harvard applicants who are Black. And I had seen somewhere that among those that attended Harvard, a large percentage of Black enrollees were immigrants.¹⁴¹ And the children of immigrants.¹⁴² So this, as few as 30% were of American Black descent—who could trace descendants back from slavery.¹⁴³ So this changes the dialogue. Again, we're kind of being reduced as something as simplistic as just skin color, and we're not talking about heritage and history that's being passed down. So, the whole diversity issue becomes even more distorted because of immigration.

As a side point, the census has been tracking immigration and they noticed that Nigerian immigrants, for example, have the largest percentage of college graduates of African immigrants.¹⁴⁴ They have a huge percentage of those with graduate degrees.¹⁴⁵ Their children are going to go to Princeton. Their children are going to go to Harvard. But their experience is going to be similar to the experience of the immigrant professor whose children are also going to be at Harvard, much more so than the lower, middle-class Black kid who's in D.C. and has to try to work their way out of the neighborhood. I think that's another consideration. It does work into the immigration debate.

HON. JAMES C. HO: Shall we open it up to some questions? Sir?

QUESTIONER 1: Yes. Does this mic work?

HON. JAMES C. HO: We can hear you.

QUESTIONER 1: Thank you for the panel, and good to see you again, Professor Yoo. You're—

JOHN YOO: Good to see you, too. [Laughter]

QUESTIONER 1: It's always a reunion and a pleasure to hear all your comical analysis.

JOHN YOO: My comical analysis? [Laughter] It's always funny.

QUESTIONER 1: Your comment about—this is the first time I've heard this—but Asians living like Mormons but voting like Puerto Ricans. I experienced a silent chuckle when I heard that for the first time. But I agree with you. You gave, actually, some really excellent compare and contrast analysis to the remedial question. That's one thing I want to focus on. But

¹⁴¹ Aditi Balakrishna, *Many Blacks at Ivies Not from U.S.*, THE HARV. CRIMSON (Mar. 9, 2007), <https://www.thecrimson.com/article/2007/3/9/many-blacks-at-ivies-not-from/>.

¹⁴² *Id.*

¹⁴³ See Jason B. Johnson, *Shades of Gray in Black Enrollment/ Immigrants' Rising Numbers a Concern to Some Activists*, SFGATE (Feb. 22, 2005, 4:00 AM), <https://www.sfgate.com/education/article/Shades-of-gray-in-black-enrollment-Immigrants-2728709.php>.

¹⁴⁴ Leslie Casimir, *Data Show Nigerians the Most Educated in the U.S.*, HOUS. CHRONICLE (Jan. 12, 2018, 9:58 AM), <https://www.chron.com/news/article/Data-show-Nigerians-the-most-educated-in-the-U-S-1600808.php>.

¹⁴⁵ *Id.*

before I jump into that question, to Ms. Althea, to your point about diversity. Di-versity—if anybody ever looked at the root word, “di” is almost like divide. So, I’m all for diversity, but when there’s ideological differences that Professor Yoo has mentioned, there’s no unity in ideology when there’s too much diversity because there’s a division.

But going back to your point, Professor, I think the whole affirmative action talk and remedy—

HON. JAMES C. HO: Do you have a question? I don’t mean to be impolite, but we have other people.

QUESTIONER 1: Sure. Could you speak on the point about the liberal professors, there’s no surprise that they outweigh the conservative professors on campus. So, if you want to broaden the question, could you speak on those points you see, if there are cause and effect to the issues at hand that you presented? Thank you.

JOHN YOO: Well, I thought with *Grutter* the idea that maybe it’s true that you want ideological diversity in colleges, universities. That produces better educational outcomes, although in the Supreme Court case, there was no evidence produced to this effect.¹⁴⁶ The Court just said it. Or at least, I think what they actually did is they deferred to the views of university presidents, who I would really not trust on this issue. But usually they ask for money when they are—another one of the reasons I really don’t trust them. But that was what the Court did—equate ideological diversity with racial diversity. Why not just see if universities are producing ideological diversity in the first place? Which I would say they are not.

