

Implicit Bias Against Asian Americans: A Blind Spot in the Harvard Admissions Case

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ABSTRACT

Last Term, the U.S. Supreme Court ruled against Harvard University's and the University of North Carolina's race-conscious undergraduate admissions programs, holding that the institutions failed to satisfy the strict scrutiny required by the Equal Protection Clause. The Court concluded that both institutions had used race as a "negative," siding with plaintiffs who alleged that Harvard had *intentionally* discriminated against Asian American applicants in particular. Yet the Court's opinion, like the litigation as a whole, gave short shrift to the possibility that implicit or unconscious bias is responsible for inequities in admissions outcomes.

This Article explores the legal, social, and educational ramifications of that possibility, focusing on one of the elements of the college admissions process most susceptible to implicit bias—the writing and reading of recommendation letters.

Part One introduces the concept of implicit bias, which while not without its detractors has increasingly been adopted in the natural and social sciences. Part Two takes the litigation against Harvard as a case study, describing why recommendation letters are particularly prone to the influence of implicit bias. It analyzes how several amici treated implicit bias in the voluminous briefs they filed at the Supreme Court. Part Three asks, if implicit bias in the writing and reading of recommendation letters affects the judgments selective colleges and universities make, do Asian American students whose chances of admission suffer have any recourse against the colleges to which they are applying, the high schools from which they are graduating, or other actors in the admissions landscape? Because Part Three concludes that such allegations are generally not actionable, Parts Four and Five explore the steps that institutions of higher education and secondary

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schools could take to limit the impact of implicit bias on admissions outcomes.

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“[T]he record shows that Asian student applicants get the lowest personal scores of any other group. What accounts for that? . . . It has to be one of two things. It has to be that they really do lack integrity, courage, kindness, and empathy to the same degree as students of other races, or there has to be something wrong with this personal score.”¹

So observed U.S. Supreme Court Justice Samuel A. Alito, Jr. at oral argument in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the case in which the Supreme Court struck down Harvard’s race-conscious undergraduate admissions process and narrowed, if not eliminated, the use of race as a factor in higher education institutions’ admissions decision-making.² Justice Alito’s comment echoed, nearly word for word, an argument the advocacy group Students for Fair Admissions (“SFFA”) made throughout the course of its litigation against Harvard. As SFFA put it in one of its Supreme Court briefs, “Either Asian Americans really do lack ‘integrity,’ ‘courage,’ kindness,’ and ‘empathy.’ Or Harvard is discriminating against them. Because the first conclusion is racist and false, the second must be true.”³

These are not, however, the only two inferences supported by the evidence about Harvard’s race-conscious admissions process. To conclude that Harvard—and countless institutions like it—must have intentionally discriminated against Asian American applicants because admissions officers assigned them “personal scores” that on average were lower than the scores the officers awarded to other students overlooks the possibility that implicit or unconscious bias is afoot.⁴ In

1. Transcript of Oral Argument at 53:20–54:4, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199) [hereinafter *Harvard Tr.*].

2. *See* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) [hereinafter *SFFA III*].

3. Reply Brief for Petitioner at 20, *SFFA III*, 143 S. Ct. 2141 (No. 20-1199) [hereinafter *Pet. Reply Br.*].

4. This Article employs the umbrella term “Asian American” because that term appears most commonly in the parties’ briefs. I leave intact original sources’ alternative formulations. Regardless of the particular terminology used, the risk remains that any single category can

light of the Supreme Court’s decision in *Students for Fair Admissions*, this Article explores the legal, social, and educational ramifications of implicit bias in the college admissions process, focusing on one of the elements of that process most susceptible to implicit bias—the writing and reading of recommendation letters. Although implicit bias may also affect how alumni and staff perceive the applicants they interview and how admissions officers assess what applicants disclose in their personal essays,⁵ this Article zeroes in on recommendation letters for three reasons. First, highly selective colleges and universities almost uniformly ask applicants to solicit recommendations from as many as three writers who taught and mentored them.⁶ Second, as the district court in *Students for Fair Admissions* found (and the Supreme Court did not dispute), these recommendations “inform[] perceptions about applicants across numerous dimensions”: academic, extracurricular, athletic, and personal.⁷ Third, there is an ample empirical literature showing that recommendation letters and other narrative assessments of individuals’ strengths and weaknesses are vulnerable to the effects of implicit bias.⁸

Part One introduces the concept of implicit bias, which while not without its detractors has increasingly been adopted in the natural and social sciences.⁹ Part Two takes SFFA’s litigation against Harvard as a case study, describing why recommendation letters are one of the components of selective admissions processes that are particularly prone to the influence of implicit bias. Nevertheless, implicit bias

obscure the vast diversity of Asian cultures and their complex relationships—historically as well as today—with White U.S. cultures. This point has been made by jurists and commentators on all sides of the debates about race-conscious admissions. *See, e.g.*, SFFA III, 143 S. Ct. at 2168; *id.* at 2154; *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 414 (2016) (Alito, J., dissenting).

5. *See* Eric Hoover, *The Supreme Court Just Put an ‘Extra Burden’ on Application Essays*, CHRON. HIGHER EDUC. (July 12, 2023), <https://www.chronicle.com/article/the-supreme-court-just-put-an-extra-burden-on-application-essays>.

6. The exact numbers vary, but the most selective institutions, including Ivy League colleges and universities, are at the higher end of the range. *See College Recommendation Requirements*, COLL. TRANSITIONS, <https://www.collegetransitions.com/dataverse/recommendation-requirements> (Aug. 2022).

7. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 169 (D. Mass. 2019) [hereinafter SFFA I].

8. *See infra* Part I.

9. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010).

received scant attention in all stages of the litigation against Harvard, as well as in SFFA's parallel lawsuit against the University of North Carolina ("UNC"), which the Supreme Court decided simultaneously with the Harvard case. Part Three asks, if implicit bias in the writing and reading of recommendation letters affects the judgments Harvard and its peers make, do Asian American students whose chances of admission suffer have any recourse against the colleges to which they are applying, the high schools from which they are graduating, or other actors in the admissions landscape? Because Part Three concludes that such allegations are generally not actionable, Parts Four and Five explore the steps that institutions of higher education and secondary schools could take to limit the impact of implicit bias in the writing and reading of college recommendations.¹⁰

I. WHAT IS IMPLICIT BIAS?

In 1998, three leading psychologists founded Project Implicit, a nonprofit organization that remains active today.¹¹ "People don't always say what's on their minds," the organization's website observes.¹² Project Implicit distinguishes between situations where people are *unwilling* to admit what they know to be true, say, out of embarrassment or fear, and situations where people are simply *unable* to be conscious of their cognitive processes.¹³ "The difference between being unwilling and unable is the difference between purposely hiding something from someone and unknowingly hiding something from yourself."¹⁴ Project Implicit's premise is that as people become aware of the implicit attitudes and prejudices that arise out of "the unconscious roots of

10. This Article focuses on undergraduate admissions, rather than admissions to graduate and professional schools or financial aid policies, because SFFA's lawsuits against Harvard and UNC concerned the institutions' undergraduate admissions programs. Many of this Article's arguments, however, are also relevant to graduate and professional school admissions—a context in which research has shown faculty members and admissions committees place even greater emphasis on subjective factors—as well as the allocation of financial aid at all levels of higher education. See generally JULIE R. POSSELT, *INSIDE GRADUATE ADMISSIONS: MERIT, DIVERSITY, AND FACULTY GATEKEEPING* (2016).

11. *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> (last visited Aug. 12, 2023).

12. *Id.*

13. Overview of Learn More, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html> (last visited Aug. 12, 2023).

14. *Id.*

thought and feeling,” they become able to limit how those attitudes affect their behavior.¹⁵

Project Implicit is perhaps best known for developing and hosting the online Implicit Association Tests (“IATs”), a series of tools designed to measure test-takers’ unconscious biases.¹⁶ The tests ask participants to make split-second associations among symbols, words, and images—including photographs and drawings of other people. The tests come in fifteen varieties and assess implicit attitudes with regard to categories that range from disability to religion, age, and especially race.¹⁷ The “Asian IAT” explores participants’ attitudes regarding “White and Asian American faces,” as well as “places that are either American or Foreign in origin.”¹⁸ The test flashes a series of images on screen.¹⁹ In the first few rounds, users become comfortable with flagging each image as either White or Asian (for the faces), or American or Foreign (for the landmarks).²⁰ Next, users are asked to press one key for White and American images and a different key for Asian and Foreign images.²¹ Then the tables are turned, and users are asked to press one key for White and Foreign images and the other key for Asian and American images.²² The test measures the extra time the user takes to associate White faces with Foreign places, and, likewise, Asian faces with American places.²³ Project Implicit posits that the length of the hesitation signifies the degree of bias in test-takers’ unconscious cognition.²⁴

Taking an IAT can be a humbling experience for those who wish to believe they are immune from unconscious bias or, at least, have made

15. *Id.*; see also Frequently Asked Questions of Learn More, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> (last visited Aug. 12, 2023).

16. Preliminary Information of Take a Test, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Aug. 12, 2023).

17. *Id.*

18. *Id.*; see also Asian AIT of Take a Test, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/Study?tid=-1> and subsequent screens (providing instructions for the Asian IAT) (last visited Aug. 12, 2023).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

strides in limiting the impact of the biases with which they grew up. My own experience is not unusual. As a White man raised in the Midwest and Southwest U.S., I first took the Asian IAT on April 15, 2021, three months after I enrolled in a law school course on Asian Americans and the Law. My performance at the time “suggested a moderate automatic association for American with European American and Foreign with Asian American.” By mid-November 2022, when I took the same test a second time, I had completed the course, graduated from law school, and begun to clerk for an Asian American judge alongside two Asian American colleagues. Yet my result remained identical: the IAT told me my responses revealed that same “moderate automatic association.”

The founders of Project Implicit initially dubbed the forms of unconscious prejudice the IATs measure “mindbugs,” suggesting that our brains form morally laden associations even when we do not wish them to.²⁵ Today, these “mindbugs” are more commonly called implicit biases, and over the past two decades their existence and significance have been the subject of robust debates in psychology, public policy, and the law. Critics charge that the IATs and similar tests generate “noise” rather than measure bias, noting that test-takers’ responses demonstrate a high degree of variability rather than “predictable error that inclines [a test taker’s] judgment in a particular direction.”²⁶ It is not the purpose of this Article to recapitulate or resolve the arguments for and against the validity of the IAT. As Professor Bagenstos has noted, “whether the IAT is a useful measure is a different question from whether implicit or unconscious bias exists.”²⁷ Instead, the pages that follow rely on the results of empirical studies that demonstrate that implicit bias operates across various domains of daily life, contributing

25. See Melinda Henneberger, *Out, Damned Spot: The ‘Mindbugs’ of Bias that Sneak into Our Brains*, WASH. POST (Feb. 7, 2013, 5:39 PM), <https://www.washingtonpost.com/blogs/she-the-people/wp/2013/02/07/out-damned-spot-the-mindbugs-of-bias-that-sneak-into-our-brains> (interviewing Project Implicit founders).

26. Daniel Kahneman et al., *Bias is a Big Problem. But so is ‘Noise,’* N.Y. TIMES (May 15, 2021), <https://www.nytimes.com/2021/05/15/opinion/noise-bias-kahneman.html>; see, e.g., Yoav Bar-Anan & Brian A. Nosek, *A Comparative Investigation of Seven Indirect Attitude Measures*, 46 BEHAV. RSCH. METHODS 668, 668 (2014).

27. Samuel R. Bagenstos, *Implicit Bias’s Failure*, 39 BERKELEY J. EMP. & LAB. L. 37, 39 (2018).

to disparate outcomes in such arenas as public- and private-sector employment, emergency-room care, and policing.²⁸

Implicit bias against individuals of Asian descent who live in predominantly White cultures can take many forms. The intellectual content of implicit biases inherently defies specification, but several stereotypes about Asian Americans have consistently recurred in U.S. history. White Americans have often perceived Asian Americans as members of a “model minority.”²⁹ Depictions of Asian laborers as “exceedingly useful” and “generally industrious and frugal” appear as early as the U.S. Supreme Court’s 1889 decision in *Chae Chan Ping v. United States*.³⁰ That same classic opinion also characterizes Asian Americans as “strangers in the land,” a trope associated with that of the “perpetual foreigner” unable to assimilate into mainstream, White culture.³¹ And perhaps because of the commonly held view that Asian cultures foster “humility and deference” in young people, educators and managers often perceive their Asian American students and junior employees to be impassive, if not interchangeable.³² The observation

28. See, e.g., Erin Dehon et al., *A Systematic Review of the Impact of Physician Implicit Racial Bias on Clinical Decision Making*, 24 ACAD. EMERGENCY MED. 895 (2017); see generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT* (2013). For instance, several studies have shown that emergency medicine providers were more likely to credit White patients’ reports of pain and other clinical symptoms than identical reports from patients of color. The providers were therefore more likely to prescribe appropriate treatment to the White patients.

29. See Annie I. Lin, *Racial Microaggressions Directed at Asian Americans: Modern Forms of Prejudice and Discrimination*, in *MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACT* 85–98 (Derald Wing Sue ed., 2010); see, e.g., FRANK H. WU, *YELLOW* 40–41 (2003); see generally Harvey Gee, *From Bakke to Grutter and Beyond: Asian Americans and Diversity in America*, 9 TEX. J. C.L. & C.R. 129, 132–33 (2004).

30. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 594–95 (1889).

31. *Id.* at 595; see also Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 243–54 (2022).

