UC Law Constitutional Quarterly

Volume 51 | Number 2 Article 4

2024

Unprecedented: Asian Americans, Harvard, the University of North Carolina, and the Supreme Court's Striking Down of Affirmative Action

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BY HARVEY GEE*

ABSTRACT

In response to the Supreme Court's decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al. ("SFFA v. Harvard")*,*[1] *author Harvey Gee urges his fellow Asian Americans—the star plaintiffs in the case and depicted as the main beneficiaries of its holdings—to fight back to preserve affirmative action. Part I explores how the Court's approach to affirmative action changed from the emergence of the Civil Rights Movement through many of the pivotal affirmative action cases prior to the 2010s. Part II then seeks to contextualize the struggle over the role of affirmative action within the Asian American community. It delves into two core mythologies that haunt these discussions—the Perpetual Foreigner Myth and the Model Minority Myth. Readers need a basic understanding of these mythologies because Part III focuses on Fisher v. University of Texas: a case that illustrates how activists and one dubiously sympathetic Justice would later tokenize Asian Americans in their efforts to dismantle affirmative action. Part IV dives into SFFA v. Harvard itself to show how the Court discarded affirmative action precedent and the arguments the dissenting Justices deployed to point out the decision's*

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1. 600 U.S. 181 (2023)

weaknesses. Finally, the article ends by advocating for interracial solidatry to resist further attacks on the hallmark achievements of the Civil Rights Movement.

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INTRODUCTION[2]

Asian Americans should not allow others to use our community as a pawn to dismantle the hallmark achievements of the Civil Rights Movement.[3]

Last term, the Supreme Court's conservative Justices effectively ended the use of affirmative action by overturning four decades of precedent. In the historic decision *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al.* ("*SFFA v. Harvard*"),[4] Asian Americans took center stage as petitioners to advocate against the use of race in Harvard and UNC's admissions processes by claiming that those systems discriminated against them. While novel from the outside, the case was far from unexpected.

Court observers and politically-minded individuals knew that it was only a matter of time before the conservative members of the Court could find the right justification to end affirmative action. Indeed, *SFFA v. Harvard* did not arrive at the Court through an organic process driven by concerns shared in a majority of the Asian American community. Conservative organizations and donor groups generated capital, found plaintiffs, and organized precursor cases to chip away at affirmative action over several years. Edward Blum, a longtime conservative advocate for colorblindness,[5] led the

2. As this article will show, the concepts of "race" and the institution of racism in America are complex ideas in and of themselves because of their layered history and how each individual experiences them differently. Therefore, it would be impossible for this article to capture or explain these concepts or honor all the experiences they produce with the complexity and nuance they deserve. But we need some way to convey these concepts and experiences, so please note that this article uses terms like the following: "Black American(s)" instead of "Blacks" or "African American(s);" "Latino American(s)" instead of "Hispanic(s)" or "Hispanic American(s);" and "White American(s)" instead of "white(s)" in order to clarify who this article intends to refer to throughout the below discussion. The article also uses the terms "Asian American(s)" to signify those persons who identify with the American experience, whether they were born in America or immigrated, and "Asian(s)" to signify those who immigrated from Asian countries. If a source uses a different signifier or identity, the article will replace the term with the above, again to maintain consistency and as much clarity as possible. Some sources do not or only vaguely distinguish between American identities and "group" identities. And so, these ascribed labels do not and cannot fully convey this distinction, which admittedly is a grave limitation. Again, there is no way to honor all the complexities that this article will discuss, but I hope this clarification still acknowledges this deficiency without offense.

3. *See* John C. Yang, *Affirmative Action Benefits Everyone—Including Asian Americans*, HUFFINGTON POST (May 14, 2018), https://www.huffingtonpost.com/entry/opinion-young-asianamerican-affirmative-action_us_5af5e145e4b0e57cd9f951c4.

4. 600 U.S. 181 (2023).

5. Nick Mordowanec, *Supreme Court Ruling on Affirmative Action May Be Surprisingly Popular*, NEWSWEEK (June 29, 2023, 10:20 AM), https://www.newsweek.com/supreme-court-issues-most-popular-ruling-yet-1809720 (describing Edward Blum as "a wealthy white

charge because he believes we are living in a post-racial world where formal discrimination no longer exists, and therefore affirmative action is no longer necessary.[6] His conviction motivated him to found Students For Fair Admissions (SFFA)[7] and work with the Asian American Coalition for Education (AACE),[8] a conservative interest group consisting largely of first-generation wealthy Chinese American immigrants.[9] Together, they contended that universities implemented discriminatory practices against Asian Americans during their admissions processes.[10] But there was more. They also argued that the court should abolish affirmative action not only because it was unnecessary, but also because any consideration of race in university admissions helps Black Americans and Latino Americans while hurting Asian Americans—thus using our community as a wedge group to undermine the interests of other minority groups.[11] The conservative Court seized

businessman," and "conservative activist on many issues including affirmative action, and he's on a mission to end it."); Stephanie Mencimer, *Meet the Brains Behind the Effort to Get the Supreme Court to Rethink Civil Rights*, MOTHER JONES (Apr. 2016), http://www.motherjones.com/politics/2016/04/edward-blum-supreme-court-affirmative-action-civil-rights.

6. Dismantling affirmative action isn't Blum's only pet project. He also played a central role in recent efforts to gut the Voting Rights Act. *See* Betsy Reed, *Man behind gutting of Voting Rights Act: 'I agonise' over decision's impact*, THE GUARDIAN (Jan. 5, 2016), https://www.theguardian.com/us-news/2016/jan/05/edward-blum-voting-rights-act-civil-rights-affirmative-action;

see Li Zhou, *Many Asian Americans Support Affirmative Action. The Recent Supreme Court Case Obscure That,* VOX (June 30, 2023, 9:58 AM), https://www.vox.com/politics/2023/6/29/23778734/asian-americans-affirmative-action-supreme-court-ruling.

7. *About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ (last visited Feb. 20, 2024).

8. *Mission*, ASIAN AM. COAL. FOR EDUC., https://asianamericanforeducation.org/en/about/mission/ (last visited Feb. 20, 2024).

9. Janelle S. Wong & Karthick Ramakrishnan, *Asian Americans and the Politics of the Twenty-First Century*, 26 ANN. REV. POL. SCI. 305, 313 (June 2023), https://doi.org/10.1146/annurev-polisci-070621-032538; Rakesh Kochhar and Anthony Cilluffo, *Social & Demographic Trends, Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-us-is-rising-most-rapidly-among-asians/ (finding that starting in 2016 economic disparities in the Asian American community surpassed the gap between Black Americans); Ben Wong, Unpublished Education Studies capstone, *Humanizing the "Nameless, Faceless Yellow Horde": Chinese American Attitudes toward Affirmative Action*, Yale College Education Studies Program at 18–19 (Spring 2019), https://educationstudies.yale.edu/sites/default/files/files/Ben%20Wong%20Education%20Studies%20Thesis%20FINAL%20WEB%20VERSION(1).pdf ("Fairness seems to be a particular concern of Chinese Americans who immigrated to the United States after 1990, the majority of whom are highly skilled and wealthy.") (internal citations omitted); *id.* at 11 (exploring the influence of AACE on perceptions of affirmative action and the wealthier Chinese American community).

10. *SFFA*, 600 U.S. at 197–98.

11. *Id*. at 215–16; *see* Zhou, *supra* note 6; PHILLIP LEE, REJECTING HONORARY WHITENESS: ASIAN AMERICANS AND THE ATTACK OF RACE-CONSCIOUS ADMISSIONS 1475, 1489-1490 (2021).

on these unrelated arguments to achieve its goal of ending affirmative action and upending decades of social justice progress.[12]

This article seeks to put this litigation and the Justices' reasoning in their proper social, historical, and political context, and by reading the ruling closely, we can see that the arguments proffered by affirmative action opponents about the lawsuit were false. In fact, *SFFA v. Harvard* will perpetuate discrimination and exacerbate unfairness, the inverse outcome these opponents supposedly wanted to prevent. Part I explores how the Court's approach to affirmative action changed from the emergence of the Civil Rights Movement through many of the pivotal affirmative action cases, like *University of California v. Bakke*[13] and *Grutter v. Bollinger*,[14] which defined how the Court applied the strict scrutiny standard to evaluate potential instances of racial discrimination prior to the 2010s. Part II then seeks to contextualize the struggle over the role of affirmative action within the Asian American community. It delves into two core mythologies that haunt these discussions—the Perpetual Foreigner Myth and the Model Minority Myth, which preserve and even strengthen the current racial hierarchy with Whites at the top, Asian Americans in the middle, and Latino and Black Americans near the bottom. Readers need a basic understanding of these mythologies because Part III focuses on *Fisher v. University of Texas*: a case that illustrates how activists and one dubiously sympathetic Justice would later tokenize Asian Americans in their efforts to dismantle affirmative action.[15] These feigned concerns for Asian Americans is a way to limit admissions to other racial minorities and admit more Whites under the guise of race-neutral admissions policies. Part IV dives into *SFFA v. Harvard* itself to show how the Court discarded affirmative action precedent and the arguments the dissenting Justices deployed to point out the decision's weaknesses. Finally, the article ends by advocating for interracial solidarity to resist further attacks on the hallmark achievements of the Civil Rights Movement.

12. *See* Harmeet Kaur, *How Asian Americans Fit into the Affirmative Action Debate*, CNN (Nov. 3, 2022, 11:01 AM), https://www.cnn.com/2022/11/03/us/affirmative-action-asian-americans-qa-cec/index.html; Alia Wong, *Affirmative Action Critics Paint Asian Americans as the 'Model Minority.' Why That's False*, USA TODAY (Nov. 6, 2022, 6:00 AM), https://www.usatoday.com/story/news/education/2022/11/06/affirmative-action-case-harvard-admissions-asian-americans/10599572002/.

13. 438 U.S. 265 (1978).

14. 123 S. Ct. 2325 (2003).

15. Fisher v. Texas, 133 S. Ct. 2411 (2013) [hereinafter "*Fisher I*"]; Fisher v. University of Texas, et al., 758 F.3d 633, 646 (2014); Fisher v. Texas, 136 S. Ct. 2198 (2016) [hereinafter "*Fisher II*"].

I. THE EVOLUTION OF THE COURT'S AFFIRMATIVE ACTION JURISPRUDENCE

A. The Civil Rights Movement Emerges

The history behind the march to racial equality shows that it is (and continues to be) a game of inches with as many advances as setbacks. During the Great Depression, the Roosevelt Administration made conscious efforts to include minorities in the economic mainstream. For example, the administration issued the first executive order to prohibit racial discrimination in public sector employment.[16] The Court responded to the corrective measures implemented by the legislative and executive branches by expanding the scope of the Fourteenth Amendment to include racial classifications.[17] The landmark case of *Brown v. Board of Education*[18]—in which the Court overruled the "separate but equal" argument from *Plessy v. Ferguson*, and held that segregation of public schools is "inherently unequal" —manifested of these efforts.[19]

The Court's decision to outlaw racial discrimination in public education represented an initial step towards dismantling the deeply entrenched system of racial segregation.[20] Following *Brown*, a litany of laws were passed that provided additional civil rights to minorities and women.[21] For example, the Civil Rights Act of 1964 states "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

16. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943) (prohibiting discrimination in government defense industries); *see also* Carl E. Brody Jr.*, A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent By the Supreme Court*, 29 AKRON L. REV. 291, 310 (1996) (discussing passage of New Deal era laws prohibiting racial discrimination).

17. *See* Regents of the University of California v. Bakke*,* 438 U.S. at 292 (comparing Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (striking down state statute prohibiting Black persons from serving on juries); Hernandez v. Texas, 347 U.S. 475, 478 (1954) (finding that unconstitutional discrimination goes beyond "'white' and Negro" binary); *with* Korematsu v. United States, 323 U.S. 214, 218–19 (1944) (upholding internment of Japanese aliens and Japanese Americans during WWII); Truax v. Raich, 239 U.S. 33, 41 (1915) (upholding state law against employment of Austrian resident aliens); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (upholding down ordinance that targeted laundry businesses despite disparate impact on Chinese aliens)).

18. 347 U.S. 483 (1954).

19. 163 U.S. 537 (1898), *overruled by* Brown v. Brd. of Educ., 347 U.S. 483, 493–95 (1954). The *Brown* Court held that race based segregation of public schools is "inherently unequal." 347 U.S. at 495.

20. *See* K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (1992) (reporting that Brown "set the stage for massive involuntary desegregation of … public schools [and] remedial race-conscious measures").

21. *See, e.g.,* Civil Rights Act of 1957, Pub. L. No. 85-315, 151, 71 Stat 634 (current version at 42 U.S.C. 1995 (1994)).

programs or activity receiving Federal financial assistance,"[22]—thus tying federal financial support to racial integration. Unfortunately, these laws never reached their intended goals.[23] While these federal actions largely eliminated "official" discrimination, "unofficial" discrimination remained,[24] and so significant inequities between Whites and minorities in education, employment, and income continued to exist.[25] A series of executive orders in the 1970s and the 1980s attempted to reenforce the Civil Rights Act by promoting affirmative action.[26] However, minorities have yet to reach the idealistic goal of performing on a "level playing field" with Whites despite these efforts.