If you look at—John McGinnis did this nice study about campaign contributions by—I think he did one on law professors, and I think Jim Lindgren then tried to do one on professors. And so I think he found something like 81 or 92% of all university and college professors give to the Democratic Party.¹⁴⁷ Now, that’s just the ones who give, but that’s some sign of the heavy imbalance in the college university systems.

So, if the Supreme Court really cared about ideological diversity, then perhaps they should hear more cases by conservative professors claiming discrimination in hiring and promotion. Again, this is a judicial capability problem because I’m sure there are many people here—I hope so—particularly younger members of The Federalist Society who have considered or thought about an academic career but are too discouraged by the reputation of universities for ideological discrimination. I think it’s true. I don’t know

¹⁴⁶ *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003).

¹⁴⁷ James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 93 (2016).

if it's intentional or unintentional.

I will say, I had this interesting debate with a professor of the English department of Berkeley, which I think is one of the great English departments. And I was giving him a hard time because I said, "I don't think there are any conservatives in your department." He said, "Of course there are no conservatives." "How can that be?" He said, "You can't be a good academic and be conservative." I was like, "What are you talking about? This is one of the finest English departments." He said, "Because to be conservative means you always defend the existing order, and good academics challenge the way things are." And I was like, "Have you actually looked at who's defending the status quo these days? And who's actually challenging it?"

But anyway, I think if the Court were serious at all—but I don't think there is really any serious Supreme Court law about ideological discrimination in university hiring.

ANDREW KOPPELMAN: I'll just agree that it's a serious problem. That's why you should go to law schools that have faculty members like John McGinnis and Jim Lindgren, and Steve Calabresi, who said the Pledge of Allegiance last night.

JOHN YOO: Very good.

ANDREW KOPPELMAN: Those are the schools you should go to. All Northwestern faculty.

JOHN YOO: It's true.

CURT LEVEY: Curt Levey. John, your remark reminded me of what people sometimes say to me, which is "You're Jewish. How can you be conservative?" So similar views that we should all adhere to the same values.

But in any case, this is mostly for Patrick. Is there some tension, or maybe I'm getting this wrong, some tension between their claim—the admission by Harvard that they do give preferences to Blacks and Hispanics and their claim that they are not discriminating against Asian Americans? By definition, if you're giving preferences to Blacks and Hispanics, aren't you discriminating against the other groups, including Whites and Asian Americans? Or is their argument just, "We're not discriminating any more against Asians than we are against Whites."

And my second question—well, my second question, I guess, would be for all of you. Why this resistance to socioeconomic preferences? Given that states like California and Texas, when it was under the *Hopwood* decision, did achieve racial diversities and socioeconomic presences. And, again, one would argue a deeper type of diversity given that it wasn't just affluent minorities. Why the resistance? I know that people say in their official positions, "Well, we can't achieve the same diversity." But at least

over a beer with some of these people after a debate, it seems like—at least to me—it’s more of a philosophical objection, just that treating White poor people the same as Black poor people is to deny the plight of the discrimination suffered by African Americans.

But in any case, I’d like to hear your views on why there is so much resistance.

PATRICK STRAWBRIDGE: Let me address the first point, and I can briefly comment on the second point and let the other panelists do that. With respect to the first question, “Is there some tension?” College admissions are a zero-sum game. That’s especially true at an elite university such as Harvard. That’s just math that’s there.

Now, under the existing Supreme Court framework, since you are actually allowed to discriminate to some extent on the basis of race, or at least in favor of certain racial groups, there is a bit of intellectual thought as to how do you distinguish between what’s unlawful discrimination and what’s lawful discrimination. And the one way we have conceived of that, and I think it’s as logical a way as any, although I’m happy to be corrected, is one can look at what the effect of racial preferences is versus Whites and Asian Americans. And one can, then, just actually say, well, let’s just look at what’s happening with Whites and Asian Americans because if Asian Americans are being treated different as Whites and everyone agrees that they’re not getting, as a group, on average, any kind of racial preference, then a negative, statistical effect just between Whites and Asians would be suggestive of actual intentional discrimination against Asian Americans.

