



ASIAN AMERICANS
**ADVANCING
JUSTICE**
LOS ANGELES

What's on Trial at Harvard?

A discussion on Asian Americans, affirmative action, and discrimination

January 16, 2019

Building upon the legacy of the Asian Pacific American Legal Center

Our speakers



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Advancing Justice – LA
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Thang Q. Diep
Harvard Class of 2019
Student *Amici*



Dr. Janelle Wong
University of Maryland
Professor of American Studies



Our goals today

1. Separate fact from fiction in the Harvard trial
2. Engage in a robust discussion around Asian Americans, affirmative action, and discrimination from diverse perspectives
3. Answer any other questions you may have!





Facts, Not Fiction, in the Harvard Trial

A quick review of the case and the evidence that came out at trial

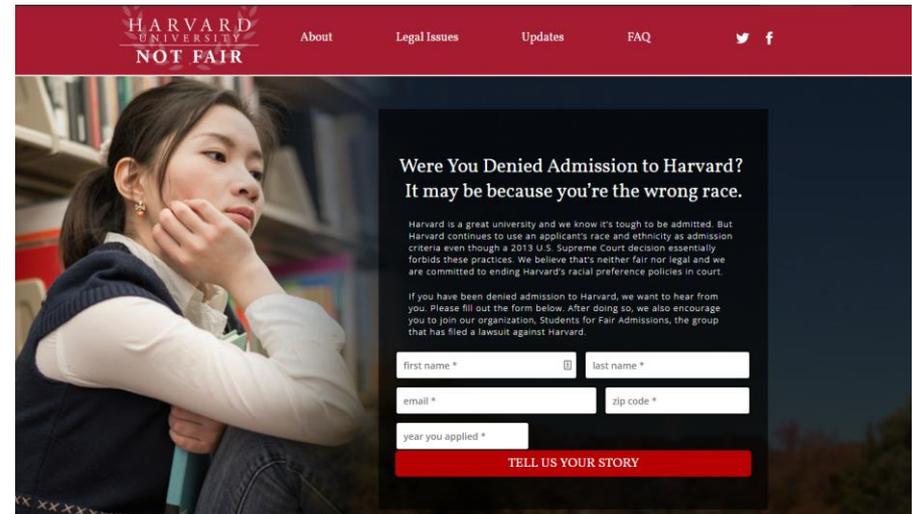


How did the Harvard admission case begin?



Ed Blum, a conservative legal strategist, tried and failed to kill affirmative action in *Fisher v. University of Texas*.

So, he decided to make Asian Americans the face of a lawsuit against Harvard to completely eliminate the consideration of race as a tool for universities to increase diversity.



A Timeline of the Case

2014

SFFA files lawsuit against Harvard seeking to “prohibit Harvard from using race as a factor in admissions” and prohibiting admission officers from being “aware of or learn the race or ethnicity of any applicant for admission”



2017

Judge Burroughs dismisses two of SFFA's legal claims that improperly seek to overturn settled law. One dismissed claim was based on the theory that any consideration of race violates Title VI. The other dismissed claim was based on the theory that race can only be used to “fill the last few places” in the incoming freshman class, which is not the law.



2018

Three-week trial. SFFA does not put a single rejected student on the stand. Eight *amici* students testify in defense of affirmative action, including 4 Asian Americans. Other witnesses include Harvard administrators and statistical experts.



2019

Final closing arguments on 2/13. Decision will follow (exact date is not known). If either side chooses to challenge the decision, it will be appealed to the First Circuit and then to the U.S. Supreme Court, who can choose whether it wants to hear the case.



What is the Harvard admissions case about?

April 25, 2015
Ed Blum, founder of SFFA

“The goal of these lawsuits is to eliminate the consideration of race and ethnicity.”



October 15, 2018
Adam Mortara, SFFA Trial Counsel

“The future of affirmative action is not on trial...”



EDUCATION

What the Harvard Trial Is Really About

The plaintiffs have downplayed the role of affirmative action in the case, but their opening arguments on Monday showed that the issue is central.

ADAM HARRIS OCT 15, 2018

OUR COLUMNISTS

ANTI-ASIAN BIAS, NOT AFFIRMATIVE ACTION, IS ON TRIAL IN THE HARVARD CASE



By Jeannie Suk Gersen October 11, 2018



The Harvard case is about killing affirmative action

THE LAW | OCT. 19, 2016
The Harvard Admissions Trial Won't End Affirmative Action — But That's the Ultimate Goal
By Cristian Ferias @cristianferias

The complaint seeks:

(b) A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, from the Court that any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*;

(c) A permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions;

(d) A permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission;





Is Harvard's race-conscious admissions program constitutional?



What is the legal standard for evaluating Harvard's race-conscious admissions policy?

Strict Scrutiny Applies

University offers reasoned, principled explanation for pursuing the benefits of diversity.

- Deference to University

Is the university's consideration of race narrowly tailored to achieve diversity?

- University has the burden
- Individualized review
 - No quotas
 - No predetermined points
- Race is not the defining feature
 - Race is one of many factors
 - Race is not dispositive

The consideration of race is necessary to achieve diversity.

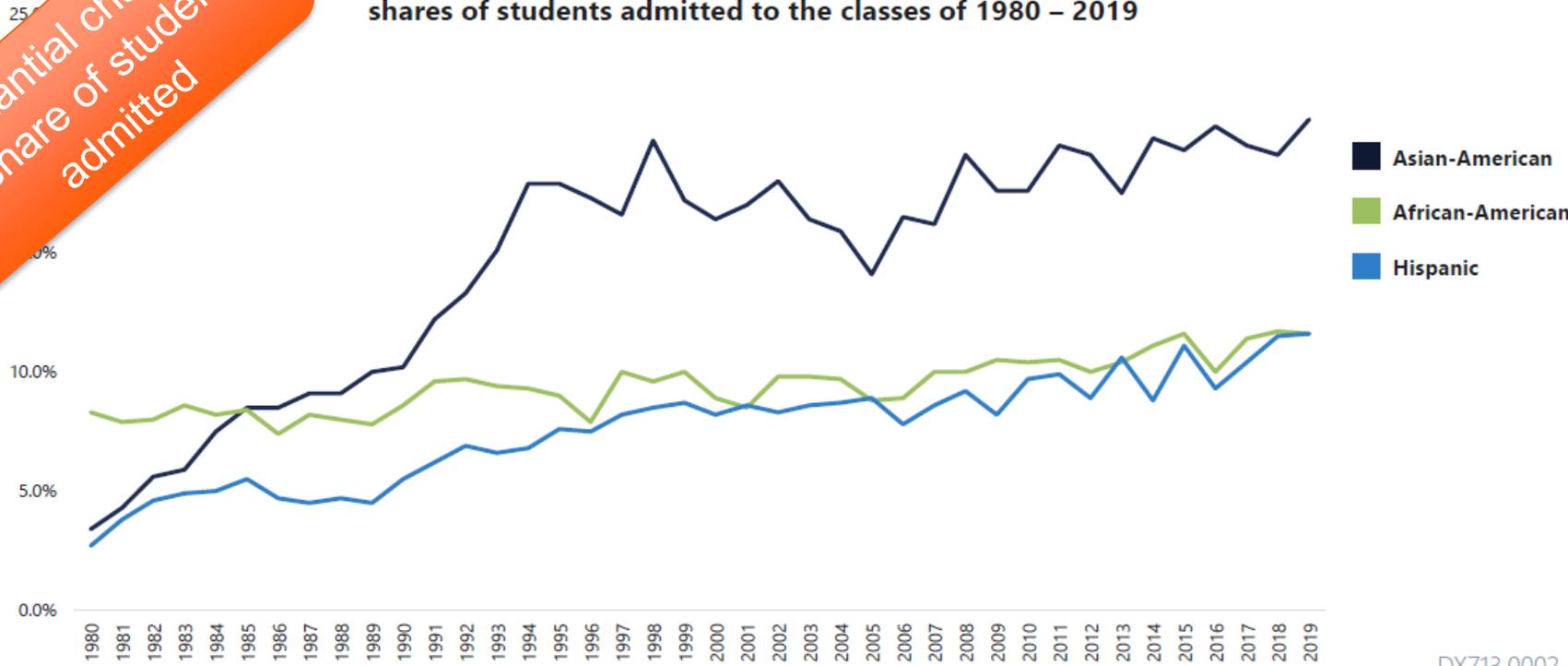
- Race-neutral alternatives do not work.