B. STRICT SCRUTINY IN BAKKE, GRUTTER, & GRATZ

The Fourteenth Amendment only protects affirmative action programs that involve state action aimed at a recognized suspect class, such as race, religion, alienage or ethnicity. If so, then the traditional equal protection analysis applies and the Court must subject the program to the highest level of review, strict scrutiny. The Court has set forth a two-pronged test for strict scrutiny review. To survive strict scrutiny, a racially discriminatory law must further a compelling government interest or purpose and the means employed by the law must be narrowly tailored to that purpose.[27]

22. Pub. L. No. 88-352, 78 Stat. 241 (1964) (current version at 42 U.S.C. 2000 (1994)).

23. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION, 201-02 (1992) (finding that requirement of "affirmative action" did not impose any obligation beyond good-faith adherence to nondiscriminatory practices).

24. In cases involving places of public accommodation, the Court held that refusing to serve Black Americans violated the Civil Rights Act. *See* Heart of Atlanta Motel v. United States, 378 U.S. 241, 241 (1964) (holding congressional power to prohibit discriminatory practices by motels); Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (upholding the same for restaurants).

25. *See* Charles E. Daye, *The Evolution of the Modern Law School: Crucial Trends that Bridge Past and Future People*, 73 N.C. L. REV. 675, 685-87 (1995) (discussing inclusion of historically under-represented minorities in law school admissions); Peter T. Kilborn, *White Males and Management; Report Find Prejudices Block Women and Minorities*, N.Y. TIMES, Mar. 17, 1995, at A1 (analyzing Federal Glass Ceiling Commission report finding that significant barriers still exist for minorities and women in the work place).

26. *See, e.g.,* Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted as amended in* 42 U.S.C. 2000e (1994).

27. *See* Holly Dyer, Comment, *Gender-Based Affirmative Action: Where Does It Fit in the Tiered Scheme of Equal Protection Scrutiny?,* 41 U. KAN. L. REV. 591, 594 (1993) (describing the Court's three standards of equal protection review); see also Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 172–77 (1984) (discussing potential failings of the Court's use of multi-level scrutiny); Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 338 (1994) (describing the Court's invidious jurisprudence as "schizophrenic" because the Court changes its definition of invidious so often).

The Court applied strict scrutiny to assess a higher education institution's affirmative action program for the first time in *Regents of the University of California v. Bakke*.[28] The case involved a White male who sued the University of California Davis School of Medicine alleging that the school denied his admission based on his race.[29] The Court concluded that the University of California's "special admissions program" violated Title VI's prohibition against racial discrimination and the Fourteenth Amendment's Equal Protection Clause.[30] But, Justice Powell's opinion also reversed the lower court's prohibition against using race as an admission criterion.[31] After a lengthy discussion about the different justifications for affirmative action, Justice Powell concluded that admissions programs could consider race as a factor if doing so served legitimate interests, such as "diversity"[32] in university admission policies,[33] and the admissions program did not rely on "strict" numerical quotas.[34] Justices Burger, Brennan, Stewart, Marshall, Blackmun, Rehnquist, and Stevens joined Justice Powell to sustain affirmative action in principle.[35] But deep divisions among the Justices about the details of the program, Powell's reasoning, and even the laws themselves remained. As a result, almost all of the Justices wrote concurrences or wrote separately.[36]

In the following decade, the decisions of *Grutter v. Bollinger*[37] and *Gratz v. Bollinger*[38] represented a defining moment for the Court on civil rights issues.[39] The *Grutter* Court revisited whether diversity is a compelling state interest and opportunity to define specific guidelines for

28. *Bakke,* 438 U.S. 265, 276–78 (1978).

29. *Id.* at 276–78.

30. *Id.* at 277–78.

31. *Id.* at 320.

32. Powell's reasoning never fully defined "diversity." *See, e.g.,* Gabriel J. Chin*, Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 883 (1996) ("Bakke's diversity rationale is unsatisfying in principle. *Bakke* does not clearly identify the value it intended to promote; as a result, it is hard to construct a program to achieve diversity.").

33. *Bakke,* 438 U.S. at 317–18.

34. *Id.* at 274.

35. *Id.* at 270-71.

36. *E. g. id.* at 380–87 (J., White, writing separately) (expressing concern about whether Title VI confers a private right of action); *id*. at 387–88 (J., Marshall, writing separately) (arguing that the Civil Rights Act confers the ability for the state to take remedial action to correct the wrongs of historical racial injustice); *id*. at 407 (J., Blackmun, writing separately) (arguing that we cannot achieve racial justice without factoring in race).

37. 123 S. Ct. 2325 (2003).

38. 539 U.S. 244 (2003)

39. *See also* Angelo N. Ancheta, *Revisiting Bakke and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases* HARV. UNI. C.R. PROJECT (2003), http://www.civilrightsproject.harvard.edu/policy/legal_docs/Revisiting_diversity.pdf.

constitutionally permissible race-conscious admissions systems.[40] The case focused on a challenge to the University of Michigan Law School's admissions policy, which affirmed the law school's commitment to racial and ethnic diversity with "special reference to the inclusion of students from groups which have been historically discriminated against, like Black, Latino, and Native Americans."[41] The law school presented evidence to show that the goal of the policy was not to remedy past discrimination, but to admit students who may bring a different perspective to the classroom as compared to students who are not members of underrepresented minority groups.[42] Writing for the 5-4 majority, Justice O'Connor said that, in upholding the University of Michigan Law School's race-conscious admission policy, the Court endorsed Justice Powell's view in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[43] However, Justice O'Connor required that affirmative action programs be narrowly tailored and of limited duration.[44] The Court acknowledged that "special niche in our constitutional tradition," and so the Justices would defer to the school's "educational judgment that such diversity is essential to its educational mission . . . given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."[45]

The Court would continue to refine its stance on diversity in higher education when it considered a challenge to the University of Michigan's admissions guidelines for undergraduates in *Gratz v. Bollinger* later that same term.[46] The guidelines, implemented in 1998, assigned each applicant points on a 150-point "selection index" based upon various criteria including high school GPA, standardized test scores, high school academic qualifications, in-state residency, and other factors.[47] After applying a strict scrutiny analysis, Chief Justice Rehnquist wrote the *Gratz* majority opinion which struck down Michigan's undergraduate admission program as "not narrowly tailored to achieve the interest in educational diversity."[48] This decision partly turned on the automatic twenty points policy because it resulted in "'virtually'' all who are minimally qualified [were] admitted, while 'generally' all

40. *Grutter*, 123 S. Ct. 2325 (2003).

41. Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 1–2 (2003).

42. *Grutter*, 123 S. Ct. at 2329–30, 2339.

43. *Id.* at 2329.

44. *Id.* at 2330.

45. *Id.* at 2339.

46. *Gratz*, 539 U.S. 244 (2003).

47. *Id.* at 255.

48. *Id.* at 270.

minimally qualified minority transfer applicants [were] admitted outright."[49] Additionally, the Court disfavored the university offer for "individualized review," which considered race, but only *after* assigning those automatic points to applicants.[50] Rehnquist thus concluded that the policy violated not only the Equal Protection Clause, but also Title VI's prohibition against racial discrimination.[51] The Court reversed the summary judgment entered in the university's favor and remanded the case for proceedings consistent with this opinion.

C. Signs of Trouble: J.A. Croson Co. & Adarand Constructors

The Court since *Bakke* has approached affirmative action more conservatively. We can see the Court begin to turn away from Powell's balancing approach in *City of Richmond v. J.A. Croson Co*.[52] In *Croson*, the Court adopted a confusing dual standard to review affirmative action programs: state and local government programs can punish and prevent racial discrimination; however, they cannot confer a benefit unless the compelling goal is "so closely" related to the means, as in the administration of the program, "that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[53] In his dissent, Justice Marshall called out the majority's reasoning as "a grapeshot attack on race-conscious remedies in general," because it "will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination."[54] Nonetheless, the Court held that the city's decision to consider race when awarding construction contracts to minorities was not narrowly tailored to remedy any goal except outright discrimination.[55] Less than a decade later, *Adarand Constructors, Inc. v. Pena* would extend this "benign discrimination" standard to federal construction contracting—invalidating a purely federal affirmative action program through the application of strict scrutiny for the first time[56] as well as

49. *Id.* at 266.

50. *Id.* at 274. *See* Sarah Freeman, *University of Michigan Drafts New Policy on Affirmative Action: Process Still Takes Race Into Account*, SAN DIEGO UNION-TRIB., Aug. 29, 2003, at A16.

51. *Gratz*, 539 U.S. at 275–76.

52. 488 U.S. 469, 492–93 (1989) (plurality opinion) (dictating that a state actor must present a compelling governmental interest that is narrowly tailored to remedy the effects of past discrimination).

53. *Id.* at 493–94.

54. *Id.* at 529 (J., Marshall, dissenting).

55. *Id.* at 507 (plurality opinion).

56. 515 U.S. 200 (1995).

overruling a case that dealt with the same issue just five years before.[57] Justice O'Connor, writing for the majority, advanced the notion that all racial classifications are equally suspect and subject to this new "strict scrutiny."[58] By embracing the highest standard of judicial review, Justice O'Connor wrote that "the purpose of strict scrutiny was to enable the Court to distinguish between benign and invidious uses of race."[59]

The Court's approach to affirmative action—from *Bakke* to *Grutter* and *Gratz* in the education context and then *Croson* and *Adarand Constructors* in the government context—has been inconsistent to say the least. Even though the Justices remained divided about the role of race in admissions, the Court embraced strict scrutiny as the standard of review for higher education cases that implicated racial discrimination. However, the Justices also continued to change how it applied that standard as each case presented new challenges to what counts as a "compelling government interest" and "narrowly tailored" means. There's no doubt that other biases simmered below these inconsistencies as well: the Court—and other social and cultural institutions—continued to view racial discrimination through the lens of the Black/White binary. This myopic perspective excluded Asian Americans and implicitly laid the foundation for *SFFA v. Harvard*.

II. CONTEXTUALIZING ASIAN AMERICAN EXPERIENCES WITH AFFIRMATIVE ACTION

Most Americans are not aware of Asian American social and racial history. We rarely discuss in depth the roles of Asian Americans in the race jurisprudence and legal literature despite the fact that Asian Americans represent 5% of the American population. Asian Americans represent fifty ethnicities—including Chinese, Japanese, Vietnamese, Korean, Indian, and Filipino Americans—and each community holds unique, even divergent views on all issues, including affirmative action.[60] Their mixed attitude about affirmative action reminds us that Asian Americans are not a monolith, and yet two ideas in particular—the Forever Foreigner and Model Minority Mythologies—continue to obscure that fact because opponents of racial justice can deploy them to sow distrust and resentment between Asian Americans and

57. The Court specifically overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), a case in which the Court *upheld* the federal agency's decision to encourage diversity in radio station broadcast programming by awarding points based on race when issuing licenses.

58. *Adarand Constructors*, 515 U.S. at 224.

59. *Id.*

60. *See* Teresa Watanabe & Jennifer Lu, *Affirmative Action Divides Asian Americans, UC's Largest Overrepresented Student Group*, L.A. TIMES (Nov. 1, 2020), https://www.latimes.com/california/story/2020-11-01/affirmative-action-divides-asian-americans-ucs-largest-overrepresented-student-group.

fellow minority groups. These ideas, among many others, negatively influence the everyday lives of many Asian Americans and made their way into the reasoning behind *SFFA v. Harvard* and its precursor cases.

A. The Perpetual Foreigner Myth

Asian Americans at various historical times were treated as "honorary Whites," or as Black, but always foreign.[61] Dean Kevin Johnson explains that what legal rights the country formally extended to Black Americans, it truthfully denied Chinese immigrants.[62] He points to an early showing of how the experiences of Blacks informed the experiences of Asians, and vice versa, and that the interests of Blacks and Asian Americans are connected, Harlan's dissent in *Plessy v. Ferguson*[63] declaring that "our constitution is colorblind" is ironic given his view of the Chinese. Emphasizing that the "separate but equal" doctrine applied to Black Americans, whose participation in the political community was unquestionable, Harlan denigrated Chinese immigrants as an "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[64] Building on the work of Professor Gabriel Chin, Johnson pointed out that Justice Harlan sought the protection of Blacks by denigrating the Chinese, leaving no doubt about his sympathies on the question of racial superiority.[65] The elevation of Black Americans over Asian Americans entrenched deep resentment and distrust between many in the between Black and Asian American communities. For example, while Justice Harlan is remembered as a defender of Black Americans civil rights, he frequently voted against Asian litigants in important immigration cases, which were consistent with his belief that the Chinese were racially unsuited to live in the United States.[66] Contemporary studies have found that Black Americans "may feel economic competition with new immigrant communities," including Asian Americans, "that can manifest as broad anti-immigrant sentiment and racism."[67]

61. *See* ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 3-4 (1998); Gary Y. Okihiro, Margins and Mainstreams: ASIANS IN AMERICAN HISTORY AND CULTURE 43-45 (1994); *see also* Frank H. Wu, *From Black to White and Back Again*, 3 SAIN L.J. 185, 208 (1996) [hereinafter "Wu, *Back Again*"].