32. Stefanie K. Johnson & Thomas Sy, *Why Aren’t There More Asian Americans in Leadership Positions?*, HARV. BUS. REV. (Dec. 19, 2016), <https://hbr.org/2016/12/why-arent-there-more-asian-americans-in-leadership-positions>; Brian X. Chen, *The Cost of Being an ‘Interchangeable Asian’*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2021/06/06/business/the-cost-of-being-an-interchangeable-asian.html>.

that these stereotypes hinder Asian American applicants to elite colleges is not new.³³

Of course, the same stereotypes have fueled more blatant forms of hostility, discrimination, and violence against Asian Americans. Space permits me to highlight only a few of the most egregious episodes.³⁴ The U.S. barred legal immigration from China for more than six decades.³⁵ In the wake of the 1882 Chinese Exclusion Act, there was a period of what one scholar has called the “driving out” of the Chinese.³⁶ Mining workers were massacred in Wyoming and Oregon, while mobs in Washington State violently evicted Chinese residents and tried to force them onto trans-Pacific steamships.³⁷ In San Francisco, laws that appeared neutral on their face targeted Chinese businesses, such as laundries, and cultural practices, such as men wearing their hair in a queue.³⁸ Even well into the twentieth century, states prohibited marriage between Asian Americans and Whites and kept Asian American children out of public schools set aside for Whites.³⁹ Perhaps most notoriously, during World War II, the Roosevelt administration evicted more than 120,000 Japanese Americans from their homes and interned them in spartan camps across the American West.⁴⁰ It was not until 2018 that the Supreme Court formally repudiated the 1944 decision in which

33. See, e.g., David Ho & Margaret Chin, *Admissions: Impossible*, BRIDGE MAG., 1983, at 7; see Amy Qin, *Applying to College, and Trying to Appear ‘Less Asian’*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html> (college applicants continue to be advised to downplay their Asian American identity, SFFA’s litigation notwithstanding).

34. See generally Denny Chin & Kathy Hirata Chin, “*Kung Flu*”: *A History of Hostility and Violence against Asian Americans*, 90 FORDHAM L. REV. 1889 (2022).

35. See An Act to Execute Certain Treaty Stipulations Relating to Chinese, 22 Stat. 58, ch. 126 (1882). Exclusion was repealed in 1943, 57 Stat. 600, ch. 344, but large-scale legal immigration from China began only after the enactment of the Immigration and Nationality Act of 1952, 66 Stat. 163, ch. 477.

36. See generally JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* (2007).

37. *Id.*; see also Denny Chin & Thomas H. Lee, *The Lost History of Asian Americans and U.S. Civil Rights Litigation: Lessons for Today*, 90 FORDHAM L. REV. 1887 (2022).

38. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879).

39. See, e.g., *Roldan v. L.A. Cnty.*, 129 Cal. App. 267 (App. Ct. 1933); see also *Gong Lum v. Rice*, 275 U.S. 78 (1927).

40. See Executive Order 9066: Resulting in Japanese-American Incarceration, National Archives, <https://www.archives.gov/milestone-documents/executive-order-9066> (last visited Sept. 24, 2023).

it found internment constitutional.⁴¹ Two years later, a new wave of violence against Asian Americans began when President Trump and officials in his administration repeatedly associated the COVID-19 virus with China and Chinese individuals.⁴²

Against the backdrop of these implicit and explicit forms of discrimination, numerous studies have examined the treatment of Asians in the media,⁴³ medical institutions,⁴⁴ corporate workplaces,⁴⁵ and, as discussed further in Part Three *infra*, the courts.⁴⁶ Some researchers have utilized the IAT as a measure of implicit bias. For instance, psychologists examining discrimination against Asian job applicants found that the greater a prospective White employer's implicit bias against Asians, as measured by the IAT, the more likely it was the employer would choose a White candidate over an Asian one with similar qualifications.⁴⁷

41. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944)); see also Mina Juhn, "Concededly Loyal": *Mitsuye Endo and the Continuing Significance of Ex Parte Endo*, UCLA ASIAN PAC. AM. L.J. (forthcoming).

42. See Chin & Chin, *supra* note 34, at 1937; Caitlin Ramiro, *After Atlanta: Revisiting the Legal System's Deadly Stereotypes of Asian American Women*, 29 ASIAN AM. L.J. 90, 91–92 (2022).

43. See, e.g., Sean Darling-Hammond et al., *After "The China Virus" Went Viral: Racially Charged Coronavirus Coverage and Trends in Bias Against Asian-Americans*, 47 HEALTH EDUC. & BEHAV. 870 (2020).

44. See, e.g., Ethan E. Bodle et al., *Cancer Screening Practices of Asian American Physicians in New York City*, 10 J. IMMIGRANT & MINORITY HEALTH 239 (2008); Ivy K. Ho & Jason S. Lawrence, *The Role of Social Cognition in Medical Decision Making with Asian American Patients*, 8 J. RACIAL AND ETHNIC HEALTH DISPARITIES 1112 (2021); Hyunsu Oh, *The Association Between Discriminatory Experiences and Self-Reported Health Status Among Asian Americans and Its Subethnic Group Variations*, 9 J. RACIAL AND ETHNIC HEALTH DISPARITIES 1689 (2022).

45. See, e.g., JANE HORAN, *Unconscious Bias Uncovered*, in HOW ASIAN WOMEN LEAD: LESSONS FOR GLOBAL CORPORATIONS 87–99 (2014); Amanda Byrd et al., *From My Perspective/Opinion: Revealing Anti-Asian Sentiment in the Classroom and Workplace*, ASHAWIRE LEADERLIVE (Dec. 3, 2021), <https://leader.pubs.asha.org/doi/10.1044/leader.FMP.26122021.8/full>.

46. See *infra* Part III; see also Mark W. Bennett, *Manifestations of Implicit Bias in the Courts*, in ENHANCING JUSTICE: REDUCING BIAS 63 (Sarah E. Redfield ed., 2017); Sophia H. Hall, *Combating Bias Through Judicial Leadership*, in ENHANCING JUSTICE: REDUCING BIAS 335 (Sarah E. Redfield ed., 2017) (both cited in Brief for the Am. Bar Ass'n as Amicus Curiae in Support of Respondents, SFFA III, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707)).

47. See Leanne S. Son Hing et al., *A Two-Dimensional Model that Employs Explicit and Implicit Attitudes to Characterize Prejudice*, 94 J. PERSONALITY & SOC. PSYCH. 971, 980 (2008).

Implicit biases are more likely to operate in environments where deference to professional judgment is the norm. In schools, teachers and social workers are often called upon to decide whether a student should be evaluated for special services (sometimes called “special needs” or “special education”).⁴⁸ In one study, researchers showed 415 educators “a hypothetical observational behavioral report about a student who was either White or Asian” and could plausibly be diagnosed with a learning disability in reading or math.⁴⁹ The participants were significantly less likely to recommend the Asian student for further evaluation, regardless of the academic subject in which the student struggled.⁵⁰ In a second experiment, the researchers gave 780 other educators the profile of a student who demonstrated traits of excellence in reading or math and asked if they would recommend the student for a gifted education program.⁵¹ This time, the respondents recommended the White and Asian students with equal frequency.⁵² The researchers concluded that “[p]articipants did not see Asian students as more gifted than White students—only less likely to be in need of extra help with a learning disability.”⁵³

Not all the empirical evidence points in this direction, however. Another group of researchers who interviewed a racially diverse sample of individuals in Los Angeles reported that Asian Americans can suffer

48. See Jiaxin Jesse Wang et al., *Do Special Education Recommendations Differ for Asian American and White American Students?*, 24 SOC. PSYCH. ED. 1065 (2021).

49. *Id.* at 1069.

50. *See id.* at 1070–71 (reporting statistical significance of $p = 0.009$).

51. *See id.* at 1072.

52. *See id.* at 1073–74.

53. *Id.* at 1076; see also Anna Chiang et al., *(Mis)Labeled: The Challenge of Academic Capital Formation for Hmong American High School Students in an Urban Setting*, 10 J. SE. ASIAN AM. EDUC. & ADVANCEMENT 1, 10 (2015), <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1118&context=jsaaca> (cited in Brief for 25 Harvard Student and Alumni Orgs. as Amici Curiae Supporting Respondent, SFFA III, 143 S. Ct. 2141 (2023) (No. 20-1199)) [hereinafter Alumni Orgs. Brief]. Of course, the biases experiments such as these have revealed are not limited to Asian Americans. Researchers have found statistically significant correlations between educators’ Black–White implicit biases and inequality in student test scores, even after correcting for variables such as local median income, unemployment, and educational expenditure per pupil. See Mark J. Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER, 566 (Annenberg Inst. Brown Univ., Working Paper, Paper No. 20-205, 2020), <https://www.edworkingpapers.com/sites/default/files/ai20-205.pdf>.

from “positive biases” as much as negative ones.⁵⁴ In a phenomenon the researchers labeled “stereotype promise,” they found that teachers often assume Asian American students “are smart, hard-working, high-achieving, and morally deserving” and that these stereotypes led the teachers both to “boost the grades of academically mediocre Asian American students” and to “place even low-achieving Asian American students on competitive academic tracks,” such as honors and Advanced Placement curricula.⁵⁵ The researchers expressed concern that the biases they identified affected numerous measures on which college admissions officers rely, including grades and recommendation letters.⁵⁶

There is little doubt about the weight recommendations carry in competitive selection processes. Strong recommendations can help candidates secure scarce opportunities, including internships, medical residencies, judicial clerkships, and, most relevant here, admission to highly selective colleges. Yet the drawbacks of relying on recommendation letters have been stressed even by university admissions officers. In 2016, one institution’s director of admissions wrote an op-ed in the *Washington Post* asserting that letters have “virtually nothing to do with the *student’s* performance, and a lot to do with the *teacher’s ability* to turn a phrase.”⁵⁷

Few researchers have explored the extent to which implicit biases affect how people write and read college recommendations, but the findings that are available are telling.⁵⁸ One study, cited in an amicus brief supporting Harvard at the Supreme Court, analyzed a randomized

54. Jennifer Lee, *Asian American Students Face Bias, But It’s Not What You Might Think*, N.Y. TIMES (Nov. 1, 2022), <https://www.nytimes.com/2022/11/01/opinion/affirmative-action-asian-american-bias.html>.

55. *Id.*; see also JENNIFER LEE & MIN ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* (2015); Adeel Hassan, *Confronting Asian-American Stereotypes*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/confronting-asian-american-stereotypes.html>.

56. Lee, *supra* note 54.

57. Jon Boeckenstedt, *Letters of Recommendation: An Unfair Part of College Admissions*, WASH. POST (Mar. 3, 2016, 2:41 PM), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/03/letters-of-recommendation-an-unfair-part-of-college-admissions>.

58. *E.g.*, Chris Houser & Kelly Lemmons, *Implicit Bias in Letters of Recommendation for an Undergraduate Research Internship*, 42 J. FURTHER & HIGHER EDUC. 585 (2017); Lory Hough, *Is It Time to Rethink Recommendation Letters?*, HARV. GRADUATE SCH. EDUCATION: ED. MAG. (Nov. 30, 2022), <https://www.gse.harvard.edu/news/ed/22/11/it-time-rethink-recommendation-letters>.

sample of recommendation letters teacher by teacher and concluded that Asian Americans “receive less positive letters than White students do from *the same teacher*, even conditional on having the same observable characteristics.”⁵⁹ Another team of researchers found “small but significant differences by gender and race” in a set of nearly 5,000 letters submitted to a selective public university.⁶⁰ The researchers examined the types of assessments the letters contained, such as whether they portrayed a candidate as a hard worker, naturally gifted, or highly accomplished.⁶¹ They found correlations of $p < .01$ or greater significance between an applicant’s ethnicity and the use of words denoting ability and achievement.⁶² Specifically, “[r]ecommenders used fewer descriptors of prior accomplishment for male underrepresented candidates.”⁶³ Yet another set of scholars reported similar results from examining a set of recommendation letters for medical residency applicants.⁶⁴

If implicit bias is ubiquitous, if it particularly affects subjective judgments about such matters as academic and professional merit, and if Asian Americans have historically experienced implicit as well as explicit forms of discrimination, it stands to reason that implicit bias against Asian Americans is at work in the admissions processes of highly selective colleges and universities. It is, therefore, worth asking why allegations concerning implicit bias in recommendations from high school teachers and guidance counselors did not play a larger role in SFFA’s lawsuit against Harvard. The next Part describes SFFA’s claims about Harvard’s admissions process and discusses how implicit bias and recommendation letters figured into the litigation.

59. Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as Amici Curiae in Support of Respondent at 25, SFFA III, 143 S. Ct. 2141 (2023) (No. 20-1199) (quoting Brian Heseung Kim, *Applying Data Science Techniques to Promote Equity and Mobility in Education and Public Policy*, 140 (May 2022) (on file with the University of Virginia, <https://doi.org/10.18130/t4h3-x158>)) [hereinafter Brief of 1,241 Social Scientists and Scholars].

60. Patrick Akos & Jennifer Kretchmar, *Gender and Ethnic Bias in Letters of Recommendation: Considerations for School Counselors*, 20 PRO. SCH. COUNSELING J. 102, 102 (2016-2017).

61. *See id.* at 105–06.

62. *See id.* at 106–08.

63. *Id.* at 111; *see id.* at 105 (defining “underrepresented candidates” as “Black or African American, Hispanic or Latino, and Native American or Alaska Native”).

64. *See* John C. Polanco-Santana et al., *Ethnic/Racial Bias in Medical School Performance Evaluation of General Surgery Residency Applicants*, 78 J. SURGICAL EDUC. 1524 (2021).

II. *SFFA v. HARVARD*: RACE AFFECTS RECOMMENDATION LETTERS TO ASIAN AMERICANS' DETRIMENT

Last year, some 57,000 students applied for admission to Harvard College, the university's traditional undergraduate program.⁶⁵ Harvard requires each applicant to submit two recommendations from high school teachers, along with a report prepared by a guidance counselor.⁶⁶ A complete application also includes, among other materials, a personal essay and high school transcript.⁶⁷ Harvard asks an undisclosed percentage of applicants to interview with alumni or, in rare cases, admissions office staff.⁶⁸ These interviewers also write and submit reports.⁶⁹ In total, therefore, Harvard's admissions officers likely review some 180,000 individualized assessments of applicants annually. These letters and reports offer distinctive insight into the values, habits, and interpersonal qualities of members of a highly competitive applicant pool.

A. *SFFA's* Lawsuits and the Lower Courts' Opinions Focus on Intentional Discrimination but Acknowledge Implicit Bias May Affect Admissions Outcomes

In contrast to the Supreme Court's previous cases involving race-conscious admissions,⁷⁰ *SFFA* brought its suit against Harvard on behalf

65. Admissions Statistics of Admissions, HARV. COLL. ADMISSIONS & FIN. AID, <https://college.harvard.edu/admissions/admissions-statistics> (last visited Aug. 12, 2023).

66. Application Requirements of Admissions, HARV. COLL. ADMISSIONS & FIN. AID, <https://college.harvard.edu/admissions/apply/application-requirements> (last visited Sept. 6, 2023).