No evidence of quotas

Substantial changes
in share of students
admitted

Asian-American, African-American, and Hispanic shares of students admitted to the classes of 1980 – 2019

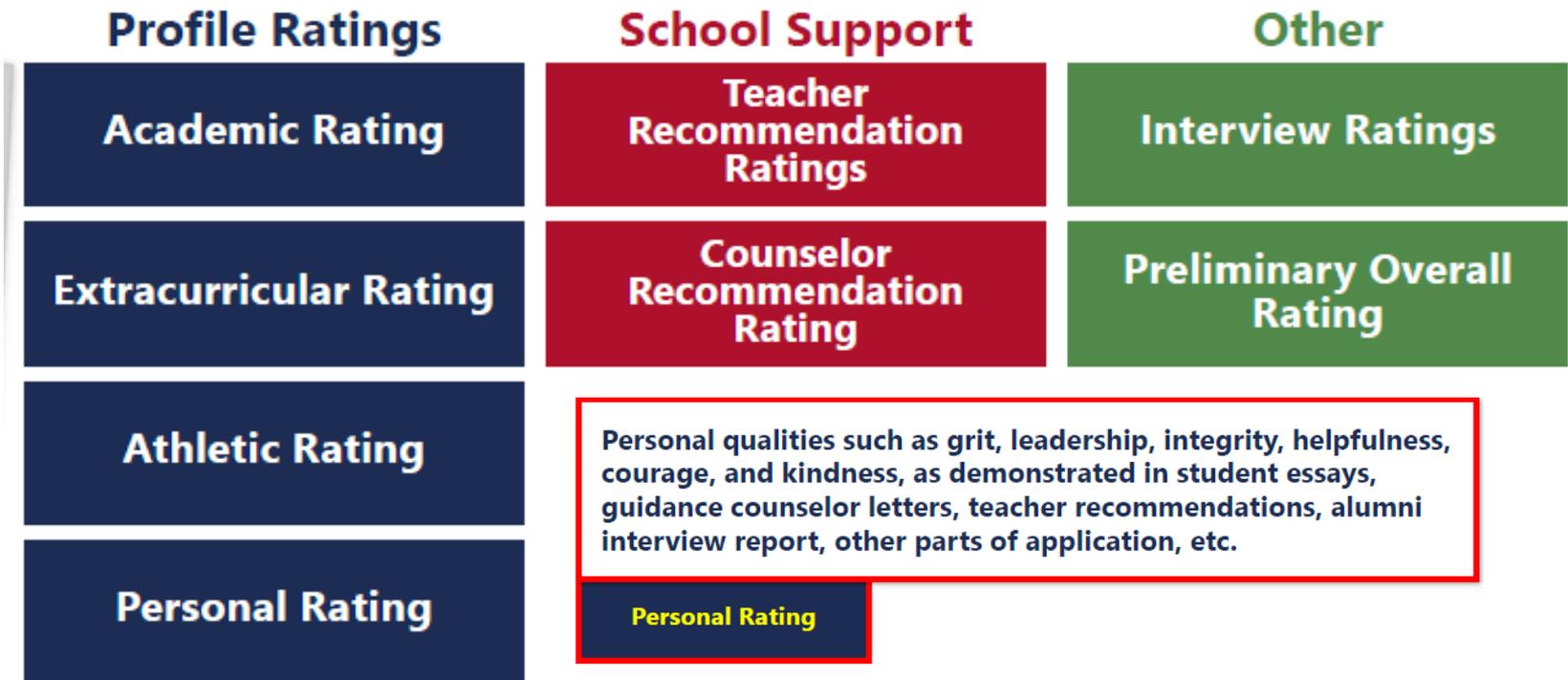


DX713.0002

Source: DD 10.103

No automatic, predetermined points for race

Race is considered contextually

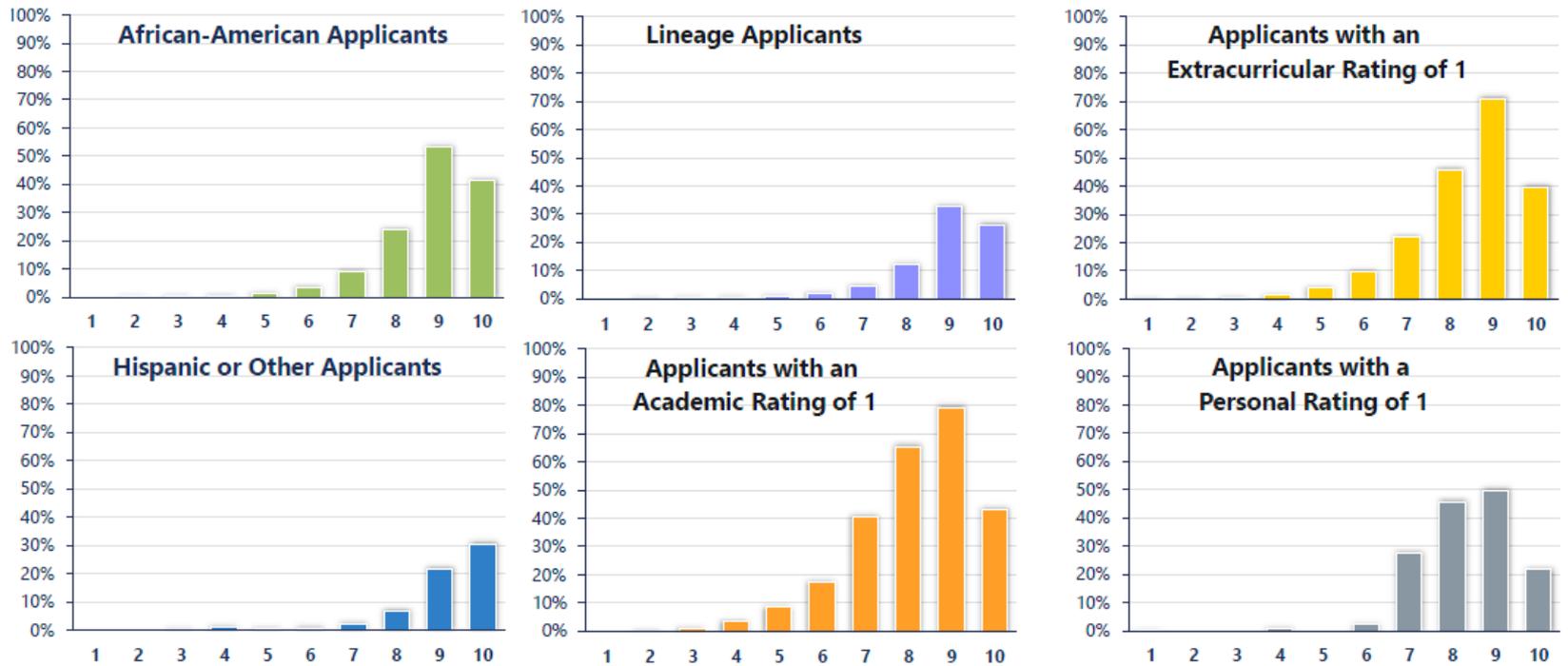


Source: adapted from Harvard opening demonstratives

No automatic, predetermined points for race

The impact of race varies depending on other factors – not automatic

Average Marginal Effect by Predicted Probability of Admission Decile (Percentage Points)



Source: adapted from Harvard's opening admissions

DX718



Race is one of many factors considered in the admissions process

Outstanding and unusual intellectual ability

Judgments—those on which critical factors in the admissions process, and they are regarded as by the most serious best by students' activity, outside the classroom, the testimony of teachers and parents.

Unusually appealing personal qualities

of backgrounds, academic interests, extracurricular activities, and career goals among students who have and learn together affect the quality of education as much as a great faculty or state material resources.

Outstanding capacity for leadership

active or latent, the 4 categories serve (even though not a top to narrow category) candidates at the expense of a first one one. These are among the most common "tips" by which applicants, presenting distinguished academic and extracurricular records, might distinguish themselves for admission.

Creative ability

MEMBERS OF OUTSTANDING AND UNUSUAL INTELLECTUAL ABILITY, UNUSUALLY APPEALING PERSONAL QUALITIES, AND OUTSTANDING CAPACITY FOR LEADERSHIP.

Outstanding capacity for leadership. Harvard aims to welcome individuals who have found major who will be leaders in their chosen fields. Evidence of ability to lead others in positive ways can distinguish an applicant for admission.

Creative ability. The Harvard Supplement to the Common Application encourages students "with exceptional talents or interests" to send the Committee music CDs, compositions, dance DVDs, slides of artwork, or selected samples of academic work (including creative writing).

18

NTAL

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DX005.0010

DX005.0010

for faculty evaluation, which can inform admissions decisions. Students' active participation and performance help enrich life at Harvard and beyond.

Athletic ability. The College has a long tradition of athletic excellence—in competition with our intercollegiate rivals and among our freshmen and alumni competitors. Harvard enriches students who are among the most active in recreational athletics, and we lead all undergraduate institutions in the number of NCAA Division I athletic teams (45). Evidence of a candidate's ability to contribute to one of these teams, and of solid personal qualities and academic abilities, can distinguish a candidate for admission.

Harvard and Radcliffe parentage. Among a group of secondary distinguished applicants, the Committee is more likely to admit the sons and daughters of Harvard and Radcliffe alumni than students without these institutional ties when all other factors are equal. Children of alumni generally prove to be highly competitive candidates even without a lineage tip. Their academic credentials—test scores and grades—are nearly identical to those of the entering class as a whole.

Geographic, ethnic, and economic factors. The excellence and diversity of our students remain ideal attributes for many prospective students. Undergraduate come from every state and more than 80 foreign countries. They have attended public, private, and parochial schools; represent all economic, ethnic, and religious backgrounds and possess a wide range of academic interests and extracurricular talents. Such diversity is not an end in itself, or a pleasant but dispensable "accessory." University President Neil Rudenstine wrote in his 1995-96 Report, "Diversity and Learning." "It is the substance from which much richer human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy and robustness that lead to greater knowledge, as well as the tolerance and mutual respect that are so essential to the maintenance of our civil society.

These factors are guidelines that are neither comprehensive nor absolute. Some successful candidates present a number of these qualities in their applications and are, in other words, well-rounded. Other applicants are successful because they are well rounded—they demonstrate exceptional ability in one area.