62. KEVIN. R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 254 (2004).

63. 163 U.S. 537 (1896).

64. *Id*. at 552, 561 (Harlan, J., dissenting); JOHNSON *supra* note 62, at 20.

65. JOHNSON *supra* note 62, at 20. *See also* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

66. *See* Gabriel J. Chin, *The First Justice Harlan By the Numbers: Just How Great Was "The Great Dissenter?"*, 32 AKRON L. REV. 629, 633 (1999).

67. Jerusalem Demsas and Rachel Ramirez, *The history of tensions — and solidarity — between Black and Asian American communities, explained*, VOX (Mar. 16, 2021, 11:00 AM),

This perceived "foreignness" led to discriminatory treatment against Asian Americans to this day.[68] For example, one study found that Asian Americans are most likely among Latino, Native and White Americans to be ask "Where are you from?"[69] An experience that further highlights how Asian Americans are perceived as "perpetual foreigners" is when someone compliments an Asian American person on how well they speak English and how assimilated into American culture they are, regardless of how long they or their families have lived in the United States.[70] Even if well-meaning comments, they nevertheless send a message to the world that they do not belong and they can never be considered Americans.[71] Words matter and sometimes words manifest into action or violence. In recent memory, the perpetual foreigner stereotype remerged during the COVID-19 pandemic and anti-Asian hate crimes soared. The statistics are alarming. "Stop AAPI Hate," a non-profit that compiles reports of violence against Asian American, received 6,600 incident reports from March 2020 to February 2021, with almost half reported in California.[72] Even before the pandemic, the Center for the Study of Hate and Extremism at California State University, San Bernardino, relayed "anti-Asian hate crimes reported to police surged between 2019 and 2020 by 145% across the country, while hate crimes overall decreased by 6%. In Boston, there was a 133% rise in anti-Asian hate crimes as hate crimes dropped in the city overall by 14%"[73] However, these negative experiences don't necessary translate to a uniform understanding of racial and social justice, including on the issue of affirmative action.

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https://www.vox.com/22321234/black-asian-american-tensions-solidarity-history (citing *Helen Marrow '00 examines immigration in the rural South*, PRINCETON ALUMNI WKLY. (Apr. 27, 2011), https://paw.princeton.edu/article/helen-marrow-00-examines-immigration-rural-south).

68. *See* Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 385 (1996) (asserting that discriminatory immigration and naturalization laws against Asian American immigrants and their descendants created an image of Asian Americans as "foreigners"). The inequalities of the past pervade the present, with past discrimination evolving into informal societal discrimination against Asian Americans. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, 897–98 (1994) (discussing the effects of discrimination and stratification upon Asian Americans); *cf.* Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1126–27 (1996) (discussing the discrimination that has prevented Asian Americans from gaining admission into universities).

69. *See* Wong & Ramakrishnan, *supra* note 9, at 316–17 fig.4.

70. *See* Deepa Bharath, *New Survey Shows Asian Americans Perceived as 'Perpetual Foreigners' in U.S.*, DAILY BULL. (Mar. 30, 2021), https://www.dailybulletin.com/2021/03/30/new-survey-shows-asian-americans-perceived-as-perpetual-foreigners-in-u-s/.

71. *Id.*

72. *See* Daniel Lam, *Amid Anti-Asian Hate, AAPI Candidates Aim to Smash Stereotypes And Lead Their Cities*, NPR (Aug. 2, 2021), https://www.npr.org/2021/08/02/1015631075/anti-asian-hate-aapi-candidates-stereotypes-bamboo-ceiling.

73. *Id*.

B. The Model Minority Myth

Next, we must acknowledge the "Model Minority Myth"—a racialized fiction that stereotypes Asian Americans as models of achievement—which haunts basically all discussions about Asian Americans and affirmative action.[74] This myth depicts Asian Americans as a monolithic ethnic group that achieves success and social acceptance through hard work and without governmental assistance or racial preferences.[75] "Today, the model minority stereotype largely revolves around presumed attitudes about the importance of education, such that Asian American parents make extraordinary sacrifices to ensure their children take advantage of every educational opportunity and relentlessly remind them of the importance of education. These cultural values, the stereotype contends, help to explain why Asian Americans as a group demonstrate the highest levels of educational attainment in the nation."[76] It thus perpetuates the false notion that Asian Americans are shielded from racial prejudice[77] and therefore are not the beneficiaries of affirmative action; so as a result, they are also uninterested in racial solidarity or social reform.[78] This stereotype also depicts Asian Americans as apathetic, but the lawsuits against Harvard and UNC themselves challenge this aspect of the myth. There are a growing number of loud Asian American conservative voices stressing the importance of hard work and individualism—a perspective that strikingly aligns with the tenets of the model minority myth.[79] These Asian American conservative writers and activists are proud of their heritage, yet critical of liberal and progressive political activism.[80] They view

74. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 40 (2000); *see also* Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 2 (2000) ("Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.").

75. *See* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 49 (2002).

76. *See* Wong & Ramakrishnan, *supra* note 9, at 308.

77. Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth: Why Asian Americans Support Affirmative Action*, 53 GUILD PRAC. 35, 37–38 (1996) (noting how racists have used the Model Minority Myth as pretextual justification for violence against Asian and Asian American communities).

78. *See* Kidder, *supra* note 74.

79. *See* Hua Hsu, *A New History of Being Asian-American*, THE NEW YORKER (May 14, 2020), https://www.newyorker.com/culture/cultural-comment/a-new-history-of-being-asian-american.

80. *Id*.

affirmative action as a limitation on their chances for success.[81] As such, they strongly believe that every individual should be judged on his or her merits alone, with no special preferences given for race or any other immutable characteristic.[82] These Asian Americans have joined affirmative action opponents who want everyone to be judged based solely on traditional standards of academic "merit."

Asian American leaders and activists who support affirmative action reject these arguments as they maintain the existing racial hierarchy and in turn do not protect Asian Americans.[83] Indeed, those who wish to maintain racist institutions often use the model minority myth to falsely elevate Asian Americans relative to Black and Latino Americans —bringing Asian Americans closer to whiteness makes them into a "buffer minority," that White Americans can leverage to control other minority groups.[84] Professor Ian Haney Lopez, in conversation with National Public Radio about the Harvard litigation (Blum's false promises of fairness and equality), argued that racial groups aspire to whiteness because of the power and privilege that comes along with being at the top as opposed to the bottom.[85] Lopez suggested "the

81. *See* Nanette Asimov, *A Hard Lesson in Diversity: Chinese Americans Fight Lowell's Admissions Policy*, S.F. CHRON., June 19, 1995, at A1 (discussing Chinese American parents suing Lowell High School because enrollment of Chinese Americans had unexpectedly exceeded proportion allowed under court-sanctioned desegregation plan); Karen Avenoso, *Asian Americans Question Latin Quotas; Many Say the System Works Against Them*, BOS. GLOBE, Oct. 14, 1996, at B1 (reporting Asian American parents who believe that racial quota systems have excluded their children from success in school admissions).

82. *See* Elaine Woo, *Caught on the Wrong Side of the Line?: Chinese Americans must outscore all other groups to enter elite Lowell High in San Francisco, sparking an ugly battle over diversity and the image of a 'model minority.'*, L.A. TIMES (July 13, 1995), https://www.latimes.com/archives/la-xpm-1995-07-13-mn-23543-story.html (reporting Asian American allegations that San Francisco's Lowell High School and the University of California's admissions process give preference to other minorities); Hayden Miller, *Proposal to change Lowell admissions sparks public controversy*, THE LOWELL STUDENT NEWS SITE (Nov. 19, 2023), https://thelowell.org/14480/news/proposal-to-change-lowell-admissions-sparks-public-controversy/.

83. *Id*.

84. *See* ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-SATE 53–56 (1999) [hereinafter "ROBERT CHANG, DISORIENTED"]; Angelo N. Ancheta, RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE 160–62 (1998). Frank Wu explains how as "[Asian Americans have been] placed in the awkward position of buffer or intermediary, elevated as the preferred racial minority at the expense of denigrating Black Americans." *See* WU, *supra* note 75, at 75. On the topic of Asian Americans as a buffer minority in education, Professor Mari Matsuda quips, "I hope we will not be used to deny educational opportunities to the disadvantaged and to preserve success for only the privileged." *See* Mari J. Matsuda, *We Will Not Be Used: Are Asian Americans the Racial Bourgeoisie?,* in WHERE IS YOUR BODY? AND OTHER ARTICLES ON RACE GENDER AND THE LAW 154 (1996).

85. *See* Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color, Here's How,* NPR (July 2, 2023), https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc.

promise of proximity to whiteness and power has been used as part of a larger trend radicalizing Asian Americans on the right."[86] Academic and activist Jeff Chang took a similar view when he criticizes Asian American groups that oppose affirmative action—including Asian American students who perceive affirmative action as a policy that unjustly benefits less-qualified Black and Latino Americans, and thereby limits their own chances of admission to prestigious universities.[87] Chang wrote that:

Asian Americans are told by conservatives that affirmative action hurts us. Yet as efforts are being made to dismantle affirmative action for racial minorities, no efforts are made to dismantle the preferences given to [White Americans] that hurt Asian Americans.[88]

White supremacy[89] underpins arguments that paint affirmative action as the reason is why we have not yet reached a strictly "merit-based," colorblind society, and discrimination still exists in both college admissions and employee hiring processes.[90] Some advocates further contend that, even if they have been beneficiaries in the past, Asian Americans should not retreat from defending affirmative action because it is a legacy of the Civil Rights Movement.[91] These arguments more than likely explain why opinion surveys and voting data for the past decade show that most Asian Americans support affirmative action.[92] About 70% of Asian Americans support affirmative action when it's described as programs intended to help racial minorities and

86. *Id*.; *see also* Wu, *Back Again*, *supra* note 61, at 208 ("The late twentieth century marked a shift for Asian Americans away from being considered functionally black and toward being seen as functionally white. But this new racial status has only a limited ambit: Asian Americans become white predominantly for the purpose of attacking affirmative action programs.").

87. JEFF CHANG, WE GON' BE ALRIGHT: NOTES ON RACE AND RESEGREGATION 147 (2016) [hereinafter "JEFF CHANG, WE GON' BE ALRIGHT"].

88. *Id.*

89. Notably, White women are among the greatest beneficiaries of affirmative action programs and policies, but the significant attention paid to the consideration of race often overshadows this fact. *Bakke* involved a White male plaintiff, while *Hopwood v. Texas*, *Gratz*, *Grutter*, and *Fisher v. Texas* involved White female plaintiffs. *See* Rebecca Riffkin, *Higher Support for Gender Affirmative Action Than Race,* GALLUP (Aug. 26, 2015), https://news.gallup.com/poll/184772/higher-support-gender-affirmative-action-race.aspx.

90. *See* National Public Radio et al., *Discrimination in America: Experiences and Views of Asian Americans*, 5–11, 23 (Nov. 2017) https://legacy.npr.org/assets/news/2017/12/discrimination-poll-asian-americans.pdf.

91. *See* Wang & Wu, *supra* note 77; Hua Hsu, *A New History of Being Asian-American*, THE NEW YORKER (May 14, 2020), https://www.newyorker.com/culture/cultural-comment/a-new-history-of-being-asian-american; Asimov, *supra* note 81; Avenoso, *supra* note 81.

92. *See* Robert T. Teranishi, *The Attitudes of Asian Americans Toward Affirmative Action,* NAT'L COMM'N ON ASIAN AM. 7 PAC. ISLANDER RSCH. IN ED. (2015), http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-affirmative_action_polling-1v2.pdf; Margaret M. Chin*, Asian American Experiences in the Workplace, Data Bits for AAPI Data*, AAPI DATA (Mar. 27, 2023), https://aapidata.com/blog/asian-american-experiences-in-the-workplace/; *see generally* Wang & Wu, *supra* note 77.

women to gain access to higher education, but for the most part first-generation Chinese Americans or recent Chinese immigrants do not.[93]

This Part admittedly oversimplified what being Asian and Asian American can be like in this country because Blum and his supporters in *SFFA v. Harvard* sought to exploit these experiences. The next Part focuses on a case that illustrates how activists and dubiously sympathetic Justices tokenized Asian Americans—by weaponizing the mythologies that seek to subjugate and homogenize—to dismantle affirmative action.