67. *Id.*

68. What To Expect After You Apply Guide, HARV. COLL. ADMISSIONS & FIN. AID, <https://college.harvard.edu/guides/what-expect-after-you-apply> (last visited Sept. 6, 2023); *see also* *SFFA I*, 397 F. Supp. 3d 126, 137–38 (D. Mass. 2019).

69. *SFFA I*, 397 F. Supp. 3d at 137–38.

70. Except when quoting from other sources, this Article uses the term “race-conscious admissions” rather than “affirmative action” because the latter has wrongly come to be associated with the practice of admitting or hiring less than fully qualified applicants. *See, e.g.*, Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action>.

of Asian American, rather than White, applicants.⁷¹ The case was also the first to go to trial. The thrust of SFFA's complaint was that the university violated Title VI of the Civil Rights Act of 1964 and unconstitutionally considered race in undergraduate admissions.⁷² Four causes of action survived motion practice: that Harvard intentionally discriminated against Asian Americans, engaged in impermissible racial balancing, used race as a mechanical factor, and failed to employ workable race-neutral alternatives.⁷³ Following a bench trial that spanned three weeks and included testimony from some thirty witnesses, including students, the district court published a 130-page opinion and found in Harvard's favor on all of SFFA's claims.⁷⁴ The First Circuit affirmed the district court's ruling in its entirety.⁷⁵ The Supreme Court granted certiorari on January 24, 2022, and heard oral argument on October 31, 2022.⁷⁶ Although the Court consolidated the case with the parallel lawsuit SFFA brought against UNC, it conducted oral argument in the cases separately.⁷⁷ Newly confirmed Justice Ketanji Brown Jackson recused herself from the case against Harvard because,

71. SFFA's lawsuits mark the sixth occasion the U.S. Supreme Court has granted certiorari to decide whether considering race in college admissions is constitutional. In *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Court dismissed the question as moot. The Court splintered in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), with one group of five Justices voting to order the University's medical school to admit the White plaintiff and another group of five Justices holding that the limited consideration of race in admissions is permissible. As described more fully *infra*, only Justice Powell voted with both groups. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court held that student body diversity was a compelling interest, so long as institutions consider applicants' race in a non-mechanical way. In a passage of the Court's opinion in *Grutter* that was discussed extensively in the SFFA oral arguments, the Court opined that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343. The Court reaffirmed *Grutter* in *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013) and *Fisher v. Univ. of Texas*, 579 U.S. 365 (2016). The advocacy organization that represented Abigail Fisher, the plaintiff in the Texas cases, was founded by Edward Blum, who went on to establish SFFA. See Robert Barnes, *How One Man Brought Affirmative Action to the Supreme Court. Again and Again*, WASH. POST (Oct. 24, 2022, 2:00 PM), <https://www.washingtonpost.com/politics/2022/10/24/edward-blum-supreme-court-harvard-unc>.

72. Complaint at 1, SFFA I, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1).

73. SFFA I, 397 F. Supp. 3d at 132.

74. *Id.*

75. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) [hereinafter SFFA II].

76. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

77. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 52 (2022).

as an alumna, she had served on one of the university's advisory boards.⁷⁸ Amici filed nearly 100 briefs across the two cases; many amici were other universities, associations of educators, and state and federal officials.⁷⁹ The Court handed down its decision in the consolidated cases on the penultimate day the Court sat in October Term 2022.⁸⁰

In the trial and appellate courts, SFFA argued that Harvard's admissions process failed to satisfy strict scrutiny, the standard the Supreme Court has used for assessing race-conscious admissions programs.⁸¹ At the time SFFA initiated its lawsuit against Harvard, the governing law reflected the Court's approach in *Grutter v. Bollinger*, where a White plaintiff challenged how the University of Michigan's law school considered race.⁸² The Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."⁸³ The Court also held that Michigan's approach was narrowly tailored because its process provided for "truly individualized consideration" of each applicant, and the law school's admissions officers used race only in "a flexible, nonmechanical way."⁸⁴ In reaching these conclusions, the Court relied heavily on Justice Lewis Powell's opinion in *Regents of Univ. of California v. Bakke*.⁸⁵ There, Justice Powell held up Harvard's admissions process as an ideal and even appended to his opinion a summary of Harvard's procedures.⁸⁶ For this reason, in *Bakke*'s wake many institutions of higher education modeled their admissions processes on Harvard's.⁸⁷

78. *See id.* Asian Americans figured less prominently in SFFA's lawsuit against UNC than its case against Harvard, and for that reason this Article concentrates on the Harvard case. In the UNC litigation, the district court held that the university's consideration of race in undergraduate admissions satisfied strict scrutiny. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (granting certiorari before judgment).

79. Ellena Erskine et al., *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSBLOG (Oct. 29, 2022, 6:44 PM), <https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases>.

80. SFFA III, 143 S. Ct. 2141 (2023); *id.* at 2176 (noting that Justice Jackson took no part in the consideration or decision of the Harvard case).

81. *See, e.g.*, Complaint, *supra* note 72, at 93–100.

82. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

83. *Id.* at 325.

84. *Id.* at 334.

85. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978).

86. *Id.* at 321.

87. *See generally* POSSELT, *supra* note 10.

If implicit biases affect subjective decision-making, as the previous Part argued, it is highly unlikely such biases are absent from college and university admissions. Yet to make out a claim under Title VI, SFFA had to prove that Harvard *intentionally* discriminated against Asian American applicants.⁸⁸ Courts thus far have not recognized implicit bias as a form of intentional discrimination that can form the basis of a Title VI action.⁸⁹ Therefore, it is not surprising that implicit bias did not figure prominently in SFFA's evidence and arguments.

Indeed, the word "bias" appears only four times in SFFA's complaint, which in the main was devoted to explaining why the "tips" (admissions shorthand for preferences) Harvard gives to members of underrepresented racial groups, but not to White or Asian American applicants, violate Title VI.⁹⁰ In keeping with the complaint's theme, three of the four references to bias alleged that the university's admissions officers exhibited more or less conscious bias against Asian Americans.⁹¹ The fourth—the only one that alludes to implicit bias—cited a First Circuit employment discrimination case in which the court held that disparate treatment claims under Title VII "extend[] both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias."⁹² SFFA did not, however, develop this line of argument.

The opinions of the district court and First Circuit mention implicit bias only in passing. In the district court, Judge Burroughs described Harvard's labyrinthine admissions process in detail. She stressed that many applicants have outstanding academic credentials. Among the approximately 35,000 who sought to become members of Harvard's graduating class of 2019, "approximately 2,700 had a perfect verbal SAT score, 3,400 had a perfect math SAT score, and more than 8,000 had perfect GPAs."⁹³ Many applicants' extracurricular, athletic, and

88. 42 U.S.C. § 2000d et seq.

89. Because the Supreme Court has not directly addressed how implicit bias fits into the structure of antidiscrimination law, it is uncertain whether claims about implicit bias would fall under the disparate treatment theory of discrimination, the disparate impact theory, or neither. *See infra* Part III.

90. Complaint, *supra* note 72, at 36, 57, 60, 97.

91. *Id.* at 36, 57, 60.

92. *Id.* at 97 (citing *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999), *cert. denied*, 528 U.S. 1161 (2000)). *See infra* Part III(A).

93. SFFA I, 397 F. Supp. 3d 126, 134 (D. Mass. 2019).

personal achievements were also “exceptional.”⁹⁴ Yet Harvard decided it could offer admission to only some 2,000 applicants, which means its staff members could not avoid difficult questions about what makes any one applicant more qualified than another.⁹⁵

When a Harvard admissions officer first reviews an application, the officer scores it on multiple dimensions.⁹⁶ Using a six-point scale (1 being the highest), the officer assigns ratings for the applicant’s academic, extracurricular, athletic, and personal achievements; in addition, the officer assigns “at least three school support ratings that reflect the strength of each teacher and guidance counselor recommendation.”⁹⁷ The officer sums up the applicant’s file with an overall rating. In assigning the academic, extracurricular, athletic, personal, and overall ratings, officers may take into account an applicant’s letters of recommendation and, if available, the report of a Harvard alum or staff member who interviewed the applicant.⁹⁸ While these ratings are strongly correlated with the likelihood an applicant will be admitted, they are not dispositive. Harvard’s full 40-member admissions committee reviews and votes on the dossier of each applicant an officer recommends for admission.⁹⁹

In her findings of fact and conclusions of law, Judge Burroughs focused on SFFA’s allegation that Harvard manipulated the *personal* rating to disadvantage Asian Americans, but she also discussed racial disparities in applicants’ *school support* ratings.¹⁰⁰ Because on average Asian Americans outperformed White applicants in academics and extracurriculars, Judge Burroughs wrote that one might “expect that those applicants would receive stronger teacher and guidance counselor recommendations.”¹⁰¹ Recommendations bear special import, she continued, because “the substance of them informs perceptions about

94. *Id.* at 134–36.

95. *See also* SFFA III, 143 S. Ct. 2141, 2154 (2023) (“Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity.”).

96. SFFA I, 397 F. Supp. 3d at 140.

97. *Id.*

98. *Id.* at 147, 137 n.14.

99. *Id.* at 136–45; *see also* 143 S. Ct. at 2155.

100. SFFA I, 397 F. Supp. 3d at 162.

101. *Id.*

applicants across numerous dimensions.”¹⁰² Yet the opposite result obtained: On average, Asian Americans received slightly lower school support ratings than Whites.¹⁰³ For the “teacher 1” rating (the admissions officer’s assessment of the first of the applicant’s teacher recommendations), in one data set 31.9% of White applicants received a score of 1 or 2, compared with 31.6% of Asian American applicants. For the “teacher 2” rating, the figures were 33.6% for Whites and 32.3% of Asian Americans. As to the rating for the guidance counselor’s report, 27.4% of Whites and 26.4% of Asian Americans received a 1 or 2.¹⁰⁴ Although these differences are small, they have the potential to produce outsized impacts in a process that typically admits fewer than one in thirty applicants overall.

Judge Burroughs considered “several conceivable explanations for the disparity including actual differences in non-academic strengths, a correlation between the quality of the guidance counselor or teacher recommenders and the racial makeup of high schools, biased teachers and guidance counselors, or biased Harvard admissions officers.”¹⁰⁵ She rejected this last explanation because she found, as a matter of fact, that while admissions officers did on average assign lower personal ratings to Asian American applicants, there was no evidence of conscious bias and Harvard’s process contained internal checks for fairness.¹⁰⁶ Even if there was “a very slight implicit bias,” a possibility about which Judge Burroughs made no finding, “the effect was so slight that it went unnoticed by careful and conscientious observers within the Admissions Office.”¹⁰⁷ For this and other reasons, Judge Burroughs concluded the most likely explanation is that “race-related variance in the school support ratings result from some combination of the other potential causes, *all of which are beyond Harvard’s control*.”¹⁰⁸

The First Circuit agreed with Judge Burroughs that “recommendation letters might correlate with race for reasons unrelated

102. *Id.* at 169.

103. *Id.* at 162.

104. *Id.*

105. *Id.* at 168. See also Harvey Gee, *Redux: Arguing about Asian Americans and Affirmative Action at Harvard After Fisher*, 26 ASIAN AM. L.J. 20, 27 (2019) (highlighting testimony from Harvard’s admissions dean attributing variances to “teachers and guidance counselors who write stronger recommendations for whites than for Asian Americans”).

106. SFFA I, 397 F. Supp. 3d at 168–70, 194–95.

107. *Id.* at 175.

108. *Id.* at 168 (emphasis added); see also *id.* at 170, 194.

to Harvard.”¹⁰⁹ The appellate panel offered several hypotheses to explain the correlation.¹¹⁰ For instance, applicants from racially privileged backgrounds “likely have better access to . . . teachers and guidance counselors with more time to write strong, individualized recommendations.”¹¹¹ Those who work part-time and, as a result, participate in fewer school activities might garner weaker recommendations. Whatever the reason, the panel found, using race-correlated factors as part of a holistic admissions process does not render Harvard liable for intentional discrimination.¹¹² Nor does the correlation between race and the strength of recommendation letters justify the conclusion “that teachers and guidance counselors are racially biased.”¹¹³

Of course, there are other ways, unrelated to recommendation letters, in which implicit bias might affect the admissions decisions of an institution such as Harvard. For applicants who interview with a volunteer alum or admissions officer, implicit bias might shape how an interviewer perceives an applicant. And implicit bias might come into play in the final stage of the process, where admissions committee members decide which candidates will fill the last seats in the class.

B. Some Supreme Court Amici Address Implicit Bias

As in the trial and appellate courts, few references to implicit bias appeared in the parties’ briefs and oral arguments at the U.S. Supreme Court. There, SFFA made two arguments. First, SFFA contended that any consideration of race in admissions offends the Equal Protection Clause of the Fourteenth Amendment; therefore, the cases in which the Court permitted institutions to consider race as one element of a holistic process were “grievously wrong” and must be overturned.¹¹⁴ Second, SFFA reprised its argument below: even under existing law, Harvard impermissibly discriminated against Asian Americans and failed to

109. SFFA II, 980 F.3d 157, 201 (1st Cir. 2020).

110. *See id.*

111. *Id.*

112. *See id.* at 202–04.

113. *Id.* at 201 n.41.

114. Brief for Petitioner at 49–50, SFFA III, 143 S. Ct. 2141 (2023) (No. 20-1199 & 21-707) [hereinafter Pet. Br.].

employ race-neutral alternatives.¹¹⁵ Harvard responded by defending the limited consideration of race as a means of achieving student body diversity and by emphasizing the lower courts' factual findings that it did not intentionally discriminate against Asian Americans.¹¹⁶

The parties' arguments reflected widely divergent views of the purpose of college admissions. On SFFA's account, the admissions process is a zero-sum game that must be analyzed from the point of view of an individual applicant. If a university admits a set number of students each year, then each time it gives a "tip" or preference to one applicant, it has unavoidably disadvantaged at least one other. If any of the "tips" are on account of race, the university has discriminated. In contrast, Harvard framed the case at a higher level of generality. Because enrolling a diverse student body—racially and otherwise—benefits all students, institutions are justified in considering race as one element of a complex process oriented toward producing a collective rather than an individual good.¹¹⁷ We will see that neither view makes much room for the operation of implicit bias.