Our goal is to admit students who will be leaders in their chosen fields. Evidence of ability to lead others in positive ways can distinguish an applicant for admission. Creative ability. The Harvard Supplement to the Common Application encourages students "with exceptional talents or interests" to send the Committee music CDs, compositions, dance DVDs, slides of artwork, or selected samples of academic work (including creative writing).

Athletic ability.

Harvard and Radcliffe parentage.

grade of academic achievement. For successful candidates rank below the top 10% is 15 percent or their high school class, cover in the case of applicants applying from secondary schools that send applicant percentages of their graduates who receive four-year colleges. Reasoner applicants but

Geographic, ethnic, and economic factors

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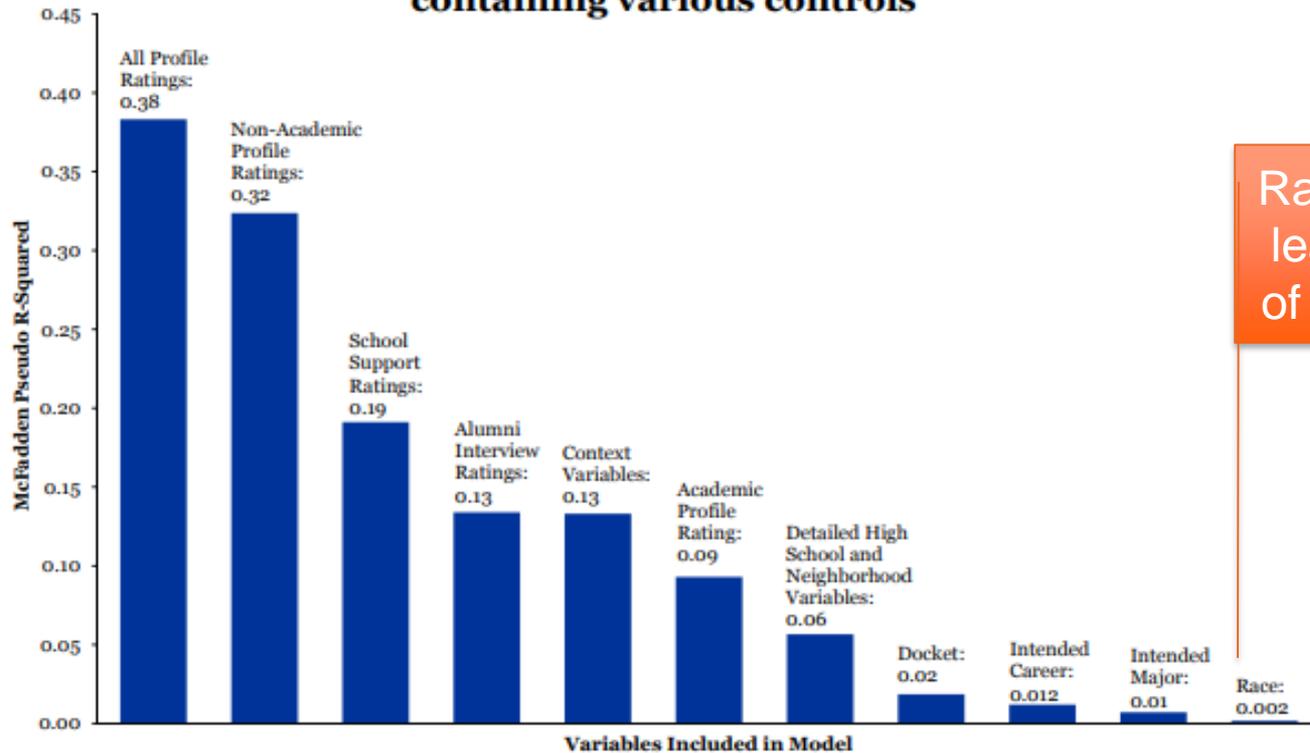
DX5.0011

Source: adapted from Harvard opening demonstratives



Race is not a defining feature of Harvard's admissions process

Pseudo R-Squared values of admissions models containing various controls



Race has the least impact of any factor.

Source: Augmented Arcidiacono Data; College Board Cluster Data; U.S. Census Data

Note: Data are from applicants to the class of 2019 in Professor Arcidiacono's expanded sample including athletes.

United States District Court
District of Massachusetts



Race is not the defining feature of Harvard's admissions process

No admissions file showed race was dispositive

SARAH COLE



Race was not the deciding factor

- “All A’s” from one of the best private college prep schools in Kansas City
- “Determination, drive, and admirable work ethic.”
- “Love and devotion to Kansas City”
- Notes on her leadership on the Board of Engage K.C. (youth advisory board to City Council), “term-time work” at TJ Maxx during the school year, and participation in debate.
- Notes about low socioeconomic status and her parents’ occupations working at ADT Security and IRS.

ITZEL VASQUEZ-RODRIGUEZ



- “[S]trong sets of AP scores [10]”
- Noted that scores are impressive out of her high school “where only 25% [of students] go to 4 year colleges.”
- “[M]y goodness, Itzel is a hard worker!”
- “2 season runner and 4X(C)”
- Comments and markings on multiple extracurriculars, including editor of paper, link leader, volunteer, and more
- “Positive respected, and kind... resilient and determined to succeed... electric personality.”
- Notes on socioeconomic status
- “[S]he’s connected w/ her heritage after a period of disconnect” and “PE [personal essay]: Latino heritage”

Source: Ex. SA-3; Ex. SA-4



Race is necessary to achieve the benefits of diversity

Race matters to applicants and is necessary to tell their story authentically

Traditional admissions criteria undervalue the potential of minority students

Race-neutral alternatives are insufficient to achieve the benefits of diversity



Race is necessary for applicants to tell their story authentically

Holistic Review Cannot Be Holistic Without Race

Eliminating race from consideration in holistic review erases a core component of students' identities.



Chris A.

18 year old student

Los Angeles, CA USA

Seeking college within 100 miles of Boston, MA

75% match



About Me

- Middle-class home
- Was bullied at school because of race
- Fluent in Mandarin and English
- Translated for parents since first grade
- Worked at family's Chinese restaurant
- 3.9 GPA
- 1490 SAT score
- 1st place prize in Chinese speech competition

Hm...it looks like Chris has excelled academically, overcome adversity, and has unique passions that would be a good fit for our school.



Considering race in the admissions process means that race is looked at in context of an applicant's life and background, just like schools consider class, limited-English proficiency, geographic location, disability, and other circumstances that provide insight into the applicant's ability to overcome adversity and maximize their potential.

We have to ignore everything about this student's race and Chinese heritage. When you take all of that out, nothing stands out about this applicant.



It does not make sense to refuse to consider race while considering all other background characteristics

because race still matters in America.

Many students testified that if they could not write about their racial identity, they didn't know what they would have written about.

Class and race are distinct aspects of people's identity.

Many Harvard students of color would not have applied if race were not considered.



Race is necessary to evaluate the true potential of minority students

Access to AP classes

SAT score biases

Implicit bias in K-12 opportunities

What is Merit?

Merit is subjective -- we all have different definitions. Is an applicant who is accomplished in music more meritorious than a star tennis player? A prolific writer? What about a person that got a 4.0 GPA and held down a part-time job versus a person that got a 4.0 GPA and had lots of private tutoring help?



The distance you run depends on where your starting line is...



Both these people **TIED** in a 400-meter race.

The race-blind conclusion: these two are equally impressive

BUT...what if...
one person actually started 50 meters behind the other.



50 meters

Wouldn't we consider the person who covered a greater distance in the same amount of time **more impressive** than the person who started ahead?

People's starting lines are pushed farther and farther back based on institutional racism.

Ignoring race would be like giving bikes to the people who are already closest to the finish line-- not only perpetuating the unfairness, but exacerbating it.