III. THE IMPACT OF FISHER V. UNIVERSITY OF TEXAS

This Part delves into the pivotal cases of *Hopwood v. Texas* ("*Hopwood*"),[94] *Fisher v. University of Texas* (a case that would split into *Fisher I*[95] and *Fisher II*[96]), because they mark a dramatic shift in how the Court begins to approach affirmative action cases. It also gives special attention to Justice Alito's fifty-one-page dissent in *Fisher II*, in which he used Asian Americans to argue against affirmative action.[97] This combination of

93. *See* Jeff Chang, *For Most Asian Americans, Diversity is a Core Value – Even If a Loud Minority Contests It*, THE GUARDIAN (July 1, 2023), https://www.theguardian.com/us-news/2023/jul/01/asian-americans-affirmative-action-supreme-court [hereinafter "Jeff Change, *Diversity is a Core Value*"]; *see also* Zhou, *supra* note 6.

94. 78 F. 3d 932, 936 (5th Cir. 1996), *cert. denied* 78 F.3d 932 (1996). In *Hopwood*, four plaintiffs, all White residents of Texas, applied for admission to the University of Texas School of Law. *Id*. The court broadly defined "'whites' (meaning Texas residents who were whites and non-preferred minorities [including Asian Americans]) and 'minorities' (meaning Mexican Americans and black Americans)," to explain which groups the law school affirmative action program had excluded and included respectively. *Id*. at 936 n.4. The Fifth Circuit then conducted a colorblind analysis and held that the University of Texas could not use race as a factor in deciding which applicants to admit to its law school. *Id. at* 932.

95. *Fisher I*, 133 S. Ct. 2411 (2013).

96. *Fisher II*, 136 S. Ct. 2198 (2016).

97. *See* Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD. WORLD L.J. 225, 272 (1995) [hereinafter "Wu, *Neither Black Nor White*"] ("Functionally, the injection of Asian Americans into the affirmative action debate transforms formally non-cognizable harm to the White majority into arguably cognizable harm against a colored minority. It completes the 'Divide and conquer' tactic by then turning affirmative action for Black Americans into discrimination against Asian Americans. Asian Americans become the 'innocent victims' in place of Whites.'"). Professor Claire Jean Kim argues that a new "sociometry" of race is necessary to understanding and challenging the existing racial power structure. *See* Claire Jean Kim*, Are Asians the New Blacks?: Affirmative Action, Anti-Blackness, and the 'Sociometry' of Race,* 15 DU BOIS REV. 2 (Oct. 25, 2018), https://doi.org/10.1017/S1742058X18000243. Kim analyzes *Bakke*, *Grutter*, *Fisher*, and *SFAA v. Harvard*, and disagrees with how Asian and Black Americans are both treated as "minorities" presumed to be similarly situated relative to "discrimination," and how Asians are used as racial spoilers when they are perceived through the lens of, they are "minorities too." *Id*. at 9–10. Kim critiques liberal Asian American advocacy groups for "insisting that Asian Americans are a bona fide 'minority' and focusing exclusively on their disadvantage relative to Whites (while neglecting to discuss their advantage to Blacks." *Id*. at 15. This "Asian spoilers" narrative enables White and Asian conservatives to present the query of why Asian

these two events would provide the springboard for Blum and his associates to bring *SFFA v. Harvard* to the Court.

A. The Decision in Fisher v. University of Texas[98]

In 1996, the Fifth Circuit in *Hopwood* prohibited the University of Texas ("UT") from considering race in their admissions process. The Texas legislature passed a law requiring UT to admit all in-state students who graduated in the top 10% of their high school classes ("Top Ten Plan"). In 2008, Abigail Fisher, a White female, applied for undergraduate admission to UT's flagship campus in Austin. Fisher, who was not in the top 10% of her class, had to compete for admission against the other in-state applicants also not in the top 10%. After UT university rejected her application, she filed suit claiming that UT's use of race as a consideration in admission decisions violated the Equal Protection Clause of the Fourteenth Amendment.[99] UT countered that its use of race was a narrowly tailored means of pursuing greater diversity.[100] After the district court decided for UT and the Fifth Circuit affirmed, Fisher then appealed to the Supreme Court.[101]

The Court had two chances to review the case. In *Fisher I*, Justice Kennedy wrote for the 7-1 majority holding that the Fifth Circuit erred because it did not use strict scrutiny to evaluate University's admissions policies.[102] The Court, therefore, could not verify whether the policy in question was necessary to achieve the benefits of diversity and that no race-neutral alternative would provide the same benefits.[103] Nevertheless, the Fifth Circuit again affirmed the entry of summary judgment for the University on remand.[104] By the time *Fisher II* returned to the Court, Fisher had since graduated from Louisiana State University and the case had already gone back and forth between courts for eight years.[105] The Court in *Fisher II* found that UT's admissions program was constitutional because the university's diversity goals satisfied the strict scrutiny standard.[106] Kennedy, who wrote the majority opinion in *Fisher II*, came to this conclusion using three key findings.

Americans are succeeding despite discrimination and Blacks are not, thereby which allowing Asian Americans to be used as "racial spoilers." *Id*. at 10.

98. *Fisher I*, 133 S. Ct. 2411 (2013).

99. *Fisher II*, 136 S. Ct. 2198 (2016).

100. *Id*. at 2210–11.

101. *Id.* at 2417.

102. *Fisher I*, 133 S. Ct. at 2421–22.

103. *Id.* at 2421–22.

104. Fisher v. University of Texas, et al., 758 F.3d 633, 646, 653–57 (2014).

105. *Fisher II*, 136 S. Ct. at 2209.

106. *Id.* at 2214.

First, the university sufficiently defined its diversity goals to advance a compelling interest. Under strict scrutiny, UT had the burden to demonstrate clearly that its purpose was a "constitutionally permissible and substantial, and its use of the classification is necessary to the accomplishment of its purpose."[107] From the majority's viewpoint, UT met this burden by showing that it tried and failed to achieve the educational benefits of diversity before implementing this race-conscious plan.[108] In this way, *Fisher* aligned with *Grutter* in emphasizing the benefits of diversity and noting that increasing minority enrolment is essential to achieving the educational benefits of diversity.[109] Second, the Top Ten Percent plan by itself was not enough to produce sufficient diversity, which justified the UT's additional efforts. Kennedy stressed the important educational benefits derived from a student body with diversity beyond class rank alone: the "concrete and precise goals" of "ending stereotypes, promoting 'cross-racial' understanding lends legitimacy in the eyes of the citizenry."[110] The majority found UT's argument that Black and Latino Americans students felt lonely and isolated due to the lack of other minority students in the classroom and on campus to be persuasive.[111] The Court was therefore satisfied with the University of Texas's "reasoned, principled explanation" for advancing its admission goals, and the statistical and anecdotal evidence that supported the University's position.[112] Finally, the admission program's holistic approach of the admission program had a meaningful effect on the diversity of the university's freshman class, and UT could not reach its goals without it.[113] UT successfully argued that critical mass of minority students was an evolving definition that UT will reach when Black and Latino Americans student do not feel like spokespersons for their race, the university environment effectively promotes a cross-racial understanding, and all students gain these educational benefits.[114] The Court thus concluded that the University's use of race played small factor of admission decisions, and its admission policies were narrowly tailored.[115]

107. *Id.* at 2208.

108. *But see* Stuart Taylor, *Symposium: Extrapolating from Fisher—Racial Preferences Forever*, SCOTUSBLOG (June 23, 2016, 4:42 PM), https://www.scotusblog.com/2016/06/symposium-extrapolating-from-fisher-racial-preferences-forever/ (criticizing for Kennedy for "accepting every argument made by the university, no matter how implausible or inconsistent with the same university's previous arguments in the same case.").

109. *Grutter*, 579 U.S. 381 (2016).

110. *Fisher II*, 136 S. Ct. at 2203; *see also id.* At 2210–11.

111. *Fisher II*, 136 S. Ct. at 2212.

112. *Id*. At 381.

113. *Id*. At 2213–14.

114. *Id*. At 2211–12.

115. *Id*. At 2212.

i. Alito's Dissent in Fisher II

Asian Americans were purposefully drawn into the Supreme Court's affirmative action jurisprudence by Justice Alito's boisterous fifty-one-page dissent, joined by Chief Justice Roberts and Justice Thomas.[116] In Fisher's brief, she argued that Texas's admissions approach was detrimental to Asian Americans and subjected them to the same inequality as White applicants, thereby exacerbating classroom diversity problems.[117] UT's response brief did not mention Asian Americans because they were neither beneficiaries of its admission plan, nor were they underrepresented minorities.[118] Yet Asian American interest groups on both sides of the issue assumed an active advocacy role by filing amicus curiae briefs. Alito focused on the majority's singular mention of Asian Americans to argue aggressively that affirmative action discriminates against them and Whites. His dissent serves two purposes: crowning himself as the real advocate for the Asian American community and conflating White and Asian American experiences to create false solidarity against "racism."

First, Justice Alito's dissent opposing affirmative action appears to be an attempt to anoint himself as the Court's strongest advocate for Asian Americans. For example, Justice Alito called the Fifth Circuit's "willful blindness to Asian–American students [was] absolutely shameless."[119] He also alleged that UT's study providing quantitative data to support its admissions program actually "demonstrated that classroom diversity was more lacking for students classified as Asian–American than for those classified as Hispanic," and therefore "the UT plan discriminates against Asian–American students."[120] However, this allegation does not reflect the actual results of the study which showed an increase of Asian American enrollment that similarly tracks the increased attendance of Latino students.[121] He similarly attacks UT's racial isolation argument:

> UT never explains why the [Latino Americans] students—but not the Asian–American students—are isolated and lonely enough to receive

116. In his separate dissent in *Fisher II*, Justice Thomas, preferring a colorblind approach to affirmative action, claimed that the Court was making policy and creating new rules. In denouncing the state's use of racial classifications, Thomas repeated the same arguments he made in *Grutter* by claiming that the majority opinion is 'irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents." 136 S. Ct. at 2215 (Thomas, J., dissenting).

117. *See* Brief for Petitioner at 8, Fisher v. Univ. of Tex. At Austin (Fisher II), 136 S. Ct. 2198 (2016) (No. 14–981)

118. *See* Brief for Respondents, Abigail Noel Fisher, 136 S. Ct. 2198 (2016) (No. 14–981).

119. *Fisher II*, 136 S. Ct. at 2228 n.5 (Alito, J., dissenting).

120. *Id.* At 2227 (Alito J, dissenting).

121. *Id.* At 2212 (plurality opinion).

> an admissions boost, notwithstanding the fact that there are more [Latino Americans] than Asian–Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian–Americans.[122]

Once again, this characterization hides the fact that UT only introduced evidence that minority students in general experienced feelings of loneliness and isolation—evidence also allowed in the *Hopwood*.[123] Alito is just trying to score points, not genuinely advocate for Asian American applicants.

By portraying himself as an ally, Alito then used Asian Americans to argue that affirmative action discriminates against Whites. Justice Alito pursues this goal by actively separating Asian Americans from Black and Latino Americans. His accusation against the Fifth Circuit—that the court wrongly assumed that most Black and Latino applicants were only able to get into UT because the university's ranking system meant that "they did not have to compete against Whites and Asian American students," —reveals this motive.[124] Alito also asserted that the majority opinion helped affluent Black Americans students and hurt Asian American students and used the perennial trope of pitting Black and Latino Americans against Asian Americans.[125] After discussing the SAT score gap between White and Black applicants, Justice Alito wrote that "Asian–American enrollees admitted to UT through holistic review have consistently higher average SAT scores than White enrollees admitted through holistic review."[126] If White applicants score higher than Black applicants, and Asian American applicants score higher than White applicants, but UT denies both Asian American and White applicants admission, then both of these groups must share the common plight of being penalized for overachieving. We can use the same words in *Fisher II*, to expose the sub-text: if "providing a boost to Blacks and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission," then both White and Asian Americans benefit from preventing Black and Latino Americans from gaining the benefits of affirmative action.[127]

Both goals—trying to prove he's an Asian American ally and conflating the White and Asian American experiences—show that Alito's dissent plays on the model minority stereotype. Indeed, Alito's dissent rests on the theory that Asian Americans are "honorary Whites" in university admissions

122. *Id.* At 2198 (Alito J, dissenting).

123. *Id.* At 2212 (plurality opinion).

124. *Id.* At 2217 (Alito, J., dissenting).

125. *Id.* At 2228 n.5.

126. *Id.* At 2216.

127. *Id.* At 2227 n.4.

programs that factor in race, implying that Asian American interests better align with White interests than with other minority interests.[128] This is the problem that Professor Alfred Yen warned about when he wrote "Asian Americans are obviously people of color, but the ease with which they are given White attributes makes it possible [for them to] argue about the interests of whites without ever mentioning whites."[129] Asian Americans Advancing Justice (AAAJ), a non-profit legal aid and civil rights organization dedicated to Asian American racial justice, observed that, by not talking about White interests and White victimhood directly, "Justice Alito [in *Fisher*] takes pains during a period of significant racial conflict in our society, to look outside the record to irresponsibly pit Asian Americans against other communities of color."[130]

Robert Chang wrote, that the "move to abandon preferences for racial minorities while leaving intact preferences that primarily benefit Whites is not about fairness or merit at all. It is about protecting white entitlement."[131] By feigning allyship and playing into the model minority stereotype, Justice Alito's dissent laid the perfect groundwork for *SFFA v. Harvard* to cement White entitlement in higher education.