As it did below, SFFA concentrated on the personal ratings admissions officers assigned Asian American applicants. Its briefs recapitulated its experts' assessment that "the personal rating is plainly influenced by race" and that, even if the personal rating is excluded, "every regression model—including Harvard's—shows a statistically significant admissions penalty against Asian Americans."¹¹⁸ Moreover, SFFA argued, Harvard did not need to consider race to enroll a diverse student body. If Harvard eliminated "tips" for athletes, "legacies" (the descendants of alumni), candidates on a dean's or director's "interest list" of current and potential donors, and children of faculty and staff (collectively, "ALDCs"), it would be able to admit a greater number of students of color (including both underrepresented minority students and Asian Americans) and achieve greater socioeconomic diversity, while suffering only a modest drop in admitted students' academic credentials.¹¹⁹ SFFA disputed the lower courts' characterization of this scenario as "unworkable," arguing that "changes to [Harvard's] desired

115. *Id.* at 71–83.

116. Brief for Respondent at 21–41, 46–48, SFFA III, 143 S. Ct. 2141 (No. 20-1199) [hereinafter Resp. Br.].

117. *See id.* at 28–30.

118. Pet. Br., *supra* note 114, at 73.

119. *Id.* at 33–34.

racial percentages; dips in its record-breaking endowment; negligible differences in chosen majors, SAT scores, or profile ratings; or ruffled feathers from a few professors whose children were denied admission” constitute insufficient reason for Harvard to consider race.¹²⁰

In arguing that Harvard intentionally discriminated, SFFA stressed not what teachers and guidance counselors wrote about applicants but how Harvard *used* that information. Contrary to the argument that any racial penalty Asian American students suffer is because of “poor recommendations from guidance counselors and teachers,” SFFA emphasized that the school support ratings “are assigned *by Harvard*”¹²¹ and that “the notion that the penalty is coming from the high schools is unproven speculation.”¹²² In addition, because admissions officers consider recommendation letters when assigning the personal rating, SFFA found it probative that Harvard changed its guidelines about the personal rating after litigation began.¹²³ The revised guidelines reminded admissions officers that “characteristics not always synonymous with extroversion are similarly valued”; this was to help officers “not fall prey to implicit bias or racial stereotyping about Asians.”¹²⁴

Only one of SFFA’s amici discussed implicit bias. The National Association of Scholars observed that when the admissions committee must “lop” the last few qualified students from the incoming class, Whites “are apparently the last to go while Asian-Americans are often the first.”¹²⁵ The association attributed this outcome to admissions officers’ “implicit bias” against Asian students as evidenced by the discrepancy between the ratings admissions staff and alumni interviewers assign Asian American applicants.¹²⁶ “It may well be that in deciding who must give up their slots in the name of racial diversity, admissions officers ironically fall back on the subconscious racial stereotypes of Asians as ‘quiet,’ ‘bland,’ ‘flat,’ ‘[un]exciting,’ ‘timid’ ‘textureless math grind[s].’”¹²⁷

120. *Id.* at 82.

121. Pet. Reply Br., *supra* note 3, at 21.

122. *Id.*

123. Pet. Br., *supra* note 114, at 19–20.

124. *Id.*

125. Brief of Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioner at 14, SFFA III, 143 S. Ct. 2141 (2023) (No. 20-1199).

126. *Id.*

127. *Id.*

For its part, Harvard denied that its officers were biased, implicitly or otherwise. It downplayed the significance of the racially correlated differentials in the personal ratings, emphasizing that admissions officers use the numbers only as a “‘preliminary’ ‘starting point’ for the Admissions Committee’s later consideration of the applicant.”¹²⁸ Harvard stressed the district court’s factual finding that admissions officers did not take race into account when assigning personal ratings; it added that, in any case, “any disparity in [the personal] rating is irrelevant if it does not produce a disparity in admissions outcomes.”¹²⁹ Harvard acknowledged the district court had “speculated that implicit bias could have played a modest role in the ‘slight numerical disparity’ in personal ratings” but noted that Judge Burroughs had “rejected that possibility.”¹³⁰ Moreover, Harvard argued the district court was correct in concluding that changing or eliminating preferences for ALDC applicants “‘would require sacrifices on almost every . . . dimension important to Harvard’s admissions process.’”¹³¹

In contrast to SFFA’s amici, many of Harvard’s amici discussed implicit bias. Their briefs fall broadly into three categories.

First, some amici made the empirical claim that the secondary education system is structurally biased against Asian Americans and other students of color. “For many students of color in the United States, there is a negative correlation between race and their opportunity to earn competitive test scores, the highest grades, extracurricular and artistic accolades, and teacher recommendation letters irrespective of family income, ability, or work ethic.”¹³² While some of these disparities are due to shortfalls in funding that some high schools serving populations of color receive, as well as to the cultural bias of some standardized tests, amici called attention to the implicit racial biases of educators.¹³³ They pointed to research showing that, in comparison to White students, teachers are less likely to call on students of color in class, assign them challenging work, or recommend them for college preparatory

128. Resp. Br., *supra* note 116, at 7.

129. *Id.* at 45.

130. *Id.* at 45–46 (quoting SFFA I, 397 F. Supp. 3d 126, 194 (D. Mass. 2019)); *see also* Harvard Tr., *supra* note 1, at 55:7–11, 57:15–21 (“[T]here’s no way. . . [to] model what the guidance counselor letters said, what the teacher letters said, what the essays said, what the interviews’ letters said.”).

131. Harvard Tr., *supra* note 1, at 49:5–8 (cleaned up).

132. Alumni Orgs. Brief, *supra* note 53, at 5.

133. *See id.* at 6–8, 11–15.

coursework; nevertheless, teachers are more likely to penalize students of color for disciplinary infractions.¹³⁴ One brief, signed by more than a thousand social scientists, cited a study (discussed *supra*) that concluded that Asian Americans generally “receive less positive letters than White students,” even from the same teachers.¹³⁵

A second set of Harvard’s amici took this logic a step further, arguing that because recommendations reflect the biases of at least some educators, Harvard is justified in considering race as a countermeasure. The American Federation of Teachers focused primarily on the biases of high school teachers.¹³⁶ Because “[t]eacher expectations of student success are closely tied to that success,” an educator’s assumptions about a student’s ability to perform academically can affect the amount and quality of time the teacher spends with that student, the grades the teacher awards, and the enthusiasm of the recommendations the teacher writes.¹³⁷ “[S]ome consideration of race,” therefore, “is necessary in order to ensure . . . a level playing field.”¹³⁸ Asian Americans Advancing Justice (“AAAJ”) put this argument even more directly: “[D]epriving universities of the ability to consider race only ties their hands from addressing potential implicit bias and taking steps to eradicate it.”¹³⁹ This is particularly the case, AAAJ contended, because the effects of implicit bias cannot be “cured by a judicial dictate that Harvard abandon considerations of race.”¹⁴⁰ A group of legal scholars, led by Professor Harpalani, added that in light of the history of discrimination against Asian Americans and the empirical evidence they are injured by implicit bias in Harvard’s admissions process, Harvard should be allowed to be

134. *See id.* at 8–9; *see also* Brief of Amici Curiae Youth Advocs. and Experts on Educ. Access in Support of Respondents at 13–14, SFFA III, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707); *see also* Brief of the Nat’l Educ. Ass’n and Serv. Emps. Int’l Union as Amici Curiae in Support of Respondents at 12–14, SFFA III, 143 S. Ct. 2141 (Nos. 20–1199 & 21–707).

135. Brief of 1,241 Social Scientists and Scholars, *supra* note 59, at 24–25.

136. Brief of American Federation of Teachers as Amicus Curiae in Support of Respondents, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707).

137. *Id.* at 15–18.

138. *Id.* at 15.

139. Brief of Asian Ams. Advancing Just. and 37 Orgs. as Amici Curiae in Support of Respondents at 27, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707).

140. *Id.* (quoting SFFA I, 397 F. Supp. 3d 126, 202 (D. Mass. 2019)).

more rather than less conscious of applicants' race.¹⁴¹ "A proper remedy would entail a recalibrated [race-conscious admissions process] better tailored to mitigate implicit biases that harm Asian Americans and other students of color."¹⁴²

A third group of amici commented on the risks that implicit racial biases pose for the successful functioning of industries and sectors other than education.¹⁴³ The Association of American Medical Colleges ("AAMC") cited studies showing, for instance, that "white physicians were more likely to assume Black patients had a higher tolerance for pain, and resultingly prescribed them less pain medication."¹⁴⁴ The American Bar Association, likewise, devoted a section of its brief to the argument that "implicit bias and stereotypes taint the administration of justice and public policy," especially at the stages of the judicial process where prosecutors and judges exercise the greatest discretion, such as charging and sentencing decisions.¹⁴⁵ Amici in this group pointed to evidence that spending time in racially diverse environments can mitigate an individual's implicit biases. The AAMC's brief cited research indicating that where healthcare providers work in racially mixed teams, they are less prone to make mistakes because team members can correct colleagues' assumptions that may be rooted in biased or stereotyped thinking.¹⁴⁶ A coalition of universities, led by the Massachusetts Institute of Technology, stressed that "engagement with students from a broad cross-section of races and backgrounds has been

141. See Brief for Legal Scholars Defending Race-Conscious Admissions as Amici Curiae in Support of Respondents at 24–27, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707). For further discussion of Professor Harpalani's arguments, see *infra* Part IV(C).

142. *Id.* at 27; see also Brief of 1,241 Social Scientists and Scholars, *supra* note 59, at 20–21.

143. This strategy resembles one that persuaded the Supreme Court to uphold the race-conscious admissions program at issue in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Justice O'Connor's opinion for the Court drew extensively on amicus briefs submitted by military and corporate leaders who argued that racially diverse leadership is "essential" to national security and economic growth. See *id.* at 330–31. At oral argument in the Harvard case, the Solicitor General sounded similar themes. Harv. Tr., *supra* note 1, at 95:14–96:11; *id.* at 95:24–96:3 ("because college is the training ground for America's future leaders, the negative consequences [of overruling *Grutter*] would have reverberations through just about every important institution in America").

144. Brief for Amici Curiae Ass'n of Am. Med. Colls. et al. in Support of Respondents at 14, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707); see also *id.* at 4 n.2.

145. Brief for the Am. Bar Ass'n as Amicus Curiae in Support of Respondents, *supra* note 46, at 8–13 (cleaned up).

146. Brief for Amici Curiae Ass'n of Am. Med. Colls. et al. in Support of Respondents, *supra* note 144, at 15–16.

shown to reduce implicit bias and challenge racial categorizations in a social setting.”¹⁴⁷ An amicus brief filed in support of neither party, however, cautioned the Court against accepting universities’ assertions about the educational benefits of diversity without requiring them to make any empirical showings.¹⁴⁸

C. The Court Is Silent on Implicit Bias

On June 29, 2023, the second-to-last day the Supreme Court sat in October Term 2022, the Court handed down its decision in *Students for Fair Admissions*.¹⁴⁹ A six-justice majority held that Harvard’s and UNC’s race-conscious admissions programs violated the Equal Protection Clause.¹⁵⁰ According to the majority, the programs flunked strict scrutiny because the universities’ interests in student body diversity were too amorphous to be subject to judicial review, the programs and racial categories they employed were not narrowly tailored, the programs used race as a “negative” and a stereotype, and the programs lacked a “logical end point.”¹⁵¹ Chief Justice Roberts’ opinion for the Court pronounced that “[e]liminating racial discrimination means eliminating all of it,”¹⁵² and although the Court did not expressly hold that race-conscious admissions programs are *per se* unconstitutional, it is difficult to imagine a race-conscious admissions program that would satisfy *Students for Fair Admissions*.¹⁵³

147. Brief for Mass. Inst. of Tech., Stanford Univ., Int’l Bus. Machs. Corp., and Aeris Commc’ns, Inc. as Amici Curiae in Support of Respondents at 13, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707).

148. Brief for Ann M. Killenbeck and Mark R. Killenbeck as Amici Curiae in Support of Neither Party at 8–9, SFFA III, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707); *See also* Ann Mallatt Killenbeck, *Ferguson, Fisher, and the Future: Diversity and Inclusion as a Remedy for Implicit Racial Bias*, 42 J. COLL. & U. L. 59 (2016).

149. SFFA III, 143 S. Ct. 2141.

150. *Id.*

151. SFFA III, 143 S. Ct. at 2175.

152. *Id.* at 2161.

153. *See id.* at 2245 (Sotomayor, J., dissenting) (“In reaching this conclusion, the Court claims those supposed issues with respondents’ programs render the programs insufficiently narrow under the strict scrutiny framework that the Court’s precedents command. In reality, however, the Court today cuts through the kudzu and overrules its higher-education precedents following *Bakke*.” (citation and internal quotation marks omitted)).

It is unsurprising that the majority opinion does not say much, if anything, about implicit bias. Had the majority decided the Harvard case more narrowly than it did, holding (for instance) that race-neutral components of Harvard College's admissions program disadvantaged some students of color, the Court's opinion might well have focused on the personal ratings Harvard assigns Asian American applicants in comparison to others.¹⁵⁴ But the Court's opinion sweeps more broadly, homing in on the universities' express consideration of race. In contrast, the only references to implicit biases of the kind this Article has been considering appeared in the opinions signed by dissenting justices. Justice Sotomayor, for instance, cited research suggesting that exposure to diverse communities produces benefits including "richer and deeper learning, reduced bias, and more creative problem solving."¹⁵⁵ She also noted that the lower courts had rejected SFFA's claim that "Harvard discriminates against Asian American applicants vis-à-vis White applicants through the use of the personal rating."¹⁵⁶ Instead, although "[t]here is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society," Harvard's consideration of race "benefit[s] all students, including racial minorities. That includes the Asian American community."¹⁵⁷

III. IMPLICIT BIAS AGAINST ASIAN AMERICANS, WHILE PERVASIVE, IS RARELY LEGALLY ACTIONABLE

SFFA's successful lawsuit against Harvard represents the culmination of a trend toward the greater prominence of Asian Americans in debates about race-conscious admissions. At the same time, the litigation has made more visible the differences of opinion on the subject within Asian American communities.¹⁵⁸ Some commentators

154. See Evan Goldstein & Len Gutkin, *Did Colleges Discriminate Against Asians? The Court Didn't Say*, CHRON. HIGHER EDUC. (July 12, 2023), <https://www.chronicle.com/article/did-colleges-discriminate-against-asians-the-court-didnt-say>.