And that’s what a lot of the statistical fight that we’re having with respect to the personal score is. The baseline in that case is White applicants. You do a logistical regression. You basically compare apples to apples, and you say, “Are Asian-Americans applicants with the same qualifications, with the same criteria, being treated differently than Whites?” And the answer, like I said, is if you don’t control for personal score, the answer is—by both experts it’s undisputed—is yes, there’s a significant discriminatory effect against Asian Americans.

So, the larger point is there. Asian Americans, I think, are disadvantaged by racial preferences in a zero-sum game. But you can look at that as a broader question than just how are they being treated against similarly situated White applicants.

The larger question, “What’s the hesitancy?” I’ll posit, too, based on arguments that have come up. One is the goal here is to achieve racial diversity. That is the end. And so, nothing’s more efficient to achieving racial diversity than using race. So that’s one of the objections that is flat out raised at some point. It’s like, well, if our goal here is to get to racial diversity, why

are we going to take the long way around, and what the Constitution or Title VI might say is beside the point, I suppose.

The second objection to it is somewhat financial, I suppose. There's some concern that that's going to require a lot of money and this is much easier. Whether that's, again, a satisfactory, constitutional, or statutory answer is what's to be adjudicated.

ANDREW KOPPELMAN: I think I go back to the main form of class-based affirmative action that matters is subsidizing education. Not cutting the budgets of state universities in order to force them to raise their tuition. Not having people graduate from college with a hundred thousand dollars of debt. And just let the admissions offices make their decisions on academic merit. I was very smart. I graduated college in 1979. I think that today, and with lots of Pell Grants—I'm a Pell-Grant kid—I think that today I would have to yield my spot at the University of Chicago to somebody dumber and richer.

HON. JAMES C. HO: Sir?

QUESTIONER 2: Good afternoon. My mother is eighty-five years old, and in 1955, she applied to law school at the University of Texas, and she received a letter stating that she, as a Black woman, would not be admitted, but that Texas would give her a voucher to attend an all-Black school in Mississippi. Now, when I was at Stanford, proponents of affirmative action argued that without affirmative action, there would be a return to a *de jure* segregation discriminatory system. But, from what I'm hearing from the panelists, that wouldn't be the case. That there are alternatives to outright discrimination and affirmative action. How can you package your message better to defeat that argument that if you eliminated affirmative action or if it were declared unconstitutional that there would be a return to 1955?

HON. JAMES C. HO: Why are you all looking at me?

PATRICK STRAWBRIDGE: I will say this. One thing that's important to remember, look, most of the people in this room move in somewhat elite American society. Most of us, obviously lawyers, academics. This issue is not viewed the same way by the general population as it is by elite society. And when I say that, it is not viewed the same way by minority populations in this country. There was a post-*Fisher II* poll that showed large majorities of Americans across ethnic and racial groups oppose the use of race in college.¹⁴⁸

So certainly, there needs to be, I think, a better job of making that

¹⁴⁸ Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RES. CTR. (Feb. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/>.

difference. I think that the work that's been done on race-neutral alternatives, which is based on the actual experience in all of the states that have eliminated the use of race as a factor in college admission, are valuable ways to get the word out that this is not a return to a natural segregate university and—I mean, come on. Does anybody in this room believe for a second that if a university were told it could not legally use race in the admissions process, it would abandon any attempt to achieve racial diversity on campus? I just don't think that's a sustainable position. It has not been the experience in the other states.

JOHN YOO: I think part of what you said—first of all, congratulations for your mother for overcoming that kind of discrimination, and also having to have you as a child. [Laughter]

Clearly, she was able to live a long and happy life despite your obstacle. But I think part of it is—I've been very moved by the arguments that Shelby Steel makes, that a lot of people who could come up with alternate policies, they feel a profound sense of guilt for the treatment of African Americans in the country's history and for conduct that's the kind you described happened to your mother. And I think it ties in with what Professor Koppelman said about affirmative action as a cheap, easy way to assuage your guilt, for university professors or elite society.¹⁴⁹ They say, "Look, we're doing something about it." But you're not really doing something about the more serious problem, which I think is K-12 education.