IV. STUDENTS FOR FAIR ADMISSIONS V. HARVARD

The organization Students For Fair Admissions (SFFA), also associated with Blum, moved away from applying the strategy of using a sympathetic young White female in *Fisher* to using Asian American student-plaintiffs to challenge the Harvard and UNC affirmative action programs. Blum contacted Chinese community groups via WeChat and social media to get

128. *See* Wu, *Neither Black Nor White*, *supra* note 97, at 272 ("Functionally, the injection of Asian Americans into the affirmative action debate transforms formally non-cognizable harm to the White majority into arguably cognizable harm against a colored minority. It completes the 'Divide and conquer' tactic by then turning affirmative action for Black Americans into discrimination against Asian Americans. Asian Americans become the 'innocent victims' in place of Whites.'").

129. Alfred C. Yen, A *Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39, 52 (1996). Whiteness status is not based solely on skin color since one can achieve it based on socio-economic success and upward mobility. As Professor Ian Haney Lopez points out in reference to Cubans and Asians, "Growing numbers of minority individuals, those with fair skin, wealth, political connections or high athletic artistic or professional accomplishments –can virtually achieve a White identity. [This] racial designation . . . like others . . . operates on a sliding scale." *See* Ian Haney Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1, 5 (2003).

130. *See* Stewart Kwoh & Mee Moua*, Opinion: On Affirmative Action, Asian Americans 'Are Not Your Wedge*,' NBC NEWS (July 19, 2016), https://www.nbcnews.com/news/asian-america/opinionaffirmative-action-asian-americans-are-not-your-wedge-n610596.

131. ROBERT CHANG, DISORIENTED, *supra* note 84, at 122.

support for his cause, recruit Chinese plaintiffs, and spread disinformation.[132] At a presentation to the Houston Chinese Alliance in 2015, Blum told the group of Chinese Americans, "I needed Asian plaintiffs."[133] These Chinese American students were portrayed as model minorities and innocent victims, but unlike Abigail Fisher, they were not White and possessed much stronger compelling qualifications for admission.[134] SFFA linked the model minority stereotype to conservative White values, and its supporters were primary affluent Chinese recent immigrants. Many legal scholars recognized Blum's tactics and disingenuous arguments as strategically made to further a conservative agenda rather than to protect Asian Americans, but those critiques did not prevent him from mounting his legal challenges.[135] After gathering support and funds, SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admission program violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[136]

Essentially, SFFA presented the false narrative that Asian American students face an "Asian Penalty" in the admissions process, and that affirmative action led to discrimination.[137] The organization viewed racial preferences in admissions as a continuation of the historical exclusion against Asian Americans.[138] SFFA and its supporters conflated anti-Asian bias with

132. *See* Mordowanec, *supra* note 5 (explaining how Edward Blum specifically recruited Asian American students and white women to challenge affirmative action); Huq Hsu, *The Rise and Fall of Affirmative Action*, THE NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action.

133. *See* Dirks, *supra* note 85.

134. *See* Stephanie Mencimer, *Here's the Next Sleeper Challenge to Affirmative Action,* MOTHER JONES (July 19, 2016, 10:00 AM), https://www.motherjones.com/politics/2016/07/abigail-fisher-going-stay-mad [hereinafter "Mencimer, *Next Sleeper Challenge*"].

135. *See* Nancy Leong & Erwin Chemerinsky, *Don't use Asian Americans to justify anti-affirmative action politics,* WASH. POST (Aug. 3, 2018), https://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-tojustify-anti-affirmative-action-politics.

136. One irony of this strategy is the fact that Blum, as a long-time advocate of colorblindness, has led efforts to gut the Voting Rights Act, a piece of legislation intended to strengthen the Civil Rights Act. *See* Betsy Reed, *Man behind gutting of Voting Rights Act: 'I agonise' over decision's impact*, THE GUARDIAN (Jan. 5, 2016), https://www.theguardian.com/us-news/2016/jan/05/edward-blum-voting-rights-act-civil-rights-affirmative-action.

137. *See* Jonathan P. Feingold, SFFA v. Harvard: *How Affirmative Action Myths Mask White Bonus*, 107 CAL. L. REV. 707, 710 (2019) (asserting that "by viewing this as a case that is all about affirmative action, common accounts tend to conflate two discrete dimensions of SFFA's suit: (1) a rather generic attack on Harvard's affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against Asian Americans. The first claim implicates affirmative action; the latter, which I refer to herein as Harvard's 'Asian penalty,' does not."); *id*. at 730 ("In this sense, by advocating for colorblindness, SFFA commits the sin for which it faults Harvard: reducing all Asian-American applicants to an undifferentiated and monolithic block.").

138. Mencimer, *Next Sleeper Challenge*, *supra* note 134.

the belief that affirmative action is anti-Asian.[139] At the same time, the media facilitated SFFA's use of a select group of Chinese Americans to make it appear that most Asian Americans opposed affirmative action.[140] Added to that, Asian Americans, who took a prominent role in racial justice solidarity efforts, were mischaracterized by the SFFA lawsuit as being anti-Black.[141] Anyone familiar with Asian American issues will easily recognize that the allegations of university admission policies discriminating against Asian Americans made by SFFA and AACE, portraying "Asian Americans as victims" of affirmative action, were not new.[142] In fact, such arguments harken back to the Reagan Administration's argument that affirmative action unfairly limited opportunities of White Americans.[143]

Undoubtedly, timing was on Blum's side. He was reusing the same arguments against affirmative action he used in *Fisher*, but this new case pitted Black and Latino Americans against White and Asian Americans. Unlike *Fisher*, the Court had a deeply conservative supermajority that was waiting for the case to reach its docket.[144]

a. Lower Court Findings

i. Harvard's Admissions Program

Harvard screened and assigned a numerical score to each application based on six categories: academic, extracurricular, athletics, school support, personal, and overall, which factored in the applicant's race.[145] Admissions subcommittees review applications from particular geographic areas and consider the applicant's race to ensure there is no dramatic drop-off in minority admissions from prior classes.[146] A list of tentatively admitted students is created later showing legacy status, recruited athlete status, financial aid eligibility, and race, which could be a determinative tip.[147]

During the 15-day trial, the parties presented six years of Harvard's admissions statistics and data—including records and internal reports showing that Harvard consistently assigned Asian American applicants lower

139. *See* Feingold, *supra* note 137, at 728–30.

140. See Zhou, *supra* note 6.

141. *Id*.

142. *Id*.

143. *See* JEFF CHANG, WE GON' BE ALRIGHT, *supra* 87, at 26.

144. *See* N.Y. TIMES, *The Editorial Board*, *supra* note 212.

145. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 397 F. Supp.3d 126, 139–44 (D. Mass 2019).

146. *Id*.

147. *Id*.

personal/social ratings despite them having higher grades and SAT scores.[148] Internal documents showed that Harvard knew its admission policies had negative effects on Asian Americans, but that awareness did not lead to action.[149] The parties used this data differently. Petitioners excluded recruited athletes, children of alumni and wealthy donors, and children of faculty from their analysis because such applicants received preferential treatment.[150] Whereas Harvard included them in its analysis.[151] SFFA argued that the documents supported a pattern of discrimination against Asian Americans in admissions.[152] Harvard, in turn, rejected such claims and responded that SFFA's flawed statistical model, on which its claims rested, ignored factors such as personal essays and letters of recommendation, and omitted recruited athletes and legacy admits.[153]

Two different courts reviewed SFFA's claims against Harvard and found no evidence of discrimination against Asian American applicants in the admissions process.

District Judge Allison D. Burroughs found that, "Harvard's witnesses credibly testified that they did not use race in assigning personal ratings (or any of the profile ratings) and did not observe any improper discrimination in the admission process."[154] She noted, "any causal relationship between Asian American identity and the personal rating must therefore have been sufficiently subtle to go unnoticed by numeric considerations, [and] diligent and intelligent admission officers who were immersed in the admissions process."[155] Judge Burroughs acknowledged, "SFFA did not present a single admission file that reflected any discriminatory animus, or even application

148. *Id*. at 145–46; *see also* Jennifer Lee, *Harvard may discriminate against Asian Americans, but its preference for legacy students is the bigger problem*, L.A. TIMES (June 22, 2018), http://www.latimes.com/opinion/op-ed/laoe-lee-harvard-legacy-student-advantage-20180622-story.html; Scott Jaschik, *Smoking Gun on Anti-Asian Bias at Harvard*?, INSIDE HIGHER EDUC. (June 18, 2018), https://www.insidehighered.com/admissions/article/2018/06/18/harvard-faces-new-scrutinyover-how-it-evaluates-asian-american; *see* Aaron Mak, *Admitting Bias*, SLATE (Oct. 15, 2018), https://slate.com/news-and-politics/2018/10/harvard-admissions-lawsuit-trial-asian-american-discrimination-reports.html.

149. Other documents revealed that the program was less likely to admit low-income Asian Americans applicants compared to higher-income Black Americans. *See* Jaschik*, supra* note 148*; see* Mak, *supra* note 148.

150. Chloe Foussianes, *A Timeline of the Harvard Affirmative Action Lawsuit*, TOWN AND COUNTRY MAG. (Nov. 2, 2018, 4:11 PM), https://www.townandcountrymag.com/society/money-andpower/a24561452/harvard-lawsuit-affirmative-action-timeline.

151. *Id*.

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

153. *Id*.

154. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 397 F. Supp.3d 126 (D. Mass 2019).

155. *Id*. at 169.

of an Asian American who it contended should have or would have been admitted absent an unfairly deflate personal rating."[156] The lack of evidence of discrimination in application ratings other than a slight numerical disparity "reflects neither intentional discrimination against Asian American applicants nor a process that was insufficiently tailored to avoid the potential for unintended discrimination."[157] Judge Burroughs concluded that Asian Americans and White applicants faced similar burdens, but Harvard did not impose racial quotas or engage in impermissible racial balancing.[158]

The First Circuit affirmed the district court.[159] Chief Judge Jeffrey R. Howard and Sandra L. Lynch wrote the panel decision and concluded: (1) there was no statistical evidence showing that Harvard intentionally discriminated against Asian Americans whose admission rates have been consistently increasing for decades;[160] (2) the personal rating had a marginal effect on Asian Americans;[161] (3) non-statistical evidence suggested that Harvard admissions officers did not engage in any racial stereotyping[162] and (4) if there was any implicit bias that could have lowered an Asian American applicant's admissions score, it would have been slight. [163]

ii. The University of North Carolina's Admissions Program

District Judge Copeland Loretta Biggs concluded that SFFA's non-statistical evidence and statistics did not support a conclusion that UNC engaged in discrimination. UNC has a similar admissions process to Harvard, which also considers a numerical rating and factors in an applicant's race, which could serve as a substantial plus. Judge Biggs determined that underrepresented minority students tended to score higher on their personal ratings than their White and Asian Americans peers, but were more likely to receive a lower rating on their academic program, academic performance, extracurricular activities, and essays.[164]

In short, Judge Biggs found "no evidence that race was used by the University as a predominant factor in evaluating a candidate's admission, nor that it was a defining feature of any individual application" and "race is not a predominant factor in the University's admission program through policy

156. *Id*. at 195.

157. *Id*. at 194.

158. *Id*. at 203.

159. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 980 F.3d 157 (1st Cir. 2020).

160. *Id*. at 102, 198.

161. *Id*. at 104.

162. *Id*. at 203.

163. *Id*. at 202.

164. *Id*. at 199–201.

or practice, not is it a defining feature of any individual application. Nor does the University use a quota system, formal, or add mechanical points for race in it is admissions decisions."[165] Within this framework of unrepresented minorities on the one hand, and Whites and Asian Americans on the other, Judge Biggs observed that (1) "the evidence shows that, as a whole, underrepresented minorities are admitted at lower rates than their White and Asian American counterparts and those with the highest grades and SAT score are denied twice as often as their White and Asian American peers;" [166] and more White and Asian American students were admitted as part of UNC's classes annually during the relevant years.[167]

The court found that Harvard and UNC admission programs were permissible under the Equal Protection Clause and Court's precedent. Although the lower courts found no evidence of discrimination or implicit bias against Asian American applicants, these findings did not foreclose the possibility of potential unconscious discrimination against Asian Americans in the admissions process. Apparently, none of this mattered to the Court as it granted certiorari after the First Circuit affirmed in the Harvard case, and before the UNC case reached judgment.

B. The Court's Decision

At oral argument before the Court, SFFA counsel's Cameron Norris signaled to the Justices that the appeal turned on the issue of discrimination against Asian Americans:

Grutter assumed that race would only be a plus. But race is a minus for Asians, a group that continued to face immense racial discrimination in this country. Asians should be getting into Harvard more than Whites, but they don't because Harvard gives them significantly lower personal ratings. Harvard ranks Asians less likable, confident, and kind, even though the alumni who actually meet them disagree. What Harvard is doing to Asians is like what it was doing to Jews in the 1920s, is shameful, but it's a predictable result of letting universities use race in highly subjective processes.[168]

Some of the Justices were of the same mind. As he did in *Fisher*, Alito again

asked a number of probing questions about discrimination against Asian Americans. Alito asked Ryan Park, North Carolina's solicitor general, about

165. *See* Students for Fair Admissions, Inc. v. Univ. of N.C. 567 F. Supp. 3d 580, 660 (D.N.C. 2021).