155. SFFA III, 143 S. Ct. at 2248 n.33 (Sotomayor, J., dissenting); see also *id.* at 2262.

156. *Id.* at 2257 (Sotomayor, J., dissenting).

157. *Id.* at 2258 (Sotomayor, J., dissenting).

158. See Erskine et al., *supra* note 79 (noting that of the almost 100 amicus briefs filed in the *Harvard* and *UNC* cases, six were on behalf of Asian American organizations or individuals).

accused SFFA of “racial mascotting,” that is, presenting “hard-working, smart” Asian Americans as victims of programs designed to benefit Black and Latinx students.¹⁵⁹ Others have urged that it is necessary to distinguish between what SFFA’s suit was fundamentally challenging, *i.e.*, Harvard’s and other universities’ use of “tips” for members of underrepresented racial groups, and what the trial revealed, *i.e.*, whether Harvard’s methods penalized Asian Americans or any other group.¹⁶⁰ Still other commentators have alleged that Harvard’s process constitutes “negative action” against Asian Americans.¹⁶¹ The term, which Professor Kang coined, denotes “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison.”¹⁶² On this logic, if implicit racial bias affects college recommendations, then Harvard’s reliance on them may be a source of negative action. Because weaker recommendations depress all of an applicant’s ratings and because Asian Americans’ letters are generally less individualized and

Three (on behalf of the Liberty Justice Center and Momoko Takahashi, the Louis D. Brandeis Center for Human Rights under Law and the Silicon Valley Chinese Association Foundation, and the Asian American Coalition for Education and the Asian American Legal Foundation) supported SFFA; the other three (on behalf of the National Asian Pacific American Bar Association et al. and the National LGBTQ+ Bar Association, Asian Americans Advancing Justice et al., and the Asian American Legal Defense and Education Fund et al.) supported the universities).

159. Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 *ASIAN AM. L.J.* 57, 69–70 (2007); *see also* Leelila Strogov, *Not a Win for Asian American Applicants*, *INSIDE HIGHER ED* (July 5, 2023), <https://www.insidehighered.com/opinion/views/2023/07/05/scotus-decision-not-win-asian-americans-opinion>.

160. Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, is on Trial in the Harvard Case*, *NEW YORKER* (Oct. 11, 2018), <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case>.

161. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 *HARV. C.R.-C.L. L. REV.* 1, 3 (1996).

162. *Id.* *But see* Chan Hee Chu, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 *ASIAN AM. L.J.* 99, 102 (2016) (critiquing the affirmative/negative action distinction because both rely on a false premise, which Chu dubs the “Proportionate Ideal”). While the Supreme Court was considering SFFA’s suit against Harvard, transcripts of sidebars the trial court conducted were unsealed, revealing that a federal official had in the late 1980s sent Harvard’s long-serving dean of admissions “a very poor, ill-advised, and in bad taste joke,” in the form of “a mock memo from the Harvard admissions office” that “referenced certain Asian stereotypes” and contained “anti-Asian remarks.” *See* Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case*, *NEW YORKER* (Mar. 23, 2023), <https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case>.

effusive than those written on behalf of White applicants, it is plausible that Harvard has denied admission to Asian Americans whom it would have accepted had letters not played as substantial a role.

The balance of this Article explores what, if anything, can be done to counter the pernicious effect of implicit bias on college recommendations. From a legal perspective, the answer may be: not much.

A. Courts Generally Struggle to Redress Implicit Bias

Broadly speaking, the Anglo-American legal tradition has yet to acknowledge or correct for the effects of implicit bias.¹⁶³ For instance, the Model Penal Code expressly declines to “impose criminal liability for unconscious intentions.”¹⁶⁴ Most criminal courts have hesitated to entertain the topic, whether in substantive or procedural contexts. The Tenth Circuit has held that a trial judge did not abuse his discretion when he refused to show a jury venire a video about unconscious bias.¹⁶⁵ The court found it telling that the defendant could “cite[] no authority requiring a trial court to educate prospective jurors about implicit biases.”¹⁶⁶ Likewise, the Second and Eighth Circuits, along with numerous trial courts, have rejected the argument that it violates the Sixth Amendment not to question prospective jurors about implicit racial bias during voir dire.¹⁶⁷ Going one step further, the Second Circuit upheld a criminal conviction where the government struck a prospective juror for cause because he expressed concern that his fellow jurors may have been implicitly biased against the defendant.¹⁶⁸

A few courts, however, have begun to acknowledge that implicit biases can affect the outcomes of legal proceedings, especially for

163. See generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Harpalani, *supra* note 31, at 264 n.162.

164. Gideon Yaffe, *The Voluntary Act Requirement*, in ROUTLEDGE COMPANION TO PHIL. LAW 174, 200 (Marmor Andrei ed., 2012).

165. *United States v. Mercado-Gracia*, 989 F.3d 829, 841 (10th Cir. 2021).

166. *Id.*

167. *United States v. Diaz*, 854 Fed. App'x. 386, 388 (2d Cir. 2021) (summary order); *United States v. Young*, 6 F.4th 804, 808 (8th Cir. 2021); *United States v. Joseph*, 2022 U.S. Dist. LEXIS 20569, at *21 (S.D.N.Y. Feb. 4, 2022) (holding that it is sufficient for the court to have “questioned potential jurors about the issue of prejudice” and “cautioned jurors about the potential risk of unconscious or implicit biases in deliberations”).

168. *United States v. Swinton*, 797 F. App'x. 589, 597 (2d Cir. 2019) (summary order).

criminal defendants of color.¹⁶⁹ The eleven-minute video the Tenth Circuit found superfluous was developed by judges and attorneys in the Western District of Washington.¹⁷⁰ Since 2017, all the district’s prospective jurors—civil as well as criminal—watch the video and hear instructions about implicit bias before being sworn in.¹⁷¹ At the state level, the Washington Supreme Court requires that courts reject peremptory challenges in criminal cases when “an objective observer could view race or ethnicity as a factor,” and it mandates that an evidentiary hearing be held when there is prima facie evidence that implicit bias in jury deliberations contributed to a conviction.¹⁷² The New Jersey Supreme Court has held that implicit bias taints a peremptory challenge to the same extent as conscious bias.¹⁷³ And some federal judges have begun to “address the elephant in the room”: whether in at least a few cases “a not-insignificant portion of the government’s case [may rest], quite impermissibly, on racial stereotypes.”¹⁷⁴

Implicit bias inhabits an especially awkward place in the structure of antidiscrimination law. Although the EEOC has long defined intentional

169. *See generally* Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859 (2015) (explaining the complex problems attending bias in jury selection).

170. Theresa Doyle, *U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias*, BAR BULLETIN (2017), <https://www.courts.wa.gov/content/publicupload/eclips/2017%2004%2006%20US%20District%20Court%20Produces%20Video%20Drafts%20Jury%20Instructions%20on%20Implicit%20Bias.pdf> (demonstrating that a few federal judges have begun to discuss implicit bias in conversations with prospective jurors); *see also* Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN’S L.J. 79, 95–96 (2020).

171. *See id.*

172. WASH. REV. CODE ANN. § GR 37 (West 2018); *State v. Berhe*, 444 P.3d 1172, 1181 (Wash. 2019) (demonstrating that other state high courts have also treated implicit bias in recent decisions); *see, e.g.*, *State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017) (“We strongly encourage district courts to be proactive about addressing implicit bias. . . .”); *id.* at 830; *State v. Holmes*, 221 A.3d 407, 436–37 (Conn. 2019) (referring to a task force the question of whether to develop a rule like Washington’s); *State v. Fleming*, 239 A.3d 648, 656 (Me. 2020); *State v. Crump*, 851 S.E.2d 904, 913–14 (N.C. 2020); *People v. Birge*, 182 N.E.3d 608, 620 (Ill. 2021) (Neville, J., dissenting).

173. *State v. Andujar*, 254 A.3d 606, 623 (N.J. 2021).

174. *United States v. \$16,037 U.S. Currency*, 2022 U.S. Dist. LEXIS 154225, at *20 (W.D.N.Y. Aug. 26, 2022); *see also United States v. Santillan*, 902 F.3d 49, 65 (2d Cir. 2018) (Pooler, J., dissenting).

discrimination to include “unconscious stereotypes,”¹⁷⁵ courts have been reluctant to follow suit.¹⁷⁶ Several courts have refused to permit expert testimony about implicit bias, excluding as an expert witness even one of the founders of Project Implicit.¹⁷⁷ Because implicit bias is by definition unintentional, no court has expressly held that implicit bias can establish a claim of disparate treatment.¹⁷⁸ Some courts have tiptoed close to this conclusion, however. The First Circuit, in a case SFFA cited in its complaint against Harvard, suggested that stereotyping prohibited under Title VII could encompass “not only simple beliefs . . . but also a host of more subtle cognitive phenomena which can skew perceptions and judgments.”¹⁷⁹ But the court relied on other evidence, such as quantitative performance reviews, when it reversed the grant of summary judgment against the plaintiff.¹⁸⁰ In another case, a federal district court in Wisconsin devoted a lengthy section of an opinion to the ways in which a supervisor had “behaved in a manner suggesting the presence of implicit bias,” even though the court had already concluded the employer had failed to rebut the employee’s *prima facie*

175. U.S. EQUAL EMP. OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS ABOUT RACE AND COLOR DISCRIMINATION IN EMPLOYMENT (2006), <https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment>.

176. *E.g.*, *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1244–45 (9th Cir. 2021) (declining to decide “whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI,” despite substantial briefing from amici on both sides of the question); *id.* at 1245 n.6; *Martin v. F.E. Moran, Inc.*, 2018 U.S. Dist. LEXIS 54179, at *91 (N.D. Ill. Mar. 30, 2018) (finding that, without more, “susceptibility to influence of implicit bias does not prove actionable discrimination”). *But see* *Chong Yim v. City of Seattle*, 451 P.3d 675, 691–92 (Wash. 2019) (finding that because mitigating implicit bias in housing is a legitimate government interest, a statute mandating landlords take measures to correct for their biases satisfies rational basis review).

177. *See* *Karlo v. Pittsburgh Glass Works, LLC*, 2015 U.S. Dist. LEXIS 90429, at *3–9, *30 (W.D. Pa. July 13, 2015); *Jones v. Nat’l Council of Young Men’s Christian Ass’ns of U.S.*, 34 F.Supp. 896, 898–901 (N.D. Ill. 2014); *see also* *Haydar v. Amazon Corp., LLC*, 2019 U.S. Dist. LEXIS 176148, at *22–23 (E.D. Mich. Oct. 10, 2019) (refusing to permit testimony from different implicit bias expert). *But see* *Nikolova v. Univ. of Tex. at Austin*, 2022 U.S. Dist. LEXIS 43679, at *2–3 (W.D. Tex. Mar. 11, 2022) (allowing expert testimony on implicit bias in case of professor denied tenure).

178. *See, e.g.*, *Wilkins v. Brandman Univ.*, 2019 U.S. Dist. LEXIS 130475, at *56 (D. Ore. Aug. 5, 2019) (holding that implicit bias cannot establish a hostile work environment claim); *Naumovski v. Norris*, 934 F.3d 200, 216 n.50 (2d Cir. 2019) (“A claim of discrimination based on unconscious bias is, by its nature, not ‘purposeful or intentional. . . .’”).

179. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999); *see also* *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 4 (1st Cir. 2000).

180. *See id.* at 48–49, 61–65.

case of disparate treatment.¹⁸¹ The court did not, however, identify its discussion of implicit bias as an alternative holding.¹⁸² Even if courts were inclined to permit plaintiffs to base disparate treatment claims on allegations of implicit bias, they would be difficult to prove.¹⁸³ No test for implicit bias is universally recognized as valid, and much of the circumstantial evidence of unconscious bias a plaintiff might introduce could just as well support the position that a defendant consciously intended to discriminate.

The disparate impact theory of discrimination might appear more promising because implicit bias can powerfully explain why a facially neutral process can generate race-correlated results. But disparate impact claims are unavailable to private parties under some statutes, including Title VI.¹⁸⁴ Even where a statute authorizes private plaintiffs to bring disparate impact claims, as in the case of Title VII, the Age Discrimination in Employment Act, and the Fair Housing Act,¹⁸⁵ the Supreme Court has held that groups of plaintiffs may band together as a class only where they can demonstrate they have “suffered the same injury,” meaning that “[t]heir claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.”¹⁸⁶ Where plaintiffs believe implicit bias permeates an institution, such as a large university’s admissions office, it is unlikely their claims will share this degree of commonality.

181. *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 775–78 (E.D. Wis. 2010).

182. *See id.*

183. *See generally* Daniel Masakayan, *The Unconscious Discrimination Paradox: How Expanding Title VII to Incorporate Implicit Bias Cannot Solve the Issues Posed by Unconscious Discrimination*, 25 GEO. MASON L. REV. 246, 276 (2017).

184. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

185. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 425–26 (1971); *Smith v. City of Jackson*, 544 U.S. 228, 230 (2005) (Age Discrimination in Employment Act); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 524 (2015) (Fair Housing Act).

186. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011); *see also* *Local 3621, EMS Officers Union v. City of New York*, 2022 U.S. Dist. LEXIS 212218, at *30 (S.D.N.Y. 2022) (plaintiffs failed to show that practices infected by implicit bias “have a discriminatory impact on a classwide basis. . .”).

B. College Applicants Have Few, If Any, Viable Claims

For these reasons, it is difficult to imagine a legal theory under which applicants could seek redress against colleges and universities for implicit bias in the admissions process. Could students instead sue the teachers and counselors who wrote their recommendation letters, or the schools and districts that employ the letter-writers?