TIC by Miguel C. Salas/Artes. Raising by Mousad Mokkara via The Noun Project

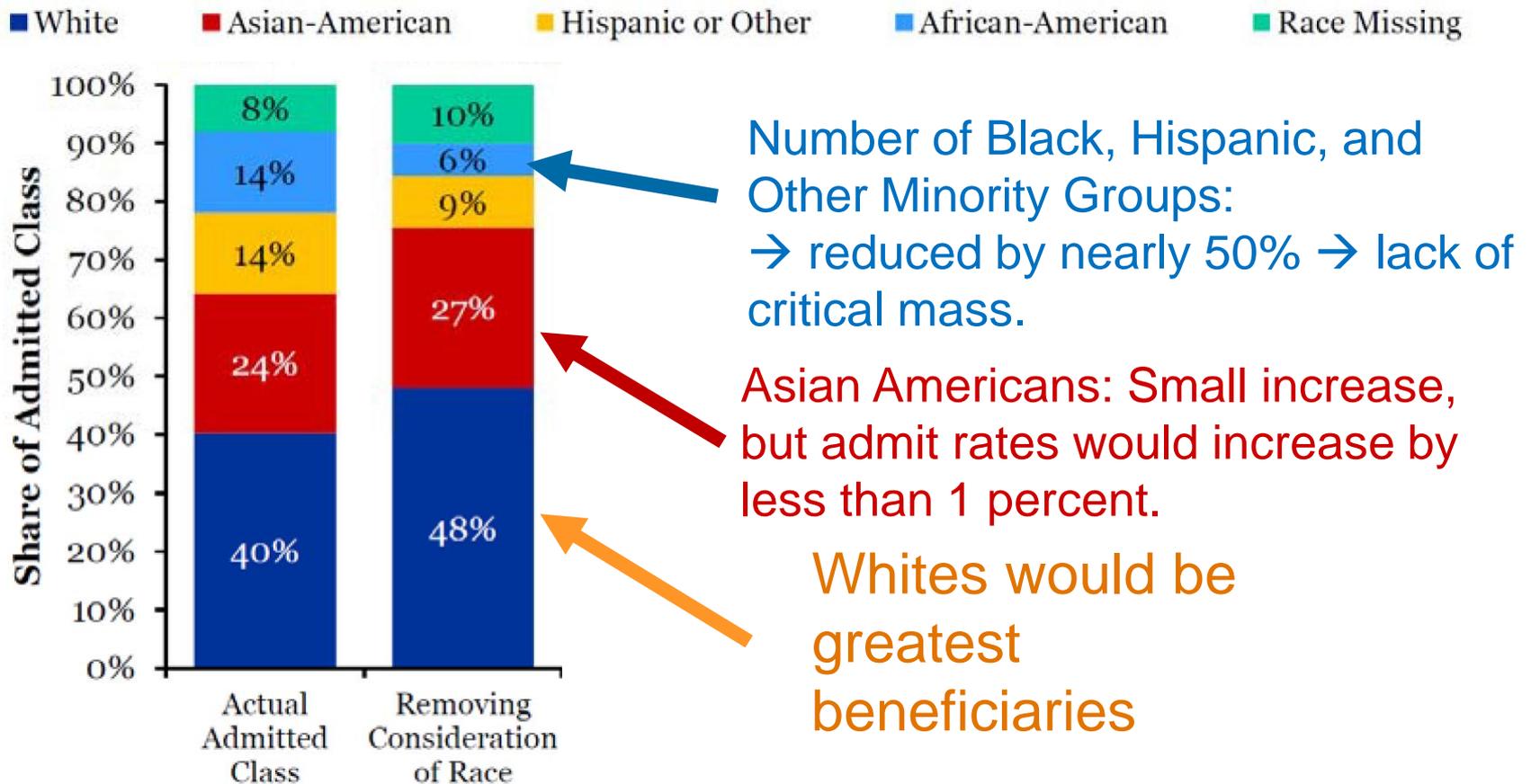
Identify contributions to diversity

Become student leaders on campus climate, ethnic studies, and service

Create spaces for learning outside the classroom



Eliminating the Consideration of Race Would Be Devastating to Diversity



David Card, Report, Page 108 (Dkt. 419-33 at 110)

Race-neutral alternatives do not work

Class would be dispositive

Socioeconomic Boost (4x)

SFFA Alternative Kahlenberg 6

SFFA Alternative Kahlenberg 7

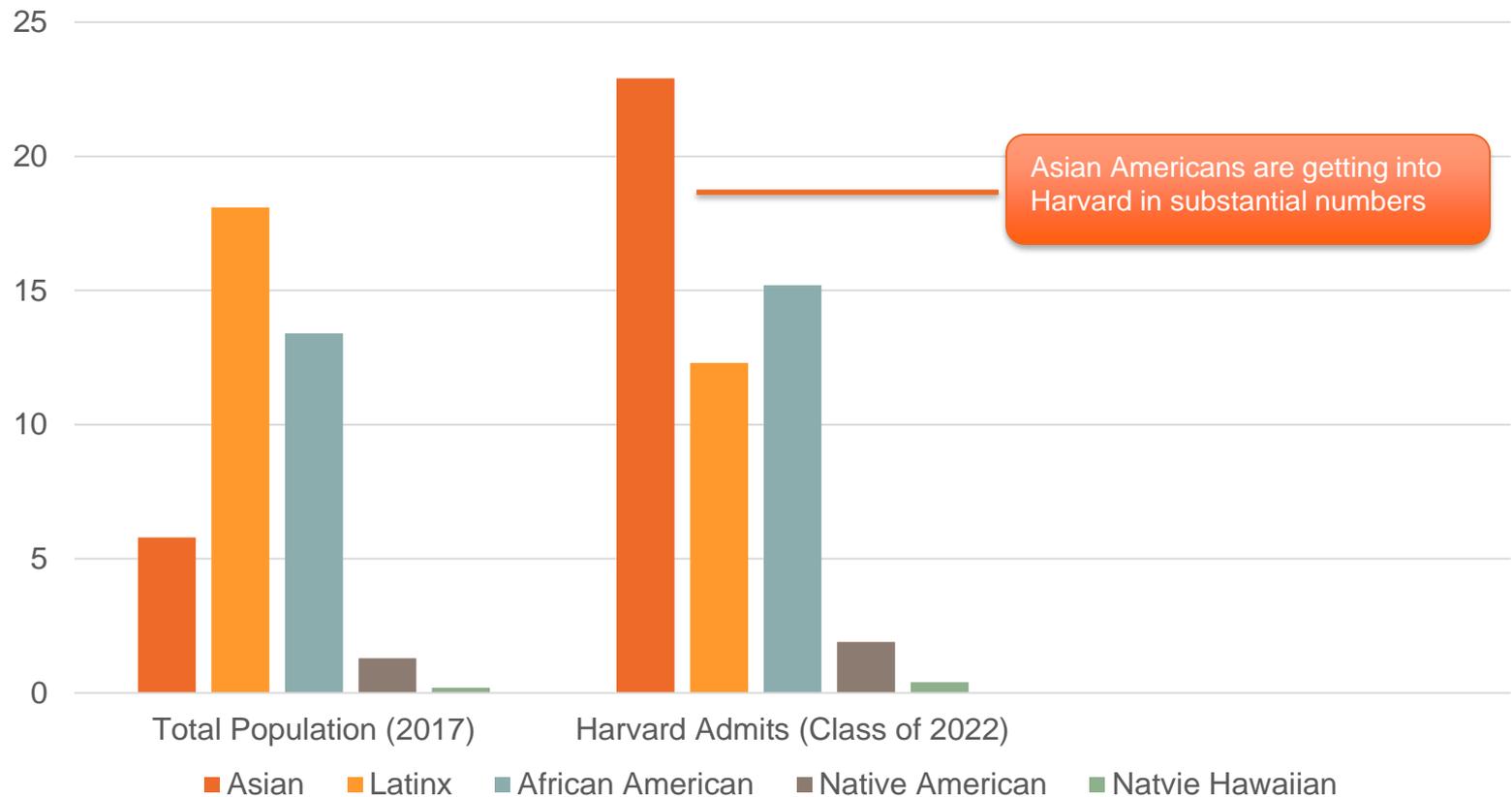
Race	Actual Admitted Class	Predicted Class	% Change	Predicted Class	% Change	Predicted Class	% Change
African-American	234	163	-30%	164	-30%	160	-32%

Class is already given more weight than race.

David Card, Rebuttal Report, Page 96 (Dkt. 419-37 at 98)

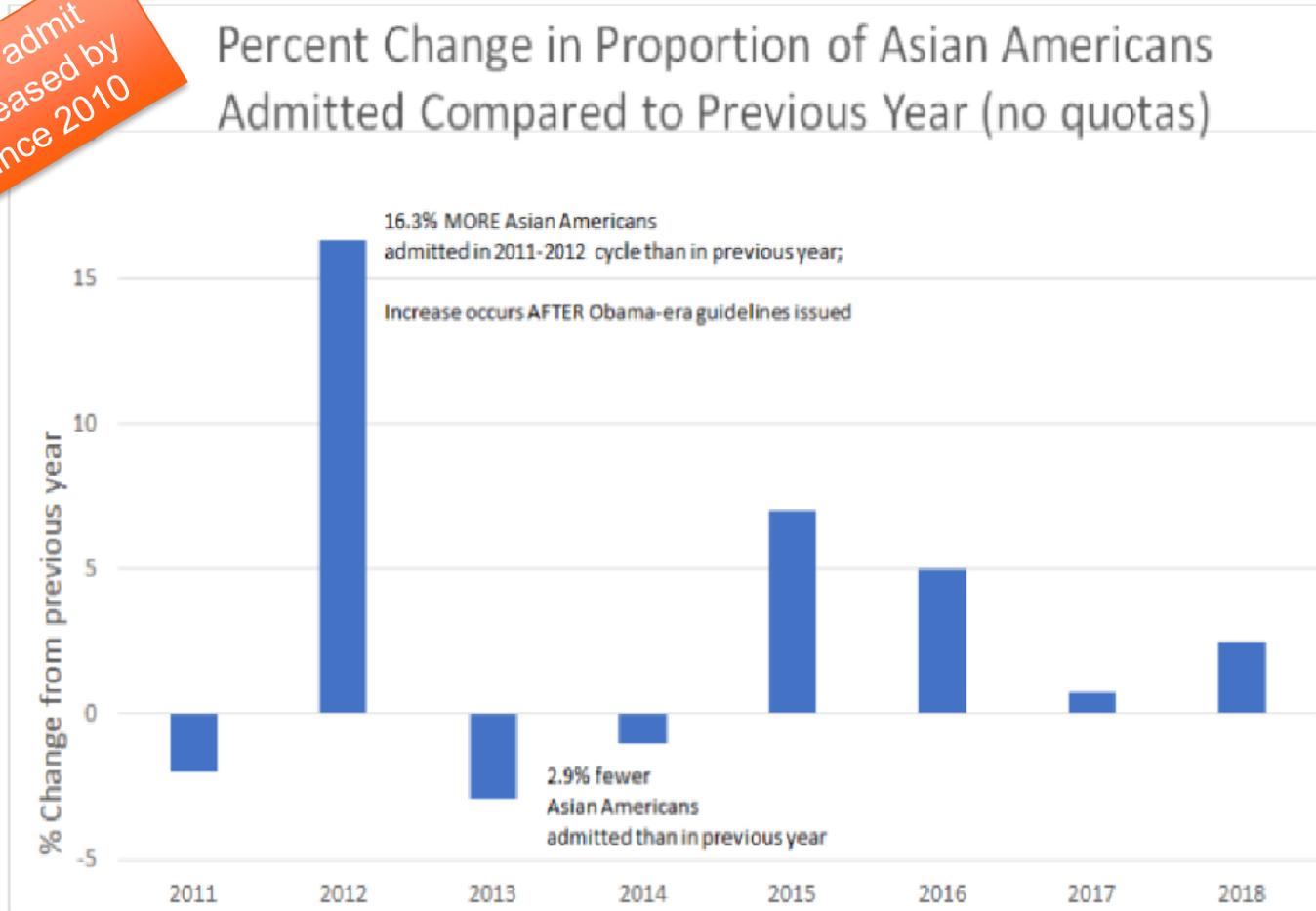
How do Asian Americans fare in Harvard's race-conscious admissions process?