And so I think if you were going to try to figure out a policy that is not just about a zero-sum fight between racial groups over limited seats at Harvard, you would want to—and I think President George W. Bush tried this in his first term—you would want to lay out a series of policies to create more opportunity in society.¹⁵⁰ And to me that more focuses on socioeconomic class and also maybe just outright rejecting—and this is where I think George W. Bush didn't go—I think following Martin Luther King's rhetoric—rejecting the use of race in all its forms, and focusing right, as he said, on "the content of [your] character," not the "color of [your] skin."¹⁵¹ But pairing that with something that creates more economic opportunity for the people who are trapped in our inner cities.

QUESTIONER 2: Thank you.

HON. JAMES C. HO: Sir?

¹⁴⁹ Richard Rothstein, *Race or Class? The Future of Affirmative Action on the College Campus*, THE PROSPECT (June 23, 2014), <https://prospect.org/culture/books/race-class-future-affirmative-action-college-campus/>; Amy J. Sepinwall, *Responsibility for Historical Injustices Reconceiving the Case for Reparations*, 22 L.J. & POL. 183, 196 (2006).

¹⁵⁰ *President George W. Bush on Compassionate Conservatism*, THE CATALYST, <https://www.bushcenter.org/catalyst/opportunity-road/george-w-bush-on-compassionate-conservatism.html> (last visited June 15, 2020).

¹⁵¹ Martin Luther King Jr., *I Have a Dream, Address at the March on Washington* (Aug. 28, 1963), available at <https://www.archives.gov/files/press/exhibits/dream-speech.pdf>.

QUESTIONER 3: Thank you. It's a very good panel. Thank you very much. I have a two-part question. Professor Yoo, you kind of anticipated some of the points I'm about to make. But first, if this Harvard case goes to the Supreme Court, and they strike down *Grutter*, would it necessarily strike down the personal assessment factor in the current way they're rating students? Though we know that this is a proxy for race, it's only a statistical relationship. They can simply claim it's a coincidence.

A second question has something to do with something you just mentioned, Mr. Strawbridge, that universities at this point are going to continue to practice some affirmative action whatever the Supreme Court says. And I think as long as diversity is our national religion, and I guess I'm at risk of being the skunk at the picnic, I really don't think racial and ethnic diversity is our strength. What do you think we could do as a society to discredit or destroy this idea?

PATRICK STRAWBRIDGE: You're certainly correct that striking down *Grutter* says nothing about how colleges have to select their applicants and whether or not they can use a holistic admissions process.¹⁵² As Professor Yoo pointed out, Berkeley still uses a holistic admissions process. And there may be outright cheating. There may be an attempt to use race on the sly without being so explicit about it. And that would require more careful policing, but there would be real value, I would think, just in a society that values what law is and how we apply laws to have at least a statement that this is not allowed and to make it more difficult to do it. If that has to be litigated or policed by the federal government, so be it. That's true under a lot of regimes today. But I don't think it's a reason not to pursue these cases, and certainly not a reason to accept some level of discrimination against groups, including Asian Americans in this particular case. So, I think that that's—the two points are unrelated to me with respect to that.

JOHN YOO: I feel like on the holistic, I would expect more universities after *Grutter*, if *Grutter* were struck down, would switch to a holistic system. The one thing about being on the inside and having watched my colleagues struggle mightily to figure out ways to get around Prop 209 with not too much success, the one thing about holistic is that it's expensive to run a system like that. So I assume most of us went to law school. Several of us may have went several times. But in law school, we don't have the huge admissions staffs that colleges do. Law schools don't want to pay for the thirty admissions officers that Harvard University probably has. The dirty secret is that most of the seats in law school are determined primarily by GPA and LSAT scores.¹⁵³ But at Berkeley, we have a holistic system for half our

¹⁵² *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

¹⁵³ Evan Jones, *5 Hard Truths About Getting Into Law School*, LAWSCHOOL (Nov. 7, 2013), <https://law.schooli.com/5-harsh-truths-law-school-admissions/>.

spaces. So, you could go to Northwestern and learn empirics, or if you just did that on the LSAT, you could apply to Berkeley.