166. *Id.* at 667.

167. *Id.* at 660.

168. *See* Transcript of Oral Argument at 3–4, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al., (No. 20-1199).

UNC's brief which did not discuss Asian students, despite the long history of anti-Asian discrimination in America, and then moved onto a discussion of how race based admissions as a zero-sum game.[169] Alito fished for a reason why Harvard would give the lowest personal rating scores to Asian applicants in comparison to Whites and other racial groups.[170] Later Alito posed the same questions to Harvard's lawyer, Seth Waxman about discrimination against Asian Americans.[171] Noticeably, neither Park or Waxman gave satisfactory answers, or sometimes no answer at all.[172] Harvard Law Professor Jeannie Suk Gersen, who was one of the few Asian Americans in attendance, wrote that she was skeptical of both the advocates and the Justices' professed concerns about possible intentional discrimination against Asian Americans students.[173] In an article that he wrote after oral arguments, Asian American activist Jeff Chang bluntly asked whether Asian Americans' interests were being adequately represented:

The decisions …did not turn significantly on the alleged harms done to Asian Americans, but rather on how the Justices interpreted the equal protection clause of the 14th Amendment. Instead, Asian Americans…were mainly there for display, as mostly White lawyers on both sides Asians-plained their history and positions to the court.[174]

But most court watchers knew that this oral argument was ultimately pointless: the conservative majority would strike down affirmative action under the guise of the Equal Protection Clause no matter what the advocates said.[175]

It was clear that the Court would not accept the lower courts' findings the Harvard and UNC's admissions programs did not discriminate against Asian American applicants. The conservative supermajority deemed the mere allegations as sufficient pretext to do what the Justices had always wanted to do: abolish affirmative action once and for all—pressing ahead even without clear evidence of a practice or pattern of anti-Asian discrimination.

169. *See* Jeannie Suk Gersen, *Affirmative Action and the Supreme Court's Troubled Treatment of Asian Americans*, THE NEW YORKER (Nov. 6, 2022), https://www.newyorker.com/news/our-columnists/affirmative-action-and-the-supreme-courts-troubled-treatment-of-asian-americans.

170. *Id*.

171. *See* Transcript of Oral Argument at 48–71, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al., (No.20-1199); see also Gersen, *supra* note 169.

172. *See* Gersen, *supra* note 169.

173. *Id*.

174. *See* Jeff Change, *Diversity is a Core Value*, *supra* note 93.

175. *See* N.Y. TIMES, *The Editorial Board*, *supra* note 212; Adam Harris, *The Decision That Upends the Equal-Protection Clause,* THE ATLANTIC (June 29, 2023), https://www.theatlantic.com/ideas/archive/2023/06/scotus-affirmative-action-ruling-implications/674567/.

i. Chief Justice Robert's Opinion

Chief Justice John Roberts wrote the forty page majority opinion addressing both the Harvard and UNC cases, joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanagh, and Amy Coney Barrett. The majority disfavored the precedent set by *Bakke*, *Grutte*r, and *Fisher*, and found Harvard and UNC's lack of specific and tangible guidelines suspect. Roberts declared that "[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause…applies without regard to any differences or race, of color, or of nationality is universal in its application."[176]

Roberts acknowledged that the Court had previously given a degree of deference to universities' academic decisions, but that "that deference must exist within constitutionally prescribed limits."[177] However, "[c]ollege admissions are zero-sum. A benefit provides to some applicants but not to others necessarily advantages the former group at the expense of the latter."[178] He argued that Harvard and UNC failed to provide "exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires." [179] To Roberts, the objectives were too vague to measure. The Chief Justice noted that both programs consider race as part of their admissions program for commendable goals, such as "training future leaders in the public and private sector" and "promoting the robust exchange of ideas."[180] At the same time, he questioned why the admissions programs did not have any standard guidelines to predict whether minority students would become engaged, productive citizens and leaders.[181] The Chief Justice also raised concerns about the fact that Harvard's admissions program's use of race had no "sunset date," which violated *Grutter* which held that affirmative action programs "must have a logical endpoint."[182] Thus, Roberts argued that Harvard and UNC's "programs do not satisfy the strict scrutiny standard of review" and they "unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[183]

Roberts deemed Harvard and UNC's holistic admission processes as inexcusable racial stereotyping because, from his vantage point, their programs operated based on the premise that minority students share the same

176. *SFFA*, 600 U.S. at 206.

177. *Id*. at 217.

178. *Id*. at 218–19.

179. *Id*.

180. *Id*. at 214.

181. *Id*.

182. *Id*. at 212 (citing *Grutter*, 123 S. Ct. at 2325); *id*. at 225.

183. *Id*. at 230.

views or perspectives on particular issues.[184] According to the Chief Justice, "[w]hen a university admits students on the basis of race, it engages in the offensive and demanding assumption that [students] of a particular race, because of their race, think alike—in violation of the Equal Protection Clause."[185] Here, he contended the two admission programs tolerated and perpetuated "the pernicious stereotype that a black student can usually bring something that a White person cannot offer."[186] To reject the universities' assertion that race is never a negative factor in their admissions programs, Roberts cited to the First Circuit finding that Harvard's admissions program "has led to an 11.1% decrease in the number of Asian Americans admitted," as well as an overall decrease in the number of Asian Americans and White students admitted.[187] Roberts also faulted the Harvard and UNC admissions programs for relying on imprecise and burdensome racial categories: "by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other."[188] With that, Roberts argued that racial classifications are demeaning, and that the student's individual experience matters, not their race.[189]

As a practical matter, the majority opinion gave little guidance on how institutions can use race going forward. For example, it remains unclear how dominant the issue of race could be when discussed in personal essays to explain how an applicant's race has affected their individual experience, and whether the ruling also extends to scholarships.[190] In light of that, the Departments of Education and Justice released initial federal guidance designed to assist a college pursue diversity while ensuring legal compliances with the Court's ruling.[191] Under the department's guidance, colleges can use race to engage in recruitment efforts, and on campus retention efforts, and universities can collect and review demographic data on applicants as long as they

184. *Id*. at 219.

185. *Id.* at 220–21

186. *Id.* at 220.

187. *Id*. at 218.

188. *Id*. at 216 (emphasis in original).

189. *Id.* at 220–21; *but see* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996) (arguing that colorblindness masks conscious or unconscious racism, and concluding that Supreme Court's colorblind approach to jurisprudence increases divisions of society along racial lines between better educated, wealthier "haves" and uneducated, poor, unrepresented "have-nots").

190. *See* Liam Knox, *Biden Administration Releases Guidance on Affirmative Action*, INSIDE HIGHER EDUC. (Aug. 15, 2023), https://www.insidehighered.com/news/diversity/2023/08/15/biden-administration-issues-guidance-affirmative-action.

191. *SFFA*, 600 U.S. at 220–21.

do not rely on it when making admissions decisions.[192] The decision also left the door open for universities to consider personal essays that discuss how an individual's race or ethnicity affected their life,[193] and for service academies like the U.S. Naval Academy and West Point to continue to use race-based/race-conscious admission programs.[194]

ii. Gorsuch and Thomas's Concurrences

Gorsuch shared the view that the Harvard admissions process "cannot . . . be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while White and Asian American applicants are unlikely to receive a meaningful race-based tip."[195] Gorsuch likewise used the Asian category to claim that it "sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population."[196] He insisted that this agglomeration ignores differences in language, culture, and historical experiences.[197] And the "Asian Penalty" issue[198] surfaced when Gorsuch devoted an entire passage to discuss how it influences paid admissions advisors tell some Asian Americans students to downplay their Asian American identity "to maximize their odds of admission."[199]

> We will make them appear less Asian when they apply, one promises. If you're given an option, don't attach a photograph to your application, another instructs. It is difficult to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that race-conscious admission benefit [] the Asian American community. And it is hard not to wonder whether those left paying the steepest price are those least able to afford it children of families with no chance of hiring the kind of consultants who know how to play this game.[200]

Justice Thomas shared this perspective, and found that UNC and Harvard's admissions programs confer "no concrete and quantifiable

192. *Id*.
193. *Id*. At 230–31.
194. *Id*. At 214 n.4.
195. *Id.* At 302 (J., Gorsuch, concurring).
196. *Id.* At 293–92.
197. *Id.* At 155–56.
198. *See* Feingold, *supra* note 137, at 730.
199. *SFFA*, 600 U.S. at 293 (J., Gorsuch, concurring).
200. *Id.* At 293–94 (internal citations omitted).

educational benefits of racial diversity."[201] He wrote in his concurrence that "[a]ffirmative action is a disguise for discrimination."[202] In fact, Thomas asserted that any consideration of race is detrimental to Black and Latino Americans because "those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended," thus resulting in eventual, avoidable failure.[203] Justice Thomas further alleged that race-conscious admissions programs themselves "are leading to increasing racial polarization and friction."[204]

Thomas also offered the lengthiest discussion of Asian Americans in American history generally and college admissions. After providing an overview on the history of racism against Asian Americans, he pivots to admissions: "the zero-sum nature of college admissions," results in an intense competition in which any disadvantage, such as being Asian American, can be devastating.[205] Like Roberts and Gorsuch, Thomas characterized Whites and Asian Americans as two racial groups disadvantaged by affirmative action. Like Gorsuch, Thomas chided the universities for "lump[ing] together White and Asian students from privileged backgrounds with Jewish, Irish, Polish, or other 'White' ethnic groups whose ancestors faced discrimination and descendants of those Japanese-American citizens interned during World War II," thus reducing the diversity of experience in each group.[206] He also suggested that Black and Asian Americans have conflicting interests because, in his opinion, "it seems particularly incongruous to suggest that a past history of segregationist policies toward [B]lacks should be remedied at the expense of Asian American college applicants," particularly when both Asian Americans and Whites "are not responsible for the racial discrimination that sullied our Nation's past."[207] Then, as if his last few assertions weren't provocative enough, Justice Thomas stated that "individuals, and others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned."[208] One can only guess which two groups he believes might feel this resentment.

While both majority and concurring opinions dubiously ignored racial history in their analyses of racial minority groups, this disconnect is most

201. *Id.* At 254 (J. Thomas, concurring).
202. *Id.* At 258.
203. *Id.* At 268.
204. *Id.* At 277.
205. *Id.* At 273–74.
206. *Id.* At 299.
207. *Id*. At 273–74.
208. *Id*. At 283.

apparent where Thomas's concurrence in which he wholehearted endorsed colorblindness, a key argument for Blum as well. Here, he offered a defense of a colorblind constitution, while simultaneously praising Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*:

> For Justice Harlan, the Constitution was colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to equality before the law."[209]

Thomas conveniently ignores a broader understanding of Justice Harlan's comments, which as a reminder from earlier in this Article, were actually anti-Chinese.[210] Indeed Thomas's opinion does not mention that as a historical matter, racially and culturally, the Chinese were frequently compared with [B]lack Americans and White Americans—comparisons that stressed racial hierarchies, the perceived immorality of the Chinese, their supposed cultural inferiority, and their ultimate inability to assimilate into American society.[211]

America is not truly race-blind, and affirmative action was only a modest tool to achieve diversity, but removing race from the admissions process can hinder racial diversity.[212] In response to Justice Jackson's dissent, in which she argued that American society has been and will always be color-conscious,[213] Thomas seems to have embraced the model minority myth when he conjured up an incendiary hypothetical. He asks how she would explain to a hardworking Chinese student why he should shoulder the burden of affirmative action.[214] He lobbed this response: "If such a burden would seem difficult to impose on a bright-eyed young person, that's because it

209. *Id.* At 246 (citing Plessy v. Ferguson 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. Of Ed. Of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954)).

210. *Plessy*, 163 U.S. at 561 (1896) (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.").

211. JOHNSON *supra* note 62, at 254.

212. *See The Editorial Board: The Supreme Court Upends 'Equal Protection*,' N.Y. TIMES, July 2, 2023, at 11 [hereinafter "N.Y. TIMES, *The Editorial Board"*].

213. *SFFA*, 600 U.S. at 385 (J., Jackson, dissenting).