Asian Americans are not shut out of Harvard



How do Asian Americans fare in Harvard's race-conscious admissions process?

Asian American admit rates have increased by 27 percent since 2010



Asian Americans Benefit from Harvard's Race-Conscious Admissions Process

Thang Diep



Race is only considered positively

Sally Chen



- Notes “immigrant Vietnamese identity” and using “pencils as tools,” a reference to Mr. Diep’s personal essay about rejecting his racial identity and then embracing it again.
- “Very committed to pushing himself academically and personally”
- “A well involved, first generation student from a modest background.”
- “Strong sense of self”
- “Unusually caring individual who works very hard and has an infectiously happy personality”

- “[L]ow-income and with Taiwanese-speaking parents, she relates to the plight of outsiders in Ralph Ellison and Faulkner
- Notes that she grew up in a “culturally Chinese home”
- “[E]nthusiastic learner and a school leader”
- Notes 1st Violin Chair, SB President, and research programs
- “We were drawn in by Sally’s warmth and humor” and she “demonstrated energy and specific desire to connect socially with everybody”

Conclusion: Harvard's race-conscious admissions policy is constitutional

- ✓ Individualized review
 - ✓ No quotas
 - ✓ No pre-determined points for race
- ✓ Race is not the defining feature of applications
 - ✓ Race considered as one of many factors to select among highly qualified candidates
 - ✓ Race matters less than any other factor
 - ✓ Application files show that race is never dispositive
- ✓ Race-neutral alternatives don't work
 - ✓ Lack of critical mass; dramatic reductions in diversity
 - ✓ The consideration of race is necessary to attract and admit the best applicants
- ✓ No undue burden on Asian American students





Is Harvard discriminating against Asian Americans in favor of white applicants?

The law recognizes two types of discrimination

Disparate Impact

- The focus is on the **consequences** of the defendant's practices, rather than the defendant's **intent**.
- Adverse impact + no legitimate justification
Adverse impact + less discriminatory alternative
- e.g. *Barnhardt & U.S. v. Meridian Municipal School District* - school discipline policies
- Only the government can enforce disparate impact

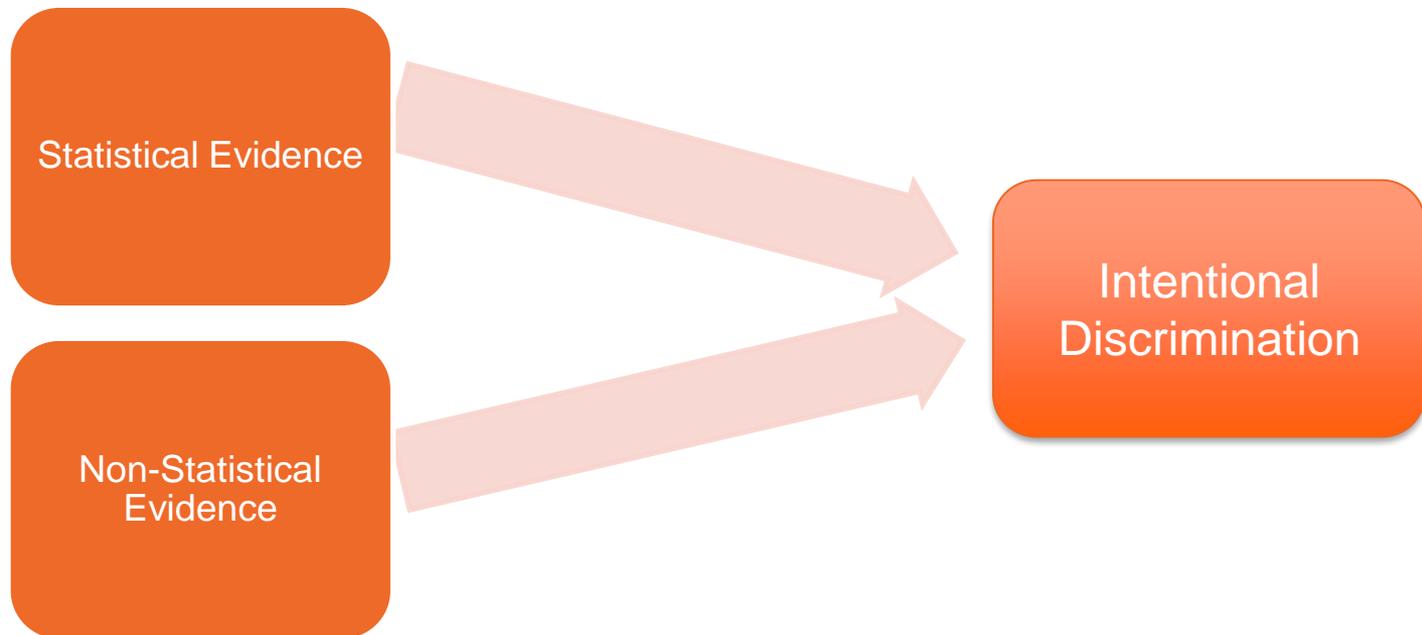
Intentional Discrimination

- The focus is on the decisionmaker's intent – the challenged policy was adopted **because** it had an adverse effect on the protected group, not merely **in spite of** the fact that it had an impact.
- Adverse impact + foreseeability + history of discrimination
- e.g. *Personnel Adm'r of Mass. v. Feeney* – veteran preference statute
- Private litigants can only bring intentional discrimination claims.



The Harvard case is about intentional discrimination

Plaintiffs (SFFA) have the burden to prove intent.



The Harvard case is about intentional discrimination

1. Plaintiffs have the burden to prove that Harvard is intentionally discriminating against Asian Americans in favor of whites.
2. Statistical evidence of disparate impact is helpful, but does not ultimately prove intent in most cases.
3. Where the statistical evidence is highly disputed, non-statistical evidence and specific examples are helpful.

Disclaimer: The law's definition of discrimination is too narrow. It should be expanded to comport with the reality that many policies and practices limit equal opportunity.



Intentional Discrimination: Descriptive Statistical Evidence

SFFA Post Trial Brief, p. 10:

No disparate impact
in admit rates

36. From the class of 2014 through the class of 2018, whites and Asian Americans were

admitted at about the same rate every year. T9.68:2-20; PD38.20. But that should not be the case.

There is a positive correlation between the academic index and admission, meaning a high academic

index increases the probability of being admitted to Harvard. T9.71:8-13; PD38.21. Yet, for Asian

Americans, having a higher academic index than white applicants does not translate into more spots

in the admitted class. T9.69:17-70:2. White applicants are admitted at a higher rate than Asian