But the holistic system is going to cost colleges and universities a lot of money to implement in the way you might think would happen after *Grutter*. And so, I'm like, "Great! Make them pay more money to live up to their ideals."

Secondly, I would just point out that the holistic system is going to be very difficult, again, I think for courts to monitor whether they truly are engaging in a—let's consider socioeconomic barriers that someone had to overcome. Or are they secretly just cheating? One effect I think after Patrick's lawsuit is that the Harvard admissions office will ban all emails or written memos of all kinds, and they'll do everything in person talking to each other. They're never going to write anything down again. And I'm sure after this lawsuit, no college and university admissions office is ever going to write anything down in email. They might use whatever app there is where it disappears after thirty seconds, along with the inappropriate pictures they're probably sending each other. But they're never going to write anything down.

So, I don't see how a court wants all the universities go to a holistic system. They could use a system which, as a conservative, I just instinctively don't like, which is *prima facie* differences based on statistical disparities. Which is kind of what's going on here. When it's employed in other contexts, I've really thought that should not be the way to get into court. It's just so, "Oh, there's deferential racial hiring in this industry or that industry; therefore, you readily get into court and demand the other side prove they don't have racial animus." But that might be the way the law goes if every university just said, "We're not going to tell you what we're doing, but we're just going to look at the whole person now."

QUESTIONER 3: I guess that still speaks to the idea that diversity is an end in and of itself, again, which I think is a corruption. It's a very bad thing in my view. So how do we destroy this idea? You may not have an answer, but that, to me, seems to be the ultimate question. They're going to continue to do it so long as society seems to value this idea.

JOHN YOO: So, you know, it's interesting. If you talk to people in the sciences—Berkeley is a very strong science university—they wouldn't say the purpose of education is diversity itself. I agree. Somehow diversity went from being a means—the idea of diversity helps achieve some other human good—to becoming the end in and of itself. And I don't understand what the end in and of itself actually is. You know, why is diversity for its own sake good? But I don't see how to diffuse it. Being at a university you might have a different opinion. I think this has become so hard wired to professors and the way they think that it's not going to go away. In fact, over time it's been getting stronger and stronger, which is different than saying we

should have different subjects taught. That's a different kind of diversity. But just the idea of diversity itself, I think, has become so firmly planted, I think more than any other institution in our society. It's become so firmly planted in academia, I don't see how it gets uprooted, actually.

ANDREW KOPPELMAN: I blame Lewis Powell. It was clear that there's a strong imperative to remedy the history of racial injustice when *Bakke* is decided. It's only a few years after the Civil Rights Act got passed. And Powell says you can do this, but you must use the word diversity, over and over again, and that's your free pass.¹⁵⁴ And they do it, and of course it takes on a life of its own, and of course it makes not a lick of sense.

JOHN YOO: This is interesting, just to pursue this, because I agree. He could've said what affirmative action is—is a remedy for past wrongs, which I think a lot of people would agree with—

ANDREW KOPPELMAN: Stevens said that. No one listened to him.

JOHN YOO: The problem is that, the only thing that's good about this that gives me hope is I agree, this was created by the Supreme Court. So maybe the first step is for the Supreme Court to confess its error and at least start the process by getting rid of its elevation of diversity as the real reason for these policies.

DR. ALTHEA NAGAI: Okay, I want to say from the statistician's perspective, one of the ways of holding institutions accountable is to have their admissions data made public. You could strip it of private info. But the Center for Equal Opportunity, we've spent years trying to FOIA flagship universities to see, "What exactly are they doing?" And it takes forever. There are lots of roadblocks. Some are more accommodating than others. And especially when you talk about state universities, you're talking about taxpayer money. You're talking about does a university have a 10% plan of—what does it look like. It does not involve a lot of work on the part of a university to make the data stripped of identifiers to make is public because they all have this data available. They report it routinely to the *U.S. News and World Report* and to the federal government.¹⁵⁵

So, this is how you hold them accountable. You need groups to basically monitor them to make sure they're doing what they say they're doing.