Such lawsuits would confront numerous obstacles, whether the plaintiffs were to challenge particular letters or school policies writ large.¹⁸⁷ Plaintiffs would likely complain of violations of Title VI and the Equal Protection Clause, which the Supreme Court has held are substantively co-extensive.¹⁸⁸ The Court has read into Title VI a private cause of action for disparate treatment claims,¹⁸⁹ and individuals can also sue under 42 U.S.C. § 1983 against persons acting “under color of” the state.¹⁹⁰

To make out a claim under Title VI, plaintiffs must show intentional discrimination.¹⁹¹ But because the defendant in a Title VI action must be an institution,¹⁹² it is insufficient for a plaintiff to demonstrate that a school employee wrote even an overtly racist letter.¹⁹³ Absent being able to show that an institution purposefully discriminated or ratified discriminatory conduct, a plaintiff must prove that it showed “deliberate indifference” to the deprivation of rights.¹⁹⁴ This is not a low bar. In the harassment context, plaintiffs must establish that an institution

187. The following analysis considers only schools that receive public funding. The fact that government regulates a private institution is insufficient to convert its decisions into state action. *See, e.g.,* *Maas v. Corp. of Gonzaga Univ.*, 618 P.2d 106, 109 (Wash. Ct. App. 1980)

188. *See, e.g.,* *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). At oral argument in the SFFA cases, the justices showed little appetite for distinguishing the Fourteenth Amendment and Title VI when it comes to the permissible use of race in admissions. *See, e.g.,* Transcript of Oral Argument at 54:13–55:18, SFFA III, 143 S. Ct. 2141 (2023) (No. 21-707) [hereinafter UNC Tr.]. Whether plaintiffs could bring claims under state and local antidiscrimination laws, which are often more robust than federal statutes, is beyond the scope of this Article.

189. *Guardians Ass’n v. Civ. Service Comm’n of N.Y.C.*, 463 U.S. 582, 593–95 (1983).

190. Teachers and other school personnel clearly act “under color of” law. *E.g.,* *Walker & Serrano ex rel. Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003). Circuits are split as to whether Congress, in enacting Title VI, intended to preclude § 1983 suits. *See* *Alexander v. Underhill*, 416 F. Supp. 2d 999, 1005–06 (D. Nev. 2006) (collecting cases).

191. *See, e.g.,* *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001).

192. *TC & KC v. Valley Cent. Sch. Dist. Bd. of Educ.*, 777 F. Supp. 2d 577, 593 (S.D.N.Y. 2011) (“The proper defendant . . . is the entity that receives federal funding”).

193. *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *see also* *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665–66 (2d Cir. 2012) (Chin, J.).

194. *Id.*

exercised “substantial control” over the harasser and the context in which the harassment occurred; that it was “severe and discriminatory”; that the institution had “actual knowledge”; and that its action or inaction “at a minimum, cause[d] students to undergo harassment or ma[d]e them liable to or vulnerable to it.”¹⁹⁵ Analogous claims about racial bias in college recommendations would likely fail because institutions generally do not control what teachers and counselors write in recommendation letters, nor do they tend to know the content of those letters before they are sent.¹⁹⁶

The standard under § 1983 is also demanding. The Supreme Court has held that § 1983 equal protection claims lie only when a state actor has engaged in purposeful discrimination. Yet because municipalities are not liable under the theory of *respondeat superior*, plaintiffs must attribute discriminatory intent *directly* to a city or school board.¹⁹⁷ To show a policy or custom of discrimination, plaintiffs must establish “a clear and persistent pattern,” “notice or constructive notice,” and “tacit approval” or “deliberate indifference” that “can be said to amount to an official policy of action.”¹⁹⁸ Plaintiffs must also show a causal link with the deprivation of their rights.¹⁹⁹ For many of the reasons just discussed, plaintiffs complaining about implicit bias in college recommendations would find this standard nearly insurmountable. Even if a court were to break new ground and accept that implicitly biased letters constitute intentional discrimination, plaintiffs would have to show that a school was or should have been aware of letter-writers’ bias and either sanctioned it or purposefully chose not to act.

With civil rights causes of action unavailing, plaintiffs might consider bringing tort suits. The tort of misrepresentation, however, lies

195. *Zeno*, 702 F.3d at 666 (internal quotation marks omitted).

196. Case law interpreting Title IX of the Civil Rights Act, 20 U.S.C. § 1681, establishes a similarly high standard. A school is generally not liable to a private plaintiff for damages arising from a violation of the statute unless it has noticed the conduct was actionable. The sole exception is if the school (again, the institution rather than an employee) “engages in intentional conduct that violates the clear terms of the statute.” *Davis*, 526 U.S. at 642 (discussing exception to the rule of *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

197. *Monell v. Dep’t of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 691 (1978). Absent waiver, states and state education agencies enjoy sovereign immunity. Administrators and school board members may be shielded by qualified immunity.

198. *Doe v. Claiborne Cnty.*, 103 F.3d 495, 508 (6th Cir. 1996).

199. *Id.*

in highly limited circumstances—almost all of which require plaintiffs to show that they, not a third party, relied on a defendant’s representation.²⁰⁰ Because assessments of academic and professional performance are generally subjective, courts have hesitated to find tortious conduct in the writing of recommendations, absent a writer having deliberately affirmed a falsehood.²⁰¹ Likewise, courts have rejected theories of “educational malpractice” in contexts where an educator’s duty is not clearly defined.²⁰² So even if a student could demonstrate that a recommendation reflected implicit bias, it is unlikely a court would impose liability for misrepresentation. Claims for defamation would also likely founder because it would be difficult for a plaintiff to prove that an implicitly biased statement was factually false, rather than an expression of opinion. Even where a student could prove all the elements of the tort, most jurisdictions offer a qualified privilege for good-faith statements made to a third party who shares with the defendant a “common interest” in the substance of the communication.²⁰³ It would be hard to dispute that an institution of higher education lacks such an interest in an educator’s assessment of an applicant’s qualifications, especially where a highly selective institution is choosing among many excellent candidates.²⁰⁴

Barriers like these—plus the expense, time, and social cost of litigation—explain why there are only a handful of lawsuits involving college and graduate school recommendations. In no reported case has a student or family succeeded. In 2010, St. Louis parents sued their daughter’s guidance counselor, principal, and school district in tort for emotional, psychological, and financial harm when the counselor’s adverse recommendation led Colorado State University to withdraw

200. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 5 (AM. L. INST. 2020). College recommendations are unlikely to satisfy the Restatement’s narrow exception for misrepresentations that pose an unreasonable risk of physical harm. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997).

201. E.g., *Richland Sch. Dist. v. Mabton Sch. Dist.*, 45 P.3d 580 (Wash. Ct. App. 2002).

202. E.g., *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121–22 (Iowa 2001).

203. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (N.Y. 1992). The qualified privilege has a lengthy pedigree. See, e.g., *Berry v. N.Y.C. Ins. Co.*, 98 So. 290, 292 (Ala. 1923).

204. Nevertheless, lawyers at one public research university have cautioned faculty and staff members about the prospect of litigation arising from recommendation letters. See *Legal Implications of Letters of Recommendation*, OFF. OF COUNS., UNIV. OF ALA. IN HUNTSVILLE, https://www.uah.edu/images/administrative/legal/pdf_files/legal_implications_of_lltrs_of_rec.pdf (last visited Nov. 26, 2022).

admission and an athletic scholarship.²⁰⁵ The university relented, and the parents dropped their suit.²⁰⁶ In 2014, a San Diego father filed an administrative claim for \$250,000 when his son's counselor penned an "extremely negative and imbalanced" recommendation.²⁰⁷ Either the claim settled or the father chose not to pursue it further.²⁰⁸ In 2016, a Nigerian family living in Washington, D.C., sued the exclusive Sidwell Friends School for discriminatory treatment of their daughter.²⁰⁹ They argued, *inter alia*, that because a counselor's recommendation mentioned that the student and her family were not U.S. citizens, colleges were less willing to consider her under their race-conscious admissions programs.²¹⁰ The trial court dismissed the suit, and the D.C. Court of Appeals affirmed.²¹¹

More recently, a former student government president sued her undergraduate institution, Western Kentucky University, for sex discrimination and retaliation.²¹² Loandria Dahmer alleged that the university failed to respond to "various expletive-laden, sex-based threats of violence from peers," on the one hand, as well as inappropriate behavior on the part of the student government's faculty advisor, on the other hand.²¹³ She also claimed that after she reported the harassment, the university's president refused to write her a letter for the prestigious Rhodes Scholarship; the dean of the College of Arts and Letters wrote her recommendation instead.²¹⁴ The district court held that the president's refusal did not constitute a sufficiently adverse action to

205. McCoy v. Rockwood Sch. Dist., No. 10SL-CC02618 (Cir. Ct., St. Louis Cnty., June 30, 2010).

206. Jessica Bock, *Rockwood Swimmer's Parents Sue District over Scholarship Loss*, ST. LOUIS POST-DISPATCH (Jul. 9, 2010), https://www.stltoday.com/news/local/education/rockwood-swimmers-parents-sue-district-over-scholarship-loss/article_12268258-e8af-5eb3-b4ea-36657e15a640.html.

207. Maureen Magee, *Family Wants \$250K for Bad College Letter*, SAN DIEGO UNION-TRIB. (Aug. 14, 2014, 5:26 PM), <https://www.sandiegouniontribune.com/news/education/sdut-claim-accuses-scpa-counselor-tainting-college-app-2014aug14-htmlstory.html>.

208. State and federal courts with jurisdiction in San Diego have no record of a related lawsuit.

209. Adetu v. Sidwell Friends Sch., 2019 D.C. APP LEXIS 36 (D.C. Jan. 23, 2019), *cert. denied*, 139 S. Ct. 2724 (2019).

210. *Id.*

211. *Id.*

212. Dahmer v. W. Ky. Univ., 2021 WL 816914, at *9 (W.D. Ky. Mar. 3, 2021).

213. Dahmer v. W. Ky. Univ., 2022 WL 19396342, at *2 (6th Cir. Oct. 13, 2022).

214. *Id.* at *13.

support Dahmer's claim of retaliation.²¹⁵ "Failing to receive a letter of recommendation signed by the President would not dissuade a reasonable person from engaging in protected activity."²¹⁶ The Sixth Circuit affirmed this part of the district court's decision but remanded the case for trial on Dahmer's harassment claims.²¹⁷

The outcomes of these cases, combined with the fact that few have sued secondary schools over college recommendations, suggest that no plausible legal remedy exists for harms from implicit bias in these letters. Solutions, therefore, lie outside the courthouse.

IV. UNIVERSITIES COULD MITIGATE THE INFLUENCE OF IMPLICIT BIAS

More in the past few years than ever before, U.S. colleges and universities have publicly committed to combat systemic racism.²¹⁸ Prior to the Supreme Court's decision in *Students for Fair Admissions*, many selective institutions pledged to recruit and enroll student bodies that reflect the country's racial diversity.²¹⁹ Admissions offices, including Harvard's, have cautioned staff members against stereotypes that may affect how they perceive applicants, and Judge Burroughs found that this was just one of a number of steps Harvard took to mitigate the influence of bias.²²⁰ Institutions and applicants share an interest in ensuring that admissions processes rely as little as possible on measures that reproduce racial inequities, and to that end, institutions should consider at least three policy proposals.

215. *Dahmer*, 2021 WL 816914, at *9.

216. *Id.*

217. *Dahmer*, 2022 WL 19396342, at *16.

218. See *What Has Higher Education Promised on Anti-Racism in 2020 and Is It Enough?*, EAB (Nov. 16, 2020), <https://eab.com/research/expert-insight/strategy/higher-education-promise-anti-racism> (noting the emergence of these commitments following the murder of George Floyd at the hands of Minneapolis police in May 2020).

219. Harvard and UNC were both among these institutions. See, e.g., *Advancing Racial Justice*, HARV. FAC. ARTS & SCIS., <https://www.fas.harvard.edu/overview/advancing-racial-justice>; *UNC System Racial Equity Task Force*, UNIV. OF N.C. SYS., <https://www.northcarolina.edu/unc-system-racial-equity-task-force> (last visited Aug. 12, 2023).

220. SFFA I, 397 F. Supp. 3d 126, 139 (D. Mass. 2019).

A. Institutions Could Rely Less on Attributes Correlated with White Racial Identity

First, college and university admissions offices could critically examine whether and how their selection criteria perpetuate racial disparities. The starkest example is the preference many institutions extend to the children of their alums. In 2018, 42% of admissions directors at private U.S. institutions acknowledged they consider so-called “legacy” status.²²¹ A more recent report put the percentage at close to 50%.²²² These preferences are not insignificant: At Harvard, “ALDC” applicants are admitted at a rate several times higher than applicants at large; on average, they comprise some 30% of the entering class.²²³ Because U.S. colleges and universities have historically been oriented toward Whites, legacy preferences are available to a greater proportion of White students compared to students of color.²²⁴ Likewise, the other categories within Harvard’s ALDC umbrella—prowess in Olympic sports, a family’s capacity to make substantial donations, and a family member’s being employed at the university—are also correlated with race. The district court found that these applicants were “disproportionately white.”²²⁵ “8% of [W]hite applicants [were] ALDCs[,] compared . . . [with] 2% of Asian American applicants.”²²⁶

221. *The 2018 Surveys of Admissions Leaders: The Pressure Grows*, INSIDE HIGHER ED, <https://www.insidehighered.com/news/survey/2018-surveys-admissions-leaders-pressure-grows> (last visited Aug. 12, 2023).

222. James Murphy, *The Future of Fair Admissions Issue Brief 2: Legacy Preferences*, EDUC. REFORM NOW 1, 8 (2022), <https://edreformnow.org/wp-content/uploads/2022/10/The-Future-of-Fair-Admissions-Legacy-Preferences.pdf>. To be certain, a small number of highly selective institutions, including Johns Hopkins and MIT, have publicly abolished legacy preferences, but they remain in the minority of their peers. Abigail Johnson Hess, *Six of the Top 10 Universities in the World No Longer Consider Legacy When Evaluating Applicants-Here’s Why*, CNBC:MAKE IT (Mar. 17, 2019, 10:30 AM), <https://www.cnbc.com/2019/03/16/top-universities-that-do-not-consider-legacy-when-admitting-students.html>. Several states bar public universities from considering legacy status. Murphy, *supra* note 222, at 6. Following the *Students for Fair Admissions* decision, this area of the landscape is rapidly evolving.

223. SFFA II, 980 F.3d 157, 171 (1st Cir. 2020).

224. As increasing numbers of Asian Americans and other students of color graduate from selective institutions, the pool of those who stand to benefit from the continued use of legacy preferences will become more racially diverse than it is today.