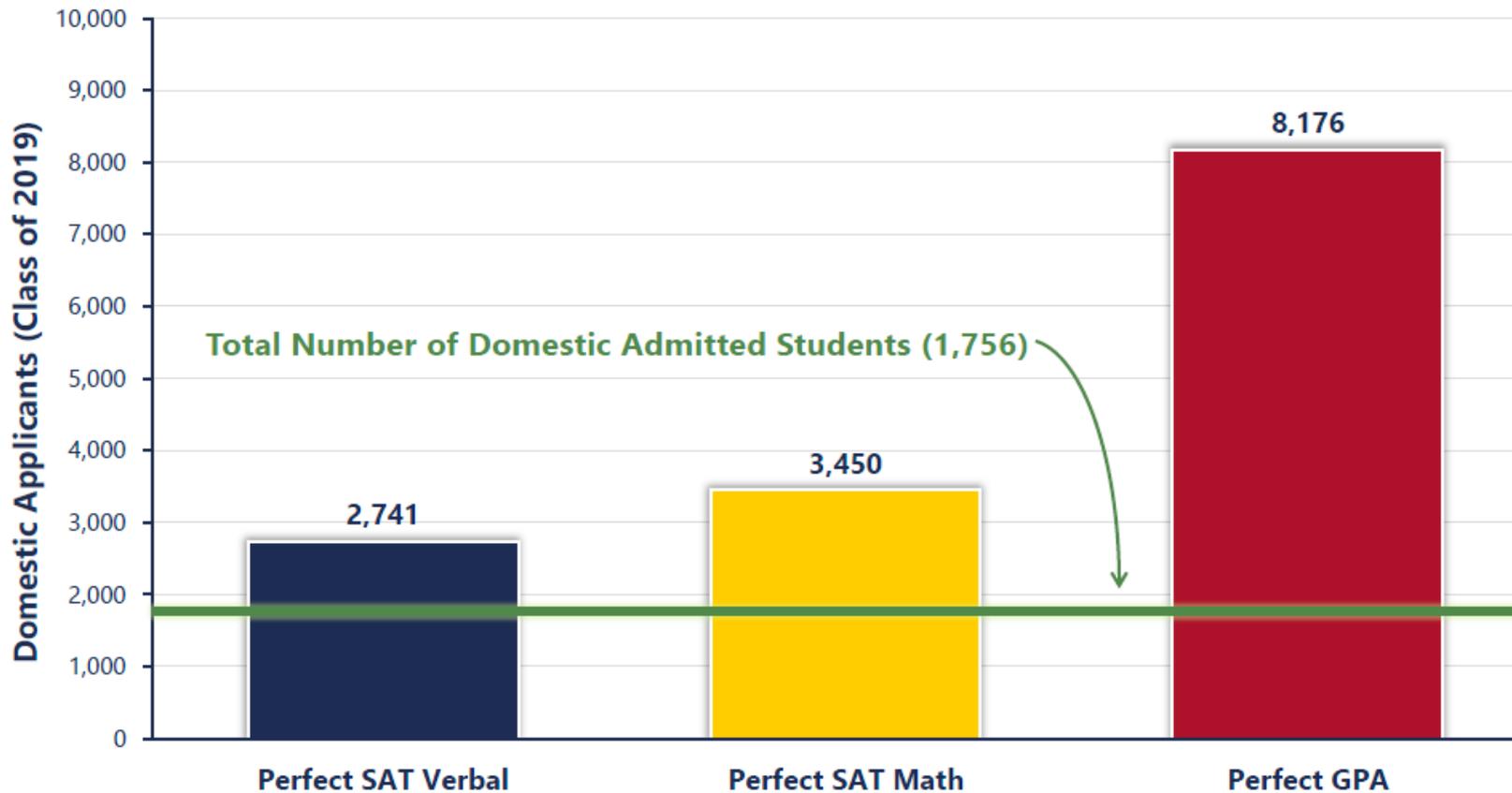
Good scores and
GPA necessary,
but not sufficient

Academic index =
SAT scores and
grades

Merit = high test
scores and
grades



The Reality: Overabundance of Academically Qualified Applicants

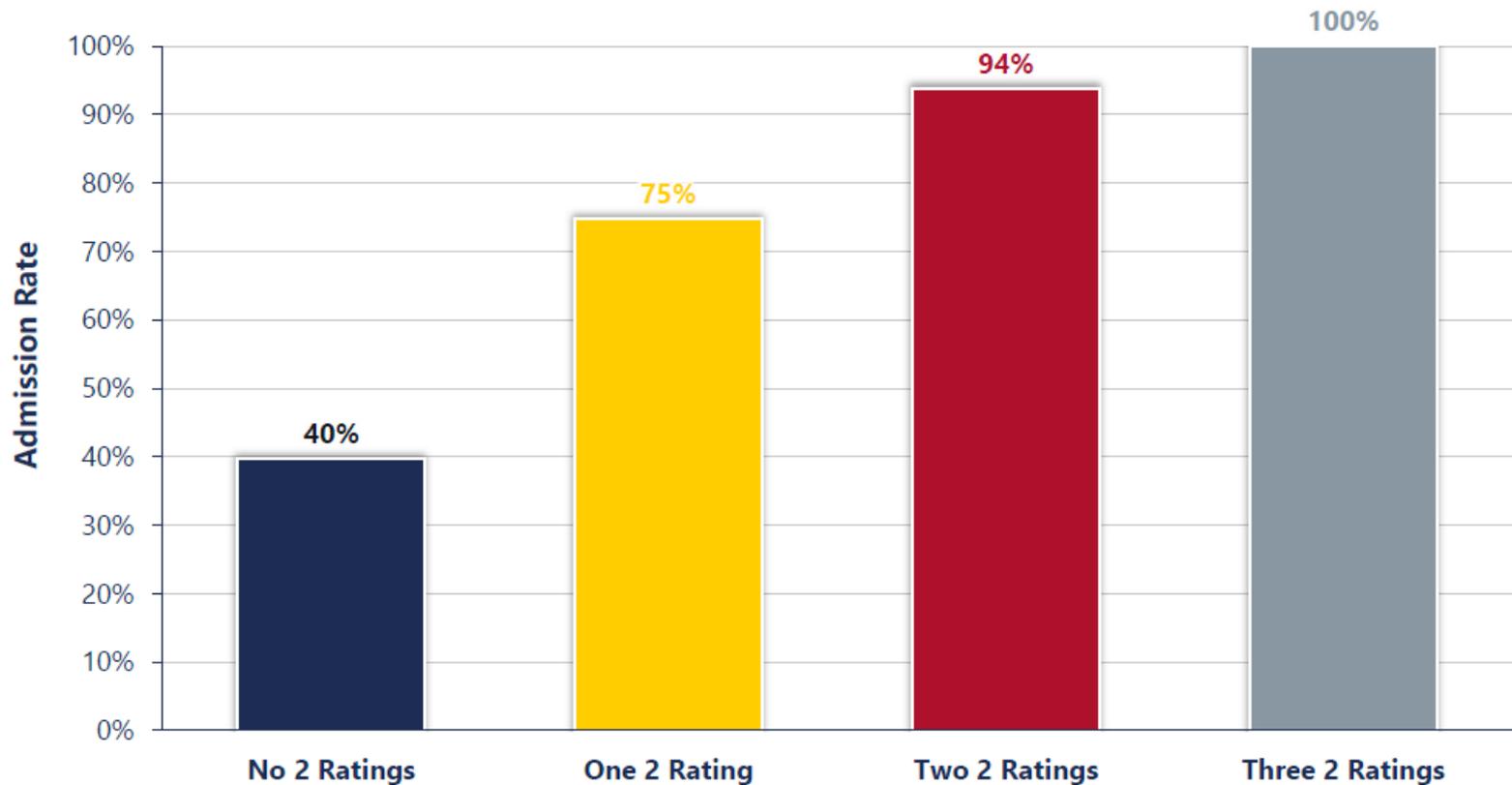


Source: DD 10.3



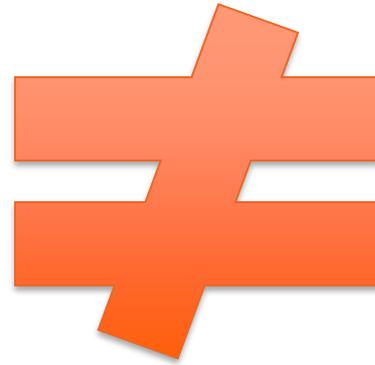
The Reality: Merit Is Defined by Non-Academic Criteria

Even for Academic 1s, Other Ratings Matter



Conclusion: Descriptive Statistics Do Not Demonstrate Discrimination

High
Academic Index
Alone



Higher rates of
admission

No disparity in admit
rates between whites
and Asian Americans

Intentional Discrimination: Regression A Battle of the Experts

Dr. Card – Harvard's expert



No statistically significant difference between similarly situated white and Asian applicants

Dr. Arcidiacono – SFFA's expert



Statistically significant Asian penalty.

WHY?

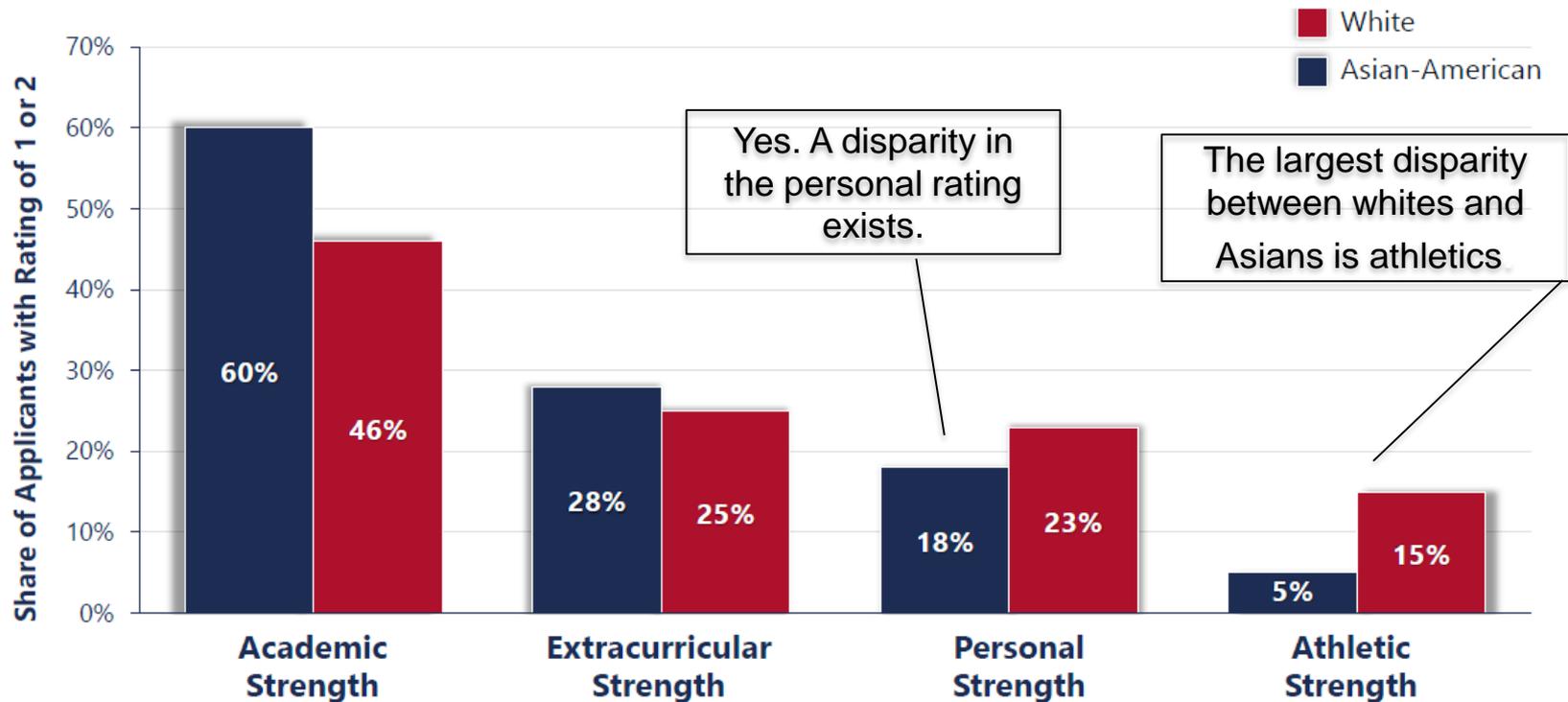
Dr. Card includes the personal score in his analysis and Dr. Arcidiacono does not.