214. *Id*. At 283 (J., Thomas, concurring); *see* Abbie Vansickle*, Black Justices Spar Over Decision*, N.Y. TIMES, June 30, 2023, at A15 (analyzing and contrasting the arguments given by Justices Thomas and Jackson).

should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation."[215]

iii. Justice Sotomayor, Kagan, and Jackson's Dissents

Justice Sonia Sotomayor and Ketanji Brown Jackson used their dissents to point out the gaps and hypocrisy of the majority opinion.[216]

Sotomayor first distinguished between discrimination against Asian Americans and the effort to abolish affirmative action. She noted Justice Thomas's allegation that race-conscious admissions programs discriminated against Asian Americans "points to no legal or factual error below, precisely because there is none."[217] Sotomayor stated that even assuming arguendo that Harvard engaged in racial discrimination, "there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process."[218]

Both Justice Sotomayor and Jackson rejected the majority's application of strict scrutiny by determining that the programs were narrowly tailored. Sotomayor reasoned that the universities undertook reasonable balancing: for example, even if Harvard's use of race does advantage some Asian American applicants, eliminating the consideration of race would significantly disadvantage other Asian American applicants. Sotomayor's dissent emphasized that the "limited use of race" by colleges and universities "has helped equalize educational opportunities of all students of every race and backgrounds and has improved racial diversity on college campuses."[219] To support her assertion, she cited Harvard's application files which demonstrated that the race-conscious holistic admission policies do increase Asian American enrollment; while "Asian American enrollment declined at elite universities that are prohibited by state law from considering race."[220] Justice Jackson in her dissent, joined by Justices Sotomayor and Kagan, focused on UNC's program, but came to the same conclusions.[221] She stressed how UNC's holistic review process evaluating applicants for admission allowed

215. *SFFA*, 600 U.S. at 283 (J., Thomas, concurring).

216. Justice Elena Kagan joined both dissents. *Id*. At 317 (J., Sotomayor, dissenting); *id*. At 384 (J., Jackson, dissenting).

217. *Id*. At 374 (J., Sotomayor, dissenting).

218. *Id*. At 266.

219. *Id*. At 318.

220. *Id*. At 375 (J., Sotomayor, dissenting).

221. Jackson recused herself from the Harvard case because served as six-term member of Harvard's Board of Overseers. *See* Kayla Jimenez*, What Justice Jackson's Recusal From Harvard Affirmative Action Case Means for Black Students*, USA TODAY (Feb. 28, 2023), https://www.usatoday.com/story/news/education/2023/02/28/ketanji-brown-jackson-recusal-harvard-affirmative-action-case-supreme-court/11156381002/.

a full personalized assessment of the advantages and disadvantages that the applicant experienced in their life.[222]

Sotomayor agreed with those in the majority like Roberts and Gorsuch that the Asian American community is not a monolith, but that fact actually increases the need for race-conscious holistic admissions "to allow colleges and universities to consider the vast differences within [that] community."[223] Sotomayor shared similar concerns about the impact of eliminating affirmative action as those expressed in the *Amici* Brief filed by Asian American Advancing Justice. It argued that "[r]ace–conscious admissions programs have opened the doors to higher education for [Asian Americans and Pacific Islanders], as they have for other countries of color," and "depriving universities of the ability to consider race only ties their hands from addressing potential implicit bias and taking steps to eradicate it."[224] "Although progress has been slow and imperfect," she wrote yet "race-conscious college admission has advanced the Constitution's guarantee of equality and have promoted" *Brown v. Board of Education*'s "vision of a Nation with more inclusive schools."[225]

As to the majority's contention that *Grutter* set forth a sunset provision for affirmative action, Sotomayor responded that there is no strict predictable deadline in *Grutter* to end affirmative action in twenty-five years.[226] As the Court had held in *Fisher II*, the *Grutter* Court only intended the "sunset provision," to encourage continuous reflection about the role of race because "[e]quality is an ongoing project in a society where racial inequality persists."[227] Indeed, according to Sotomayor this command to end the use of race in admissions "as soon as possible," still "rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable."[228]

222. *SFFA*, 600 U.S. at 400–01 (J., Jackson, dissenting).

223. *Id*.; *see also* Jeffrey Rosen, *Is the U.S. Ready to Go Colour-Blind?,* INDEP. (LONDON), July 24, 1995, at 11 (asserting that practical consequences of "colour-blind" principle would mean in many cases a return to virtually all-White American universities and workplaces).

224. *See* Brief of Asian Americans Advancing Justice and 37 Organizations as Amici Curiae in Support of Respondents, Aug. 1, 2022, at 27. AAAJ's brief also outlined how historical discrimination against Asian Americans and Pacific Islanders manifested into disparate access to higher education among AAPI subgroups. For example, the brief detailed the lower-than-average admissions rates for various AAPI subgroups —including Filipino, Thai, Native Hawaiian, Pacific Islander, Laotian, Samoans Guamanians, Chamarros, and Fijians—seeking to enroll in the University of California system.

225. *SFFA*, 600 U.S. at 375 (J., Sotomayor, dissenting); *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1, 2–3 (1991) (criticizing Supreme Court's use of traditional equal protection analysis as "[a colorblind] interpretation of the Constitution," which "legitimates, and thereby maintains, the social, economic, and political advantage that Whites have over other Americans.").

226. *SFFA*, 600 U.S. at 369–70 (J., Sotomayor, dissenting).

227. *Id*. At 370.

228. *Id*. At 369–70.

Jackson, on the other hand, entertained the idea of a "definite end," of affirmative action programs, but only when the "deep-rooted, objectively measurable problems," that these programs address also end.[229]

Sotomayor and Jackson also advocated for affirmative action by writing extensively about the fallacy of colorblindness. Sotomayor defined "educational opportunity [as] a prerequisite to achieving racial equality in our nation and that these structural barriers reinforce other forms of inequality of communities of color."[230] Justice Jackson passionately argued for how diverse student bodies in higher education help all students.[231] Justice Sotomayor decried that the majority's decision to roll "back decades of precedent and momentous progress" and "cement[ed] a superficial rule of colorblindness as a constitutional principle in an endemically segregated society."[232] Justice Jackson went further when she wrote that "[o]ur country has never been colorblind," because of our "lengthy history of state-sponsored race-based preferences in America."[233] Justice Jackson then took aim at the heart of the majority's reasoning:

> With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems. No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. [234]

229. *Id.* At 404 (J., Jackson, dissenting).

230. *Id*. At 336–37 (J., Sotomayor, dissenting); *see also* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 179 (1996) (interpreting race-blind philosophy as maintaining status quo, and as serving certain racial groups and not others); *see also* Parker, *supra* note 189, at 773 (stating the Supreme Court enforces gross racial inequalities pervading America and deprives nation of claim to racial justice).

231. *SFFA*, 600 U.S. at 403–04 (J., Jackson, dissenting).

232. *Id.* At 333–34 (J., Sotomayor, dissenting) ("Ignoring race will not equalize a society that is racially unequal. Equality re-quires acknowledgment of inequality."); *e.g.* John A. Powell, *An Agenda for the Post-Civil Rights* Era, 29 U.S.F. L. REV. 889, 895 (1995) (criticizing assumption by proponents of colorblindness that there exists true equality between races); LOPEZ, *supra* note 230, at 178 (asserting that race-blindness works against efforts to address past discrimination); see also Jim Chen, *Diversity and Damnation,* 43 UCLA L. REV. 1839, 1844–45 (1996) (asserting that colorblindness sounds good theoretically, but ignores social reality of economic and unconscious discrimination); Neil Gotanda, *Failure of the Color-blind Vision: Race, Ethnicity, and the California Civil Rights Initiative,* 23 HASTINGS CONST. L.Q. 1135, 1137 (1996) (rejecting notion that colorblindness promotes a progressive, forward-looking "vision" of racial justice).

233. *Id.* At 385 (J., Jackson, dissenting).

234. *Id.* At 407.

Justice Sotomayor also attacked the majority's reliance on the fallacy of colorblindness as a smokescreen for policy making. She decried how "six unelected members of [the *SFFA*] majority upend[ed] the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law."[235] In sum, these dissents expose the false premises of colorblindness and should serve as an invitation for Asian Americans join the fight against to preserve civil rights not just in education, but already all sectors of American life.

V. THE CRUCIAL ROLE OF INTERRACIAL SOLIDARITY IN A POST-*SFFA* WORLD

SFFA v. Harvard has placed the Asian American community at a familiar crossroads. About thirty years ago, Professor Mari Matsuda outlined the near-impossibility for Asian Americans to be neutral in race relations. According to Matsuda, as Asian Americans attempt to define their place in American society, they are becoming the "racial bourgeoisie" situated between Black and White.[236] Matsuda rhetorically asked, "If White, as it has been historically, is the top of the racial hierarchy in America, and [B]lack, historically, is the bottom, will yellow assume the place of the racial middle?"[237] She then argued that the role of Asian Americans as the "middle" in a racial hierarchy—negotiating disputes between Black Americans and Whites—is a critical one. Asian Americans can reinforce White supremacy by falsely believing that they can become just like Whites through cultural assimilation and maintaining the status quo; or they can align themselves with Black and Latino Americans seeking racial justice.[238] *SFFA v. Harvard*

235. *Id*. At 353 (J., Sotomayor, dissenting).

236. *See* Matsuda, *supra* note 84, at 149, 154.

237. *See id.*; *see also* Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L.J. 81, 83 (1995) (stating that social stratification in mainstream society "is dominated not only by racial hierarchy, but [also] by a bipolar black/White structure," and that "Asian Americans are often placed in the 'middle' of this structure, sort of yellow buffer zone between black and White"); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 826 (1997) (suggesting that noticeably absent from traditional civil rights litigation strategy and legal discourse is a critical inquiry on the connection between law and racial hierarchy, including Asian Americans' purported status as a "'middle minority' [buffer] in the continuing subordination of Black Americans").

238. Matsuda, *supra* note 84, at 149–50; *see also* Wu, *Back Again*, *supra* note 61, at 204 (discussing how Asian Americans can "assert that they are not black in order to be accepted as White," as a way of cooperating with, and sustaining, White supremacy); Eric K. Yamamoto, *supra* note 237, at 821, 894 (discussing how Asian Americans and Whites are characterized "as victims of racial preference for Black Americans and Latinos").

in combination with current events could catalyze more Asian Americans to join in the interracial struggle for civil rights.

Again, while this choice between being a complicit bystander or an active collaborator isn't new, the spark for the conversation is. Videos of police violence against Black Americans have gone viral on social media, forcing more and more Americans of all colors to confront this dilemma. In July of 2014, social and traditional media started to increasingly, and rightfully, cover police violence against Black Americans because of the mass protests in Ferguson, Missouri in response to Eric Garner's violent death.[239] Protests escalated during the pandemic when police officers killed George Floyd and Breonna Taylor, among others, in 2020.[240] These demonstrations put a spotlight on what Black Americans and other minorities already knew to be true: the fight to end racism is far from over.

While incidents of police brutality against Asian Americans do not occur with the frequency they do against Black Americans, they do happen and this violence has inspired the community to take action.[241] Throughout the 1960 and 70s, Asian Americans worked together with Black Americans in seeking institutional reform of the NYPD stop and frisk practices. On April 26, 1975, NYPD officers savagely attacked Peter Yew, a twenty-seven-year-old engineer from Brooklyn, for being a concerned bystander.[242] Officers then took Yew back to the police station where they stripped and beat him again before charging him with resisting arrest and assault on a police officer.[243] About 2,500 Chinatown residents marched on City Hall in response, which led to mass beatings by NYPD officers.[244] The protests made a difference: the offending officers were suspended and charged with assault, the charges against Yew were later dismissed, and the precinct captain was transferred to another command.[245]

Unfortunately, reporting on police violence against Asian Americans has declined, but the pain continues. In 2006, a Minneapolis police officer,

239. *E.g. Timeline of events in shooting of Michael Brown in Ferguson*, AP NEWS (Aug. 8, 2019, 10:28 AM), https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62?utm_source=copy&utm_medium=share.

240. *E.g. George Floyd: Timeline of black deaths and protests*, BBC (Apr. 22, 2021), https://bbc.com/news/world-us-canada-52905408 (last visited Feb. 29, 2024).

241. *See* Kellen Browning & Brian Chen, *In Fight Against Violence, Asian and Black Activists Struggle to Agr*ee, N.Y. TIMES (Dec. 19, 2021), https://www.nytimes.com/2021/12/19/us/black-asian-activists-policing-disagreement.html.

242. *See* Leslie Maitland, *25,000 Chinese Protest Alleged Police Beating Here*, N.Y. TIMES (May 13, 1975), https://www.nytimes.com/1975/05/13/archives/2500-chinese-protest-alleged-police-beating-here.html.

243. *Id.*

244. *Id.*

245. *Id.*

Jason Anderson, shot and killed a nineteen-year-old Hmong refugee, Fong Lee, in an elementary school parking lot.[246] When a grand jury declined to indict Anderson and ruled the shooting justified, Lee's family brought a wrongful death claim against the city of Minneapolis. An all-White jury ruled that Andersen did not use excessive force, even after learning that the gun found beside Lee's body was planted.[247] In 2007, eighteen-year-old Chonburi Xiong, a Hmong teenager, was shot twenty-seven times in his Detroit home by White policemen[248]—a situation eerily similar to Breonna Taylor's tragic death in Louisville when police attacked her home in the middle of the night.[249] Xiong's family sued for $5 million after both the Macomb County Prosecutor's Office and an internal police investigation found that the shooting was justified.[250] In the end, Xiong's family settled for $130,000.[251] Then in December of 2020—just seven months after Minneapolis police officer Derek Chauvin murdered George Floyd by kneeling on his neck for more than nine minutes—police killed 30-year-old Filipino American Angelo Quinto by kneeling on his back for five minutes.[252] While Fong, George, Chonburi, Breonna, and Angelo's stories are different, they all should be alive today for the same reason.