KEN MASUGI: Hi, my name's Ken Masugi. I'd like to ask my

¹⁵⁴ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

¹⁵⁵ Lindsay Cates, *How Colleges Choose Which Students to Admit*, U.S. NEWS & WORLD REP. (Sept. 10, 2019, 9:00 AM), <https://www.usnews.com/education/best-colleges/articles/2019-09-10/how-colleges-choose-which-students-to-admit>.

wife a question, rather to have her—

HON. JAMES C. HO: It's a unique opportunity.

KEN MASUGI: —elaborate—yes. Indeed.

JOHN YOO: Are you guys really married or is this some kind of inside joke? [Laughter] You guys really are married?

DR. ALTHEA NAGAI: Yes, that's my husband.

KEN MASUGI: —I wasn't referring to Mr. Koppelman—

JOHN YOO: You're not a lawyer. You don't realize how inappropriate this is. [Laughter]

KEN MASUGI: You had a very interesting observation about Harvard trying to diversify by hitting, say, people in Nevada or Montana, but how that had a racial ethnic component in it. And I just wanted to add my own teaching experience here at Michigan State at James Madison College. Now, at the time, James Madison College—about 1,500 undergrads within the huge Michigan State system, plus the undergraduate admissions. Virtually open admissions. And I observed that among the smarter students in my classes were African American students. And they all uniformly came out of Detroit or Milwaukee from an inner-city Catholic school.

And I asked around, and it turned out, subsequently—this is twenty-five years ago—subsequently I'd ask my graduate students, who were African American, about their own background. And each and every single one of them went to a Catholic school, an inner-city Catholic school. And these are the sorts of institutions—Catholic and other religious schools and other private sorts of schools—that are being crushed by the administrative state. And the administrative state is a bipartisan creation. It's not just a liberal, democratic creation. And so, I think there are modest forms of affirmative action because James Madison College, under then-Dean Bill Allen, wanted to get more of these students in, not because they were African American, but simply because they added quality to the student body. And so, there are dual motives here that can lead I think to some good results. So, Dr. Nagai?

DR. ALTHEA NAGAI: This came up in conversation, and it was in response to I think what came out in the lawsuit when you were examined—I think the admission officer—Fitzsimmons is his name? He was on the stand.

PATRICK STRAWBRIDGE: “Sparse country.” Is that what you're talking about?

DR. ALTHEA NAGAI: Yes! “Sparse country.”

PATRICK STRAWBRIDGE: I'll just briefly touch on it.

DR. ALTHEA NAGAI: Oh, yes. Oh, that made me mad.

PATRICK STRAWBRIDGE: So Harvard, like a lot of universities, buys standardized test results from high school students and uses that for recruiting.¹⁵⁶ And they basically have groups who they target their recruiting for. They send out letters. They try to get them to apply to Harvard. And one of the things that came out in the process was that they have a variety of breakdowns.¹⁵⁷ And they want high achieving groups by ethnicity, so they target high scorers.¹⁵⁸ And, obviously, the SAT bands change depending on what group they're targeting because they're basically trying to target the top performers.¹⁵⁹ And, of course, the legacy of standardized testing and other educational disparities in our country is that different racial groups do differently on some standardized tests.¹⁶⁰

So, what was interesting about it was that in what they call "sparse country," which is basically outside of the coasts and the heavy metropolitan areas where, presumably, Harvard does not get as much applications, or at least there's not the same level of high-performing students. Harvard asked for test results, and the effect of it is that their floor in "sparse country," which only applies to White students or people who don't say their race is lower than the floor that they apply for Asian American nationwide. And what that means is that if you're in "sparse country," which to be clear, includes such undeveloped waste lands as Las Vegas, Nevada, and Phoenix, Arizona—¹⁶¹

JOHN YOO: They are.