What is the personal score?



Do Asian Americans do worse on the personal rating than Whites?



Source: DD 10.4



What explains the lower personal ratings of Asian Americans?

SFFA

Asian American applicants are strong on the observable data, so the lower personal ratings can only be explained by discrimination.

Harvard

Asian American applicants are weaker on the non-academic factors that influence the personal rating.

Amici

Asian American applicants are not weaker on non-academic factors, but there is less information available about their non-academic strengths.



A look at the observable data and what it explains about the personal rating

Controls Included in Arcidiacono Baseline Admissions Models 4 & 5

Demographics/Descriptives

- race/ethnicity
- female
- disadvantaged
- application waiver
- applied for financial aid
- first generation college student
- early decision indicator
- mother's education indicators
- father's education indicators
- intended major indicators
- school type indicators
- graduate school legacy
- permanent resident
- father deceased
- mother deceased
- parent attended ivy league
- rural

Geography

- docket indicators
- college board high school characteristics
- college board neighborhood characteristics

Academic Variables

- SAT math, standardized
- SAT verbal, standardized
- SAT2 average, standardized
- missing SAT2 average × race/ethnicity
- converted GPA, standardized
- academic index (AI), standardized
- $AI^2 \times \text{academic index} > 0$
- $AI^2 \times \text{academic index} < 0$
- flag for converted GPA = 35 × race/ethnicity

Interactions

- female × intended major
- female × race/ethnicity
- race/ethnicity × disadvantaged
- race/ethnicity × early decision

Time

- year indicators
- year indicators interacted with: docket, female, disadvantaged, first generation, early decision, applied for financial aid, permanent resident, intended major, flag GPA, missing SAT2 average

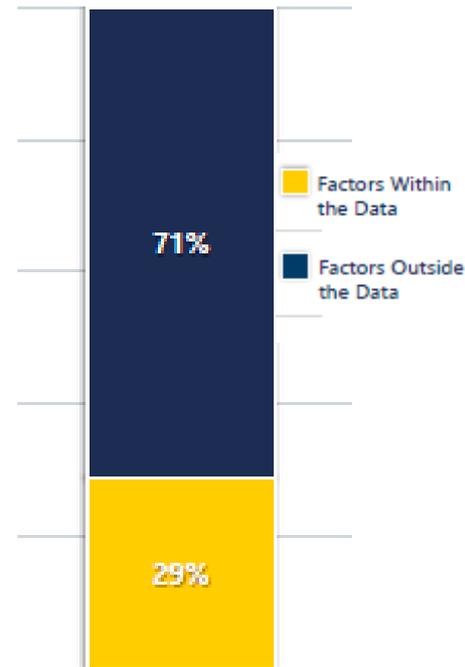
Ratings*

- academic
- extracurricular
- athletic
- teacher 1
- teacher 2
- counselor
- alumni personal and alumni overall ratings
- interactions with missing alumni overall rating and race/ethnicity
- indicators for receiving pairs of two among: academic & extracurricular, academic & athletic, extracurricular & athletic, alumni personal & alumni overall
- total twos for school ratings

*Additional Model 5 Variables

This is the observable data!

The observable data only explains 29 percent of the personal rating!