Unfortunately, police violence also continues to enflame racial tension between Black and Asian Americans.[253] For example, in November of 2014, NYPD officer Peter Liang's bullet ricocheted off a wall and shot Akai Gurley, an unarmed twenty-eight-year-old Black man.[254] This event exposed the spectrum of opinions on racial justice that *SFFA v. Harvard* would try to

246. *See* Brandt Williams, *Fong Lee Family Angered by Verdict,* MPR NEWS (May 28, 2009), https://www.mprnews.org/story/2009/05/28/fong-lees-family-angered-by-verdict.

247. *Id*.

248. *See* Sandra Svoboda, *Shooting Point*, DETROIT METRO TIMES (Feb. 7, 2007, 12:00 AM), https://www.metrotimes.com/news/shooting-pains-2186589.

249. *See* BBC, *supra* note 240.

250. Sarah Rahal, *Asian-American community sees signs of resurgence in Detroit*, THE DETROIT NEWS (Feb. 18, 2019, 9:14 AM), https://www.detroitnews.com/story/news/local/detroit-city/2019/02/18/lost-asian-american-community-detroit-sees-reason-hope/2744890002/.

251. *Id*.; BBC, *supra* note 240 (Breonna Taylor's family settled for $12 million).

252. Jacey Fortin, *California Man Died After Police Knelt on Him for 5 Minutes, Family Says*, N.Y. TIMES (Feb. 25, 2021), https://www.nytimes.com/2021/02/25/us/angelo-quinto-death-police-kneel.html.

253. LEE, *supra* note 11, at 1475, 1501; Hansi Lo Wang, *'Awoken' By N.Y. Cop Shooting, Asian-American Activists Chart Way Forward*, NPR (Apr. 23, 2016, 7:30 PM), https://www.npr.org/sections/codeswitch/2016/04/23/475369524/awoken-by-n-y-cop-shooting-asian-american-activists-chart-way-forward.

254. *See* Jay Caspian Kang, *N.Y. Police Shooting Cases Divides City's Asian-Americans: How Should Asian –Americans Feel About the Peter Liang Protests*, N.Y. TIMES (Feb. 23, 2016), http://www.nytimes.com/2016/02/23/magazine/how-should-asian-americans-feel-about-the-peter-liang-protests.html; *Asian America: We Cannot Support Peter Liang,* ASIAN AM. ALL. (Feb. 25, 2016); Wang, *supra* note 252.

ignore. NPR reported that "the Liang case has not only exposed a growing range of opinions within the increasingly diverse Asian-American community. For some Asian-Americans, it has also re-energized a commitment to stand with other communities of color in solidarity."[255] Liang's actions thrusted the Asian American community into the national debate on violence against young Black American men and would inspire a new generation of activist dedicated to interracial justice.

Trends since 2014 show that Asian Americans increasingly support the Black Lives Matter movement and other interracial movements.[256] In 2017, for example, Asian and Black Americans collaborated with Muslim, Latino, and Jewish Americans and their communities, as well as civil rights and interfaith groups, to stand in solidarity against President Trump's travel ban.[257] Coalition building efforts and acts of interracial support has only grown stronger and more visible. In 2020—when conspiracy theories blamed Asian Americans, and specifically Chinese persons, for "causing" the COVID-19 pandemic[258]—Black American activists defended Asian Americans by calling out these heightened Anti-Asian sentiments and condemning the violence against Asian Americans.[259] This Black-Asian American solidarity refutes the image perpetuated by some news organizations and social media that people of color committed most of the violence against the Asian

255. Wang, *supra* note 252; BBC, *supra* note 240.

256. LEE, *supra* note 11, at 1475, 1501; Wang, *supra* note 242.

257. *See* Keith Ellison & Johnathan Greenblatt, *Stand Together to Fight Anti-Asian Hate. We All Have a Stake in a More Insular America*, USA TODAY (Mar. 9, 2021), https://www.usatoday.com/story/opinion/2021/03/19/unite-against-anti-asian-hate-black-muslim-White-jew-column/4748667001/.

258. Chris Jackson, et al., *Survey: More than 30 Percent of Americans Have Witnessed COVID-19 Bias Against Asians*, IPSOS AND CTR. FOR PUB. INTEGRITY (Apr. 28, 2020), https://publicintegrity.org/health/coronavirus-and-inequality/survey-majority-ofasian-americans-have-witnessed-covid-19-bias/.

259. *See e.g.,* Vinay Harpalani*, Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L.REV. 233, 251 (2022); *How Violence Against Asian Americans Has Grown and How to Stop It, According to Activi*sts; PBS NEWS HOUR (Apr. 11, 2022), https://www.pbs.org/newshour/nation/a-year-after-atlanta-and-indianapolis-shootings-targeting-asian-americans-activists-say-we-cant-lose-momentum; Amy Yee, *New Surveys of Asian Americans Show Persistent Racism and Hardship,* BLOOMBERGLAW (May 9, 2023), https://news.bloomberglaw.com/social-justice/new-surveys-of-asian-americans-show-persistent-racism-hardship; Russell Contrera*, Nearly 75% of Chinese Americans Report Discrimination in Past Year*, AXIOS (May 1, 2023), https://www.axios.com/2023/05/01/chinese-americans-report-racial-discrimination-asian-hate; Browning & Chen, *supra* note 241; Testimony of John C., Yang, Before the United States House of Representatives Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties Hearing on "Discrimination and Violence Against Asian Americans" (Mar. 18, 2021), https://docs.house.gov/meetings/JU/JU10/20210318/111343/HHRG-117-JU10-Wstate-YangJ-20210318-U21.pdf.

American community during the pandemic.[260] In reality, more than three-quarters of offenders of anti-Asian hate crime and incidents have been White males.[261] More and more activists have taken up Professor Claire Jean Kim's call for Asian Americans to stop looking through an "Asian-first" prism, and expanded efforts to eradicate hate crimes against their and all communities of color.[262] Asian Americans and everyone who is concerned about social justice can address the anti-Blackness within their community and reject racial stereotypes that support White hegemony. The idea of collaborative racial justice work is not new, yet is as relevant as ever as all racial minorities figure out what's next.

CONCLUSION

Justice Ginsburg once wrote: "It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."[263] This statement is as true today as when she wrote it in her *Grutter* concurrence, in which she diligently documented the constitutional precedents that the Court would end in *SFFA v. Harvard*. Almost thirty-five years after *Bakke*, and as evident in *SFFA v. Harvard*, Asian American communities continue to debate and disagree about affirmative action.[264] While there is more work still needed, Asian Americans have also taken and will continue to take action in to support affirmative action and participated in solidarity efforts.

260. *See* Kimmy Yam, *Viral Images Show People of Color as Anti-Asian Perpetrators. That Misses the Big Picture,* BROOKINGS (June 15, 2021), https://www.brookings.edu/articles/why-the-trope-of-black-asian-conflict-in-the-face-of-anti-asian-violence-dismisses-solidarity/. Most contemporary treatments of criminal justice issues which function within the traditional Black-White framework of racial analysis forgoing a more comprehensive understanding between the relationship between race, criminal law, and criminal procedure. We must reject the Black-white binary and instead actively include Asian Americans in discussions of criminal justice since they too are persons of color. *See* Victor C. Romero, *Asian American Allyship,* 11 INDIANA J.L. & SOC. EQUALITY 162, 165 (2023).

261. *See* Yam, *supra* note 260, Romero, *supra* note 260.

262. *See* CLAIRE JEAN KIM, ASIAN AMERICANS IN AN ANTI-BLACK WORLD 361 (2023); AAAJ brief, *supra* note 224, at 11 ("We recognize that systemic inequities in law enforcement practices have victimized communities of color, including Asian American communities, but in particular Black communities, and we stand in solidarity with all communities of color in facing injustice in the criminal justice system. We call on policymakers to seek solutions to hate incidents and hate crimes that do not further criminalize communities of color or pit communities of color against each other.").

263. *Grutter*, 539 U.S. at 345 (2003) (J., Ginsburg, concurring).

264. Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 640–41 (1997); Ida Mojadad, *Asian Americans have been on both sides of the affirmative action debate*, THE S.F. STANDARD (June 29, 2023, 11:03 AM), https://sfstandard.com/2023/06/29/affirmative-action-case-recalls-80s-berkeley-admissions-fight/.

Regardless of what the Court may think, Asian Americans remain underrepresented. Sotomayor acknowledged as much when she wrote in her dissent that "[t]here is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society."[265] For example, many Asian Americans who do experience success climbing the corporate ladder still encounter discrimination through subconscious biases and racial preferences.[266] The Pew Research Center reported that 50% of Whites held subconscious preferences for other Whites over Asians, the highest level of implicit racial preference tracked.[267] Furthermore, non-Asians subject Asian Americans to racial stereotypes, and ridicule Asian Americans as passive individuals who lack leadership skills, resulting in glass-ceilings, blocking their path to the highest professional tiers of elected bodies, corporate boardrooms, and mainstream media.[268] Many still perceive Asian Americans as intelligent and industrious yet quiet, introverted, and lacking interpersonal skills and charm.[269] The Court deliberately ignored these realities to pursue a colorblind ideal to advance the interests of whiteness and honorary whiteness.

This article has hopefully demonstrated that limiting to race relations to an outmoded Black/White binary fails to address important issues concerning other racial groups in a constructive manner. Color-blindness is an inadequate social and legal policy, so in a post-*SFFA* world, racial justice

265. *SFFA*, 600 U.S. 181 at 375 (J., Sotomayor, dissenting).

266. *See* ROSALIND S. CHOU AND JOE R. FEAGIN, THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM 106 (2008) (discussing discrimination based on citizenship and foreign-status, and describing the perpetual foreigner stereotype imposed on Asians).

267. *See* Nick Kim Sexton, *Study Reveals American's Subconscious Racial Biases*, NBC NEWS (Aug. 21, 2015, 7:06 AM), https://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferencesamericans-n413371.

268. *See* WU *supra* note 75, at 51 ("[Asian Americans] are underrepresented in management, and those who are managers earn less than White Americans in comparable positions"); *see* Matsuda, *supra* note 84, at 153 (remarking, "We need affirmative action because there are still employers who see an Asian face and see a person who is unfit for a leadership position. In every field where [Asian Americans] have attained a measure of success, [they] are underrepresented in the real power positions."); *see also* Margaret M. Chin, *supra* note 92. Essentially, under this theory of stereotyping, if an individual believes all Asian Americans are highly skilled at mathematics, non-assertive and quiet, he or she will then continue to hold this belief whenever they encounter Asian Americans, even if it was not true. *See also* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-CIV. L. REV. 481, 482 (2005).

269. *See* Neil G. Ruiz, et al., *Discrimination Experiences Shape Most Asian Americans' Lives*, PEW RSCH. CTR. (Nov. 30, 2023), https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2023/11/RE_2023.11.30_Asian-American-Discrimination_Report.pdf; 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?smid=url-share; Pavithra Mohan and Anisa Purbasari Horton, *Asian-Americans on being "likable" in the modern workplace*, FAST COMPANY (July 5, 2018), https://www.fastcompany.com/40590269/asian-americans-on-being-likable-in-the-modern-workplace.

advocates will need to look for new ways to advance our cause.[270] For example, the Affirmative Action Initiative from 1996 banned the consideration of race by state universities in California.[271] The legislation initially resulting in a significant drop in the admission rates of Black and Latino American freshman applicants at UC Berkeley and UCLA.[272] In 1998, Asian American admission rates significantly declined at five of the eight University of California campuses.[273] Today, Asian Americans currently represent 42% of the student body at UC Berkeley.[274] We should give more attention to what the UCs may be doing right and also learn from what they're doing wrong so that we can continue to expand access to higher education for all.[275]

But no matter what comes next, one thing is clear: we must work together to resist the fallacy of color-blindness and protect the achievements of the Civil Rights Movement. When (not if) we successfully build a true

270. Indeed, the Asian Penalty persists in favor of White applicants and there's no sign that Blum and his entourage will stop their pursuit to end affirmative action in all American contexts. *See* Fabiola Cineas, *The Asian penalty in college admissions is still here — even without affirmative action*, VOX (Aug. 24, 2023, 6:00 AM) https://www.vox.com/23842764/legacy-admissions-asian-american-applicants-affirmative-action; Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html.

271. LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 209 PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES, CALIFORNIA JOINT LEGISLATIVE BUDGET COMMITTEE (Nov., 1996), https://lao.ca.gov/ballot/1996/prop209_11_1996.html; Ballotpedia, *California Proposition 209, Affirmative Action Initiative (1996)*, https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