225. SFFA I, 397 F. Supp. 3d at 138 n.16.

226. *Id.*

Compared to the subtle effects of implicit bias, an institution's preference for applicants with certain race-correlated attributes seems more likely to result in negative action against Asian Americans.²²⁷ Yet courts, including the district and appellate courts in the Harvard and UNC cases, have generally deferred to universities' use of such preferences. When the Department of Education investigated Harvard as early as 1990, for instance, it reported it "found no legal authority to suggest that giving preference to legacies and recruited athletes was legally impermissible."²²⁸ Judge Burroughs, too, deferred to Harvard's prediction that while "[e]liminating tips for ALDC applicants would have the effect of opening spots in Harvard's class that could then be filled through an admissions policy more favorable to non-White students," doing so would "come at considerable costs," making it harder for Harvard to secure contributions, compete athletically, and recruit employees.²²⁹ The district court in the UNC case concluded that ending the university's consideration of legacy status would have only "a de minimis effect" on the racial makeup of the student body.²³⁰

Commentators have offered several explanations for these holdings. Professor Moran suggested that courts have historically been unwilling to hold institutions responsible for components of their admissions processes that favor White applicants because the Supreme Court has implicitly grounded its decisions about race in college admissions in deference to colleges' "unique claims to academic freedom under the First Amendment."²³¹ From *Bakke* through *Grutter*, "racial equality generates all the press while academic freedom quietly powers the jurisprudence."²³² Professor Lee, too, stressed that under the First Amendment, the Court has deferred to "the discretion of the state as educator," hesitating to dictate how colleges and universities, especially

227. See, e.g., Chu, *supra* note 162162, at 116–20.

228. Scott Jaschik, *How Harvard Can Legally Favor Alumni Children and Athletes*, INSIDE HIGHER ED (Aug. 5, 2018), <https://www.insidehighered.com/admissions/article/2018/08/06/education-department-once-investigated-harvards-preferences-alumni>.

229. SFFA I, 397 F. Supp. 3d at 179–80.

230. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 640 (M.D.N.C. 2021).

231. Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2571 (2019).

232. *Id.*

public institutions, should achieve the “fundamental mission [of] the ‘robust exchange of ideas.’”²³³

In the aftermath of *Students for Fair Admissions*, such deference may be coming to an end. At oral argument, justices across the ideological spectrum expressed concern about institutions’ use of ALDC-style preferences. Justice Gorsuch cited several episodes in the Harvard record—*e.g.*, the special consideration the university gave an applicant whose family was willing to donate a major art collection, its desire to admit enough squash players to field a competitive team—and asked SFFA’s counsel to what extent the Court should defer to such interests.²³⁴ SFFA’s lawyer responded: “Not at all.”²³⁵ In his concurring opinion, Justice Gorsuch posited that Harvard and UNC “could obtain significant racial diversity without resorting to race-based admissions practices” by, *inter alia*, “reducing legacy preferences.”²³⁶ In the UNC oral argument, Justice Jackson posed a hypothetical about two students, both of whose families have lived in North Carolina for generations. The first student writes in his application essay that “I will be the fifth generation to graduate from the University of North Carolina . . . I want to honor my family’s legacy by going to this school.” The second student writes, “[M]y family’s been in this area for generations, since before the Civil War, but they were slaves and never had a chance to attend this venerable institution . . . I want to honor my family legacy by going to this school.”²³⁷ Justice Jackson asked whether it would violate the Equal Protection Clause for UNC to give a preference to the first student but withhold a preference from the second.²³⁸ SFFA’s lawyer shied away from the question, noting that “UNC shouldn’t give . . . a legacy benefit if they don’t want to give a legacy benefit. There’s no obligation they do that.”²³⁹ Justice Jackson reprised the hypothetical in her dissent, noting that “UNC considers race as one of many factors in order to best assess the entire unique import of [the two

233. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 *FORDHAM L. REV.* 2301, 2305 & 2310 (2004); accord Moran, *supra* note 231, at 2612–22.

234. Harvard Tr., *supra* note 1, at 23:10–22; see also UNC Tr., *supra* note 188, at 104:21–105:6.

235. Harvard Tr., *supra* note 1, at 23:23.

236. SFFA III, 143 S. Ct. 2141, 2215 (2023) (Gorsuch, J., concurring).

237. UNC Tr., *supra* note 188, at 65:17–25.

238. *Id.* at 66:13–21.

239. *Id.* at 67:3–6.

hypothetical students’] individual lives and inheritances *on an equal basis*.”²⁴⁰

U.S. Solicitor General Elizabeth Prelogar, too, did not hesitate to criticize the universities’ use of ALDC-style preferences. In her opening statement in the Harvard case, she declared:

“I want to be very clear on behalf of the United States that if it could be shown that eliminating those kinds of preferences would actually enable a university to meet [its] diversity goals and to be able to offer the educational benefits of a diverse student body, then, yes, we absolutely think that can function as a race-neutral alternative. And it’s incumbent on universities to consider those kinds of options.”²⁴¹

Although the Solicitor General’s argument was unsuccessful, numerous commentators have opined that, in the wake of *Students for Fair Admissions*, colleges and universities will struggle—socially and politically, if not also legally—to justify preferences for legacies and other predominantly White groups.²⁴²

Yet at the same time some justices found fault with ALDC-style preferences, there was speculation at oral argument that, were the Court to side with SFFA, institutions might begin giving preferences for personal or familial traits closely correlated with race. In the UNC oral argument, Justice Kavanaugh asked SFFA’s lawyer whether a college could constitutionally “give a plus to descendants of slaves.”²⁴³ The lawyer said no, because being descended from enslaved persons is “so

240. SFFA III, 143 S. Ct. at 2271 (Jackson, J., dissenting).

241. Harvard Tr., *supra* note 1, at 96:25–97:9; *see id.* at 102:19–103:5.

242. *See, e.g.*, James S. Murphy, *Good Riddance to Legacy Admissions*, CHRON. HIGHER EDUC. (Oct. 31, 2022), <https://www.chronicle.com/article/good-riddance-to-legacy-admissions>. Not long after the Supreme Court handed down its decision, Lawyers for Civil Rights filed a complaint against Harvard’s use of legacy preferences with the Department of Education’s Office of Civil Rights. *See* Nick Anderson & Susan Svrluga, *Civil Rights Complaint Targets Harvard’s Legacy Admissions Preference*, WASH. POST, <https://www.washingtonpost.com/education/2023/07/03/harvard-university-legacy-admissions-civil-rights-complaint/> (July 6, 2023 12:19 PM); *see also* Nell Gluckman, *Race-Conscious Admissions is Gone. Will an End to Legacy Preferences Follow?*, CHRON. HIGHER EDUC. (July 11, 2023), <https://www.chronicle.com/article/race-conscious-admissions-is-gone-will-an-end-to-legacy-preferences-follow>.

243. UNC Tr., *supra* note 188, at 44:17–18.

highly correlated with race in the history of our country.”²⁴⁴ What about giving “a plus to applicants whose parents were immigrants,” Justice Kavanaugh then asked.²⁴⁵ SFFA’s lawyer acknowledged that if the preference were for immigrants “regardless of country . . . and regardless of their racial descent, I think that that is probably closer to being okay.”²⁴⁶

Now that the Court has held that considering race in admissions is—if not per se unconstitutional—then subject to the strictest of scrutiny, a host of questions about how to promote higher education institutions’ interests in diversity and inclusion has arisen.²⁴⁷ Among them are these: how closely correlated with race must a particular attribute be to render it off limits to admissions officers, and does a university’s intent in considering such an attribute matter constitutionally?²⁴⁸ But institutions need not adopt new preferences correlated with underrepresented racial identities to eliminate existing, ALDC-style preferences correlated with White identity. If institutions scaled back or abandoned ALDC-style preferences, applicants of color would compete more effectively for seats in the entering class.²⁴⁹ And that could mitigate the effect of implicit bias by making it less likely, for instance, that recommendation letters would make the difference between acceptance and rejection for any particular applicant. Although this approach comes with costs, likely including the loss of some donations, declines in athletic competitiveness, and upset on the part of employees, ending ALDC-

244. *Id.* at 44:22–23.

245. *Id.* at 45:12–14.

246. *Id.* at 45:19–24.

247. *See, e.g.*, Daily Briefing by Rick Seltzer, CHRON. HIGHER EDUC. (July 5, 2023), <https://www.chronicle.com/newsletter/daily-briefing/2023-07-05>; Daily Briefing by Rick Seltzer, CHRON. HIGHER EDUC. (July 6, 2023), <https://www.chronicle.com/newsletter/daily-briefing/2023-07-06>.

248. I am grateful to Joshua Matz for this framing.

249. *See, e.g.*, Julie J. Park, *Does Harvard Really Discriminate Against Asian American Students?*, CHRON. HIGHER EDUC. (Mar. 7, 2023), <https://www.chronicle.com/article/does-harvard-really-discriminate-against-asian-american-students> (“The available data tell us that Asian Americans got into Harvard less not because they were less kind or confident, but because they were less likely to be legacies or recruited athletes.”).

style preferences would generate good will at a time when the credibility of higher education institutions is on the line.²⁵⁰

B. Institutions Could Raise Awareness of Implicit Bias

Recommendation letters have been part of college admissions for at least as long as legacy, athletic, and development preferences. They provide distinctive insight into applicants' trajectories and personalities. Although letters may reflect conscious as well as implicit bias, they are less starkly correlated with race than the attributes that comprise the ALDC umbrella. For these reasons, it seems unlikely that institutions will cease soliciting recommendations any time soon. But colleges could take steps to minimize the impact of implicit bias on how letters are written and read.²⁵¹

One approach would be for universities to mandate that non-employees who participate in their admissions processes, say, as recommendation writers or alumni/ae interviewers, undergo implicit bias training. This could be as brief as the Western District of Washington's prospective juror video; an institution might make watching such a presentation a prerequisite for uploading a letter or report to the admissions office database. Were elite institutions and their associations (*e.g.*, the Ivy League) to lead the way, others would likely follow suit.²⁵² Compliance with such requirements is not likely to be a

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

Amidst the contemporary reckoning with systemic racism, some commentators have offered the more radical proposal that colleges should simply use lotteries to choose among students who meet their baseline criteria for admission. *See, e.g.,* MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 155, 184-88 (2020).

251. More dramatic change is not, however, out of the question. In the wake of COVID-19 and protests against systemic racism, many institutions ceased requiring that applicants submit standardized test scores. *See, e.g.,* Brittany Britto, *Best-Optional College Admissions are Here to Stay, Experts Say*, HOUSTON CHRON. (Jan. 16, 2021, 9:13 PM), <https://www.houstonchronicle.com/news/houston-texas/education/article/Baylor-to-extend-test-optional-admissions-policy-15858393.php>. Calls have also emerged for institutions to stop requiring recommendations for job candidates. Allison M. Vaillancourt & Özlem H. Ersin, *Is It Time to Eliminate Recommendation Letters? (Hint: Yes)*, CHRON. HIGHER EDUC. (Apr. 21, 2021), <https://www.chronicle.com/article/is-it-time-to-eliminate-recommendation-letters-hint-yes>.

252. Indeed, highly selective institutions were in the vanguard with regard to recent changes in standardized testing requirements. *See* Nick Anderson, *A Shake-Up in Elite*

problem because applicants and their supporters have strong incentives to follow selective institutions' procedures and because alums who volunteer to serve as interviewers are generally highly loyal to their alma maters.

Initiatives to make readers of applications more aware of implicit biases—their own and others'—could complement measures aimed at letter-writers. Judge Burroughs recommended that Harvard “would likely benefit from conducting implicit bias trainings for admissions officers.”²⁵³ Researchers have typically found that bias is mitigated less by “one-shot strategies” than by repeated interventions, and institutions are in a better position to implement more extensive education for employees than for outsiders.²⁵⁴

C. Institutions Could Reframe Race Consciousness as an Anti-Bias Countermeasure

A third approach, which *Students for Fair Admissions* forecloses, could have been more radical. Before the Court handed down its decision, scholars proposed that institutions should conclude that because recommendation letters and other admissions inputs are likely tainted by implicit bias, institutions should expressly correct for that bias when assessing applicants from historically marginalized racial

Admissions: U-Chicago Drops SAT/ACT Testing Requirement, WASH. POST (June 14, 2018, 6:00 AM), https://www.washingtonpost.com/local/education/a-shake-up-in-elite-admissions-u-chicago-drops-satact-testing-requirement/2018/06/13/442a5e14-6efd-11e8-bd50b80389a4e569_story.html.

253. SFFA I, 397 F. Supp. 3d 126, 204 (D. Mass. 2019). This would not, however, be a cure-all. Experts, including one of the Project Implicit founders, have pointed out there is insufficient evidence about the effectiveness of implicit bias training. See Megan Zahneis, *A Judge Advised Harvard to Give Its Admissions Officers Training to Stop Bias. Will That Help?*, CHRON. HIGHER EDUC. (Oct. 4, 2019), <https://www.chronicle.com/article/a-judge-advised-harvard-to-give-its-admissions-officers-training-to-stop-bias-will-that-help>. In addition, there is at least some evidence that when people attribute unequal outcomes to implicit bias rather than conscious discrimination, “they hold those who behave in discriminatory ways less accountable for their behavior.” See, e.g., Natalie M. Daumeyer et al., *Consequences of Attributing Discrimination to Implicit Versus Explicit Bias*, 84 J. EXPERIMENTAL SOC. PSYCH. 1, 9 (2019).

254. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 302 (2015); Doyin Atewologun et al., *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness*, EQUAL. AND HUM. RTS. COMM’N 1, 4 (2018); Harpalani, *supra* note 31, at 320.

groups.²⁵⁵ Put another way, admissions officers should read recommendation letters and interview reports with a critical eye, assuming that implicit bias is more likely than not at work to the detriment of students of color.

The Court's rejection of "race-based approaches" such as Harvard's and UNC's rules out this option. Should future justices take a different view, however, Professor Carbado has proposed that a neglected footnote in Justice Powell's *Bakke* opinion might provide a jurisprudential basis for the express consideration of race as a countermeasure against both explicit and implicit bias.²⁵⁶ After recapitulating the various rationales the University of California articulated for its race-conscious admissions program, Justice Powell added one of his own: "fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."²⁵⁷ He observed that if "race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."²⁵⁸ Professor Carbado has argued that "footnote forty-three provides doctrinal support for the reframing of affirmative action. Instead of the misleading conceptualization of the policy as a preference, footnote forty-three provides a more appropriate understanding of affirmative action as a countermeasure."²⁵⁹ In competitive admissions processes, this could take the form of a correction for unconscious bias affecting recommendations.²⁶⁰ Institutions could mathematically adjust the school support ratings of certain applicants of color, just as they already use formulae to cross-

255. See, e.g., Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. Davis L. Rev. 1117, 1121 (2019).

256. See *id.* Carbado's proposal is primarily oriented toward combatting anti-Black bias. *Id.* at 1170. But Carbado notes that an admissions process can perpetuate negative action against Asian American applicants while simultaneously failing to correct for the numerous social forces that harm Black students. *Id.* at 1171–72.

257. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43. The literature on the purposes of affirmative action is voluminous. See, e.g., Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 J. CONST. L. 1145, 1195–96 (2018).

258. *Bakke*, 438 U.S. at 306 n.43.

259. Carbado, *supra* note 255, at 1121.

260. *Id.* at 1146–47.

calibrate high school grade point averages in light of schools' disparate grading systems and levels of academic rigor.²⁶¹

But in the wake of *Students for Fair Admissions*, Professor Carbado's approach no longer passes constitutional muster—if indeed it ever could have done.²⁶² This approach was not adopted by lawyers for either Harvard or UNC.²⁶³ In the Harvard oral argument, Justice Barrett pointedly said to the Solicitor General that “there’s not a remedial justification on the table here. Our precedents rule that out.”²⁶⁴ In colloquies with Justices Thomas and Gorsuch, SFFA’s counsel repeatedly distinguished present-day college admissions from the racial preferences some states enacted immediately after the Civil War.²⁶⁵ In the UNC argument, the state solicitor general clearly disavowed any remedial justification for the consideration of race in admissions.²⁶⁶ But Justice Sotomayor reminded counsel for UNC’s student intervenors that evidence at trial had demonstrated the continuing presence of white supremacist views on campus.²⁶⁷ She asked him: “[G]iven that your adversary says that race can be used to correct past discrimination, why isn’t it in this particular university appropriate to use race as one factor among many . . . to address its history of racial discrimination . . . and its continuing effects on campus?”²⁶⁸ The lawyer’s response was equivocal: he stressed the lingering effects of past discrimination while stating that “race in this case” was not “being used as a remedial order to address that.”²⁶⁹

After *Students for Fair Admissions*, Justice Powell’s footnote is definitively not the law. Moreover, in light of the skepticism a number

261. Scott Jaschik, *What if Weighted GPAs are Meaningless?*, INSIDE HIGHER ED (Dec. 3, 2017), <https://www.insidehighered.com/admissions/article/2017/12/04/competitive-high-school-asks-are-weighted-gpas-doing-any-good>.

262. See generally Bloch, *supra* note 257; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

263. See SFFA III, 143 S. Ct. 2141, 2159 n.8 (2023) (“[N]either university defends its admissions system as a remedy for past discrimination—their own or anyone else’s.”)

264. Harvard Tr., *supra* note 1, at 100:9–10.

265. Harvard Tr., *supra* note 1, at 6:24–7:5, 17:9–19:11.

266. UNC Tr., *supra* note 188, at 90:21–25.

267. *Id.* at 123:15–25.

268. *Id.*

269. *Id.* at 124:1–125:11. Justice Sotomayor returned to this theme in her dissent, highlighting “the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society.” SFFA III, 143 S. Ct. at 2232 (Sotomayor, J., dissenting).

of justices have demonstrated toward the use of race as a countermeasure except in narrow, “directly remedial” circumstances,²⁷⁰ it is unlikely to become the law anytime soon. But the other approaches this Part has proposed—eliminating preferences correlated with White racial identity and taking steps to increase writers’ and readers’ awareness of their biases—are almost certainly within universities’ lawful discretion.

V. SECONDARY SCHOOLS, TOO, COULD TAKE STEPS TO LIMIT IMPLICIT BIAS IN COLLEGE RECOMMENDATIONS

Mitigating the impact of implicit bias in college recommendations is not a task for university administrators alone. Especially in communities where many students apply to selective institutions, secondary schools and school districts have a practical and ethical stake in minimizing bias in the letters their educators write. As discussed above, likely the most prevalent form of implicit bias impacting Asian American students is unconscious stereotyping along the lines of what Professor Wu and others have dubbed the “model minority myth.”²⁷¹ Letter-writers may employ tropes and images that, even if factually true about a particular student, reinforce longstanding characterizations of Asian Americans as industrious and technically competent, yet quiet, unobtrusive, and less likely than White peers to display creativity or leadership. With the Court’s having expressly allowed universities to consider an applicant’s or recommender’s “discussion of how race affected [the applicant’s] life, be it through discrimination, inspiration, or otherwise,” the qualitative components of each student’s application materials will take on even greater import.²⁷²

Schools could prepare letter-writers to guard against falling into stereotypes.²⁷³ Secondary institutions could mandate training for their employees, weaving the topic of unconscious bias into their professional

270. SFFA III, 143 S. Ct. at 2186 (Thomas, J., concurring); *see also, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).

271. *See* Wu, *supra* note 30.

272. SFFA III, 143 S. Ct. at 2176 (Opinion of the Court).

273. *See* Jim Paterson, *You’re Biased*, J. COLL. ADMISSION (2017).

development programs. With many states cutting education funding,²⁷⁴ some administrators may be able to do no more than mandate that employees engage with freely available resources, including Project Implicit's IATs and training materials available from like-minded sources.²⁷⁵ Better funded schools might plan more substantial, in-person interventions. An ambitious school district might collect all letters written during a particular admissions cycle and analyze their contents to determine how writers differentially assessed students across races and genders, among other identities. Such an undertaking, for which there is precedent and philanthropic interest, would be a particularly powerful way to demonstrate to educators how unconscious biases may influence the testimonials they write.²⁷⁶

Schools could also reallocate resources toward individualized college counseling. Both the district and appellate courts in the Harvard case commented that one reason school support ratings were correlated with race was that White students are more likely to attend schools where teachers and counselors know them as individuals and have the time to write personalized letters.²⁷⁷ Those courts also hypothesized that better funded schools attract educators with stronger writing skills, which in turn means their recommendations will be more effective.²⁷⁸ Indeed, the more personalized and careful a letter, the less likely it will traffic in stereotypes.

Secondary schools have good reason to provide more than merely adequate college counseling. In 2015, the nationwide ratio of students

274. Michael Leachman et al., *A Punishing Decade for School Funding*, CTR. ON BUDGET AND POL'Y PRIORITIES (Nov. 29, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding>.

275. *E.g.*, Kirwan Institute's Implicit Bias Module Series, OHIO STATE UNIV., <https://kirwaninstitute.osu.edu/implicit-bias-module-series> (last visited Sept. 23, 2023) (specifically Module 2, Lesson 3, "Access and Evaluation").

276. *See* Akos & Kretchmar *supra* note 60. Several prominent funders have made implicit bias in education, healthcare, and the justice system a focus of grantmaking. *See, e.g.*, WILLIAM T. GRANT FOUNDATION, <https://wtgrantfoundation.org/> (last visited Sept. 14, 2023) (search "implicit bias").

277. *E.g.*, SFFA I, 397 F. Supp. 3d 126, 168 (D. Mass. 2019).

278. *E.g.*, SFFA II, 980 F.3d 157, 201 (1st Cir. 2020); *see also* Boeckenstedt, *supra* note 57.

to counselors was 482:1.²⁷⁹ Even the ratio recommended by experts, 250:1, means that “if a counselor were to sit with a different student every hour, eight hours a day, every school week—which we know does not happen—each high school senior could hope to see his or her counselor for one hour two or three times” before applying to college.²⁸⁰ Counselors in such settings will struggle to be more than superficially acquainted with students, which increases the risk they will write boilerplate or implicitly biased recommendations. The risk will be even greater for students who, for any number of reasons, may be inclined to be deferential or reserved in speaking with authority figures.²⁸¹ In contrast, where students develop relationships with educators who know them individually, not only will recommendations be more detailed, but students will be less likely to experience “undermatching,” the term for the unconscious channeling of excellent students from disadvantaged backgrounds to less rigorous universities.²⁸²

Yet in light of fiscal realities, providing the counseling necessary to produce better outcomes will require administrators to divert resources from other worthy activities. To avoid worsening inequality, schools that are presently under-resourced should receive a preferential share of any newly available funding. Where advocating for additional counselors is unrealistic or unsuccessful, schools could consider partnering with private foundations, joining networks of like-minded peers, or finding low- or no-cost ways for educators to hone their letter-writing skills.²⁸³ But at best, these are incomplete and temporary measures.

279. NAT'L ASS'N FOR COLL. ADMISSION COUNSELING & AM. SCH. COUNS. ASS'N, STATE-BY-STATE STUDENT-TO-COUNSELOR RATIO REPORT: 10-YEAR TRENDS (2015), <https://files.eric.ed.gov/fulltext/ED611862.pdf>.

280. Richard Barth, *It's Time To Prioritize and Fund College Counseling*, FORBES (May 3, 2019, 6:56 AM), <https://www.forbes.com/sites/richardbarth/2019/05/03/its-time-to-prioritize-and-fund-college-counseling/?sh=38c009b03d29>.

281. E.g., Andy Molinsky, *Learning to Speak Up When You're from a Culture of Deference*, HARV. BUS. REV. (July 7, 2014), <https://hbr.org/2014/07/learning-to-speak-up-when-youre-from-a-culture-of-deference>.

282. Adam Harris, *When Disadvantaged Students Overlook Elite Colleges*, ATLANTIC (Apr. 18, 2018), <https://www.theatlantic.com/education/archive/2018/04/when-disadvantaged-students-overlook-elite-colleges/558371>.

283. E.g., *Community Philanthropy Initiative (Past Work)*, COLL. FUTURES FOUND., <https://collegefutures.org/our-work/community-philanthropy-for-student-success/> (last visited Sept. 14, 2023).

VI. CONCLUSION

It has cynically been observed that “[t]here is really nothing new to say” about race in college admissions,²⁸⁴ but theories and empirical findings about implicit bias offer a vantage that has largely been absent from recent litigation. Even had the Supreme Court not held Harvard’s race-conscious admissions program unconstitutional, SFFA’s lawsuit appears to have shown, at minimum, that unconscious biases may affect how secondary educators characterize the applicants whom they recommend for admission. Given the persistence of stereotypes concerning Asian Americans, it is not unreasonable to fear that implicit bias hampers Asian American students’ prospects at the most selective universities.²⁸⁵ These observations run counter to the stark choice Justice Alito and SFFA presented at oral argument: that intentional discrimination is the only plausible, non-racist explanation for Asian American applicants’ seeming underperformance.²⁸⁶ Instead, this Article has argued, recognizing that implicit bias is not an insignificant factor in several components of college admissions—recommendation letters in particular—may be an important step toward producing more equitable outcomes in the aftermath of *Students for Fair Admissions*.

This Article has also argued, however, that courts are not well positioned to take this step. Instead, colleges and universities and, to a lesser extent, secondary schools, must lead. Absent drastic action like admitting qualified students purely by lottery,²⁸⁷ it falls to admissions

284. Richard Thompson Ford, *Affirmative-Action Jurisprudence Reflects American Racial Animosity but is also Unhappy in its Own Special Way*, U. CHI. L. REV. ONLINE (2020), <https://lawreviewblog.uchicago.edu/2020/10/30/aa-ford>.

285. See Chin & Chin, *supra* note 34; Ramiro, *supra* note 42.

286. See Harvard Tr., *supra* note 1; see also Pet. Reply Br., *supra* note 3.

287. See SANDEL, *supra* note 250. At several highly selective public high schools, proposals to replace competitive admissions processes with lotteries have been highly controversial. See, e.g., Coal. for T.J. v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. May 23, 2023) (holding constitutional race-neutral components of elite public high school’s admissions process); Sonja B. Starr, *The Next Battle over Colorblindness has Begun*, N.Y. TIMES (July 10, 2023), <https://www.nytimes.com/2023/07/10/opinion/supreme-court-high-school-admissions.html>; Laura Scudder, *Here’s Everything We Know So Far About the [Thomas] Jefferson High School for Science and Technology] Admissions Controversy*, N. VA. MAG. (Mar. 30, 2022), <https://northernvirginiamag.com/family/education/2022/03/30/tj-admissions-timeline>; Ida Mojada, *Lottery or Merit? Lowell High Admissions Policy Comes Up for a Key*

officers to ensure that processes with inherently subjective components do not perpetuate or exacerbate racial inequities. Because these officers have assumed a gatekeeping function, choosing who benefits from the advantages that prestigious degrees confer, they have substantial influence with educators who recommend their students.²⁸⁸ Colleges will likely achieve compliance, however grudging, with anti-bias measures they demand of teachers, guidance counselors, and alumni/ae interviewers.²⁸⁹

In the Harvard case, both the district and appellate courts made clear that institutions of higher education have no obligation to implement any of the suggestions this Article has offered. At oral argument, the Supreme Court justices appeared divided about the constitutionality of some proposals the Court's decision did not end up reaching, such as giving admissions preferences to candidates with personal attributes that are correlated with non-White racial identities. Now that the Court has handed down its decision, it will be for colleges and universities to explore what avenues for promoting racial diversity in their student bodies remain open to them. No doubt, the Court's holding will be refined in future litigation. But an overriding question will remain for institutions whose missions, like Harvard College's, incorporate a commitment "to strive toward a more just, fair, and promising world": whether in this particular dimension of their operations they will find the courage and creativity to make those words a reality.²⁹⁰

Vote, S.F. STANDARD (June 21, 2022, 9:00 AM), <https://sfstandard.com/education/lottery-or-merit-lowell-high-admissions-policy-comes-up-for-a-key-vote>; Cayla Bamberger, *NYC Changes Controversial High School Admissions Process*, N.Y. POST (Sept. 29, 2022, 7:39 PM), <https://nypost.com/2022/09/29/nyc-changes-controversial-high-school-admissions-process>; see also Post Ed. Bd., *Attacking Test-in Schools is Anti-Asian*, N.Y. POST (May 15, 2021, 9:08 PM), <https://nypost.com/2021/05/15/attacking-test-in-schools-is-anti-asian>.

288. See generally JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* (2002).

289. See Bob Massa et al., *In Defense of Holistic Admissions*, CHRON. HIGHER EDUC. (May 6, 2021), <https://www.chronicle.com/article/in-defense-of-holistic-admissions>.

290. Mission, Vision, and History of About, HARV. COLL., <https://college.harvard.edu/about/mission-vision-history> (last visited Sept. 24, 2023).