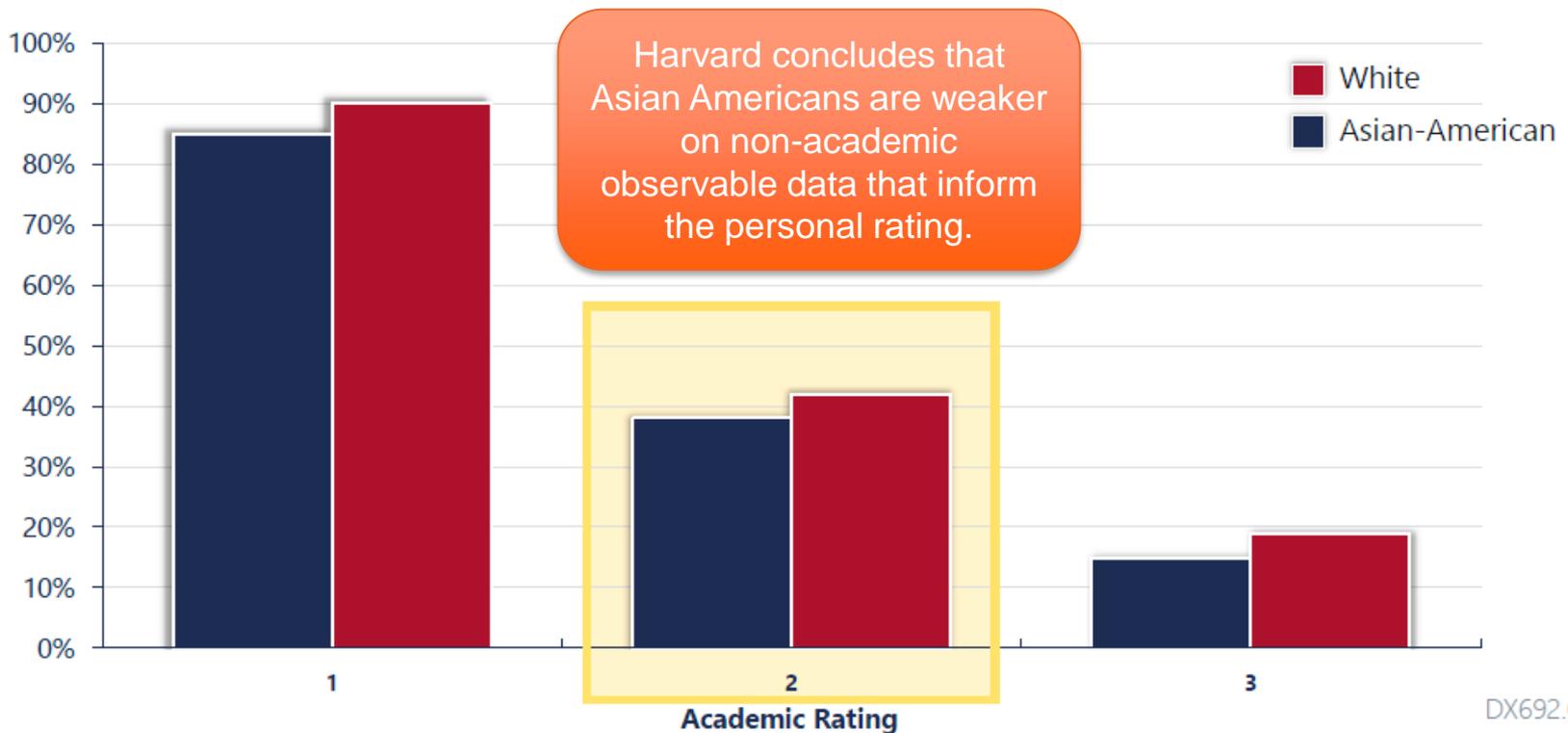
Personal Rating Regression

Source: DD 10.61

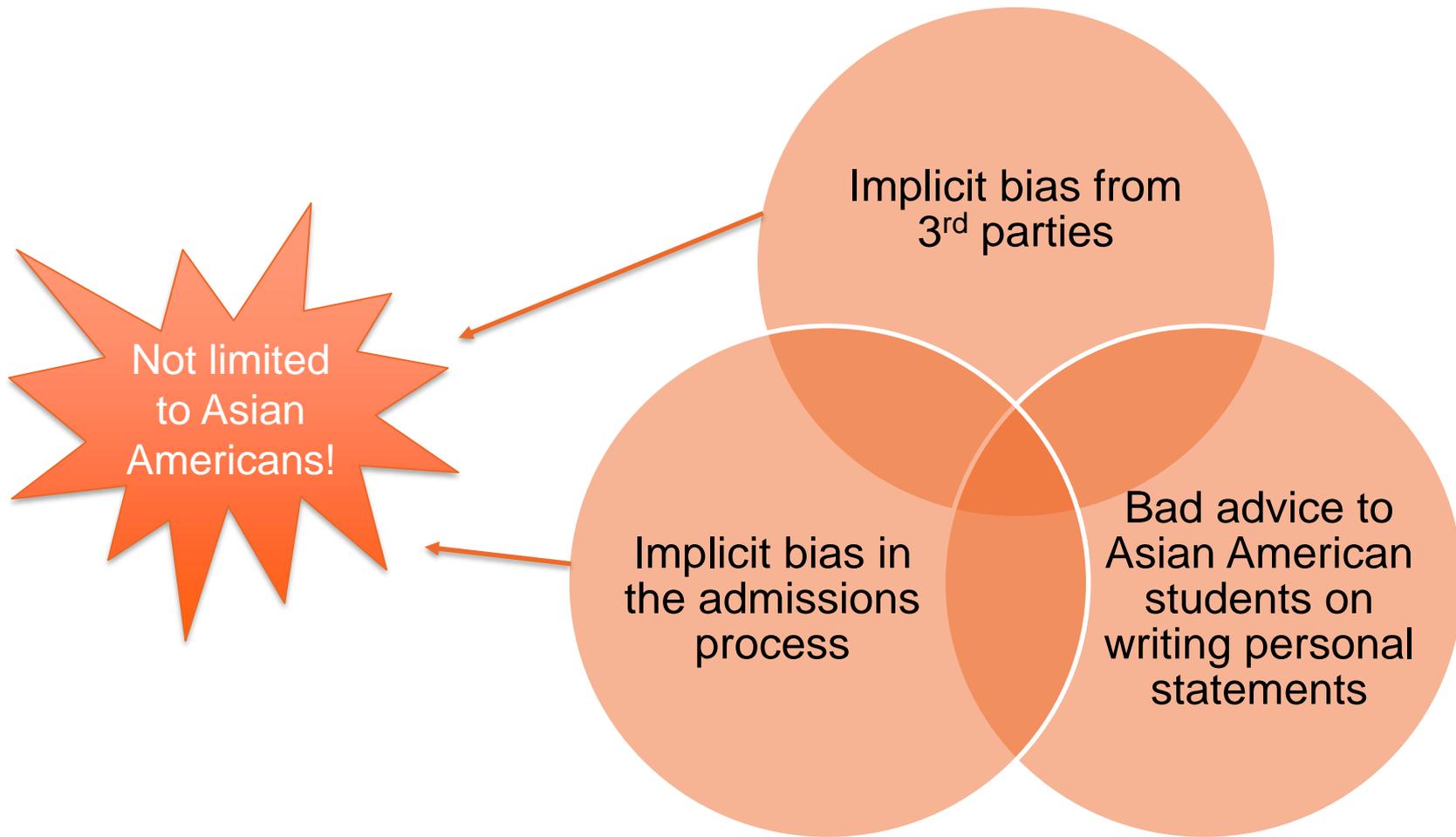


The Non-Academic Observable Data

Share With School Support and Alumni Interviewer Ratings That Sum to 11 or Less



An alternative explanation: Less information about non-academic strengths



Is the personal rating a pretext for discrimination?

The gap is persistent, but representation has increased.

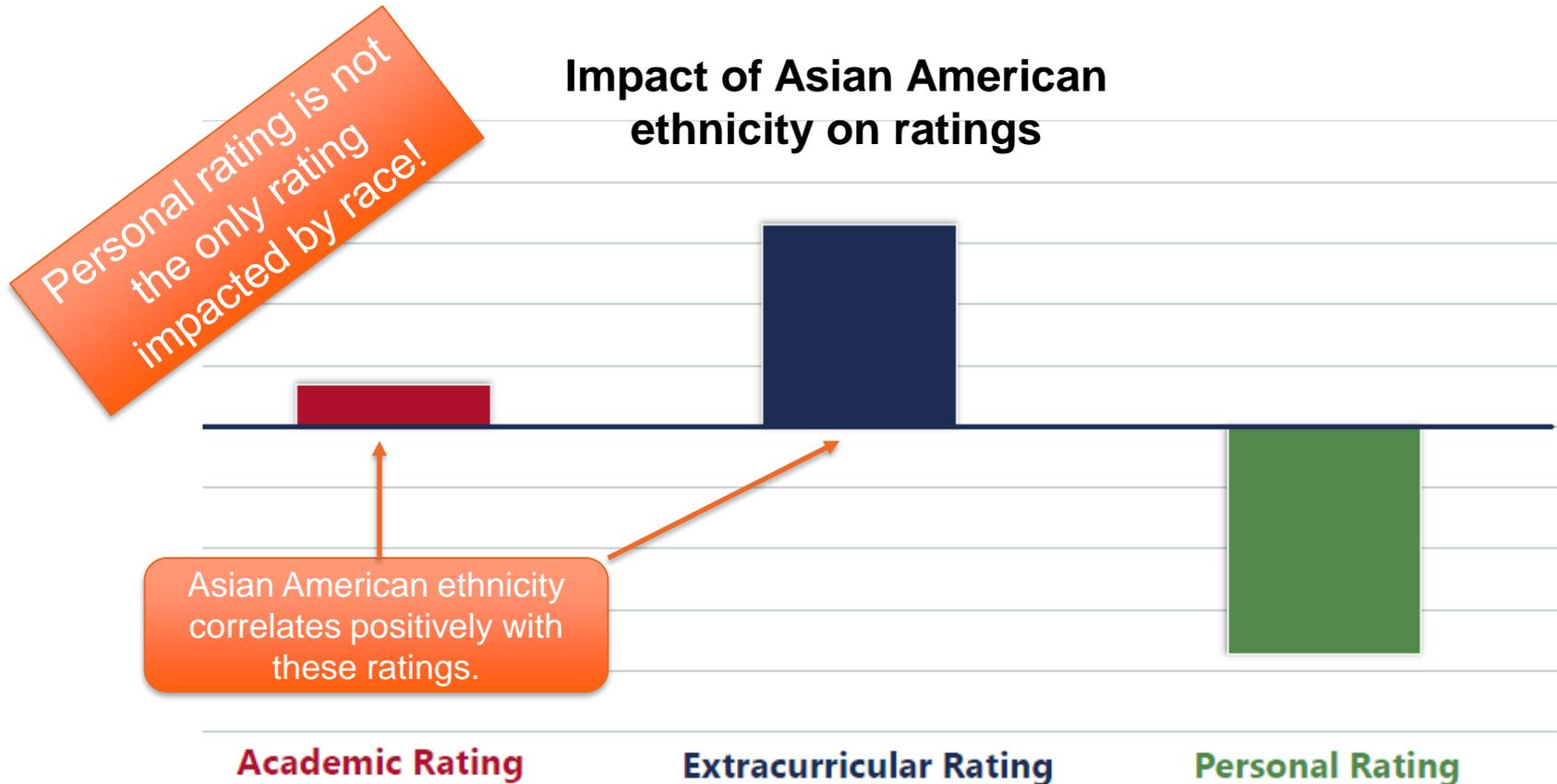
- The personal rating disparities have existed since the 1980s.
- Although these disparities persist, Asian American representation at Harvard has increased substantially since the 1980s.
- This suggests that Harvard is not intentionally using the personal rating to keep out Asian Americans.

The gap is larger for ALDC applicants, but admission rates exceed those of whites.

- A larger gap exists between the personal ratings of white and Asian American ALDCs as compared to non-ALDCs.
- However, Asian American ALDCs have a statistically higher admission rate than white ALDCs.
- This is not consistent with the idea that Harvard is intentionally using the personal rating to discriminate.



Should the personal rating be excluded from the regression analysis?



Eliminating race from the admissions process

No Significant Effect of Asian-American Ethnicity Using Modified Ratings

Class	Average Marginal Effect of Asian-American Ethnicity (Percentage Points; Not Statistically Significant)
2014	-0.27
2015	-0.18
2016	-0.38
2017	0.36
2018	-0.46
2019	0.29
Overall	-0.11

DX694

DD10.83



Conclusion: Regression does not demonstrate discrimination

Class	Average Marginal Effect of Asian-American Ethnicity (Percentage Points; Not Statistically Significant)
2014	-0.39
2015	-0.05
2016	0.09
2017	0.11
2018	-0.42
2019	0.34
Overall	-0.05

No statistically significant effect

Average Marginal Effect of Asian-American Ethnicity (Percentage Points)		
Class	Female Applicants Not Statistically Significant	Applicants from California Not Statistically Significant
2014	0.21	-0.03
2015	0.55	0.63
2016	0.05	0.60
2017	-0.01	0.12
2018	-0.34	0.45
2019	0.33	0.12
Overall	0.14	0.32

Source: DX 685

Race is considered positively for Asian American females and Asian Americans from California

Conclusion: No Intentional Discrimination

- ✓ No direct evidence of intentional discrimination
- ✓ No statistical evidence of intentional discrimination
- ✓ No evidence of intentional discrimination against Asian Americans in application files – race is discussed positively

Even if Harvard was intentionally discriminating against Asian Americans, the remedy would not be eliminating the consideration of race.



Discussion Questions

1. What are the strengths and weaknesses of Harvard's admissions process? How could it be improved?
2. What do you predict will be the outcome and ultimate implications of this case?
3. Why do you think affirmative action is such a difficult policy for people to understand and support? What are the best ways to talk about this issue with Asian American parents and students?
4. How can Asian Americans who are concerned about discrimination channel their energy productively?



Questions?



Continuing the Conversation

- February 13th – Closing Arguments
 - Digital Day of Action
- March 11-13th – Advancing Justice Conference in Atlanta



THANK YOU!