PATRICK STRAWBRIDGE: But other—if you are in one of these states, you might get a recruiting—and if you score 1320 or—¹⁶²

DR. ALTHEA NAGAI: 1310 for Whites.¹⁶³

PATRICK STRAWBRIDGE: Well, the floor was 1310. It goes up to 1370.¹⁶⁴ If you score between 1310 and 1370 and you're White, Harvard will recruit you with a letter.¹⁶⁵ If you're Asian in the same school achieving

¹⁵⁶ See Anemona Hartocollis, *Harvard's Admissions Process, Once Secret, Is Unveiled in Affirmative Action Trial*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/harvard-admissions-affirmative-action.html?action=click&module=Top%20Stories&pgtype=Homepage>; Students for Fair Admissions v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 197 (D. Mass. 2018).

¹⁵⁷ Hartocollis, *supra* note 156; *Harvard*, 346 F. Supp. 3d at 181–82.

¹⁵⁸ See Hartocollis, *supra* note 156; *Harvard*, 346 F. Supp. 3d at 181.

¹⁵⁹ *Harvard*, 346 F. Supp. 3d at 188.

¹⁶⁰ Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1243 (2011).

¹⁶¹ Transcript of Bench Trial at 147, Students for Fair Admissions v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174 (D. Mass. 2018).

¹⁶² *Id.* at 143–44.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

the same score, you will not get a letter from Harvard.¹⁶⁶

DR. ALTHEA NAGAI: Yeah. 1370. The cutoff—¹⁶⁷

PATRICK STRAWBRIDGE: It's an interesting other aspect on the ways in which Harvard seeks to cheap its class.

DR. ALTHEA NAGAI: Yeah. Now, the irony was when you—I believe when Fitzsimmons was on the stand. This was reported in, I believe, the *Chronicles*, that someone asked—I think “Lawyers, how do you explain the disparity?” And he said, “Well, you’d achieve diversity just basically because the White student would be multi-generational American, while the Asian American will most likely be in the country only two or three years,” or something implying that the applicant would be an immigrant.

PATRICK STRAWBRIDGE: Yes. What Dean Fitzsimmons, whose been the Dean of Harvard College of Admissions for going on thirty years, now, approximately—what he testified in response to that question what that when they seek students from “sparse country,” they’re looking for a certain type of student who may not have Harvard on their radar.¹⁶⁸ And he specifically made a reference to the notion that they’re looking for students who grew up in “sparse country,” not someone who arrived a year or two ago.¹⁶⁹

Now, there is a way to look at that statement as trading upon the stereotypes that I think underlie a lot of what the evidence against Harvard shows. Whether you want to call it implicit bias or unconscious bias, what we’re really talking about and what the law has recognized as a form of invidious discrimination is stereotyping. And I think you see that in the personal score part of the case. I think you see it in the response to justify the “sparse country” differences. This is racial stereotyping. It’s long been actionable under Title VII and under Title VI.¹⁷⁰ That’s really what this case is about is racial stereotyping.

DR. ALTHEA NAGAI: The irony is, though, that a lot of Asian Americans who live in “sparse country” are, in fact, the descendants of the interned.¹⁷¹ Their grandparents were interned; a lot of them emigrated from Hawaii, where I’m from, to live in Las Vegas.¹⁷² They’re Filipino; they’ve been Americans for multi-generations, and yet, they’ve been stereotyped.¹⁷³

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 149.

¹⁶⁹ *Id.*

¹⁷⁰ *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 324 (2014).

¹⁷¹ Michael Scott Davidson, *Asian-Americans Fastest-Growing Group in Southern Nevada*, ASSOC. PRESS NEWS (May 24, 2019), <https://www.apnews.com/2af94377a5d14d788a1ccc67e1851a30>.

¹⁷² *Id.*

¹⁷³ Sammi Chen, *Racial Wealth Snapshot: Asian Americans*, PROSPERITY NOW (May 10, 2018), <https://prosperitynow.org/blog/racial-wealth-snapshot-asian-americans>.

So, in the context of that, I think that they would have that higher cutoff because they're Asian American in spite of the past history. And that was kind of annoying.

HON. JAMES C. HO: Well, I have thoroughly enjoyed being the moderator for this panel. I hope you all enjoyed this. Please thank our panelists as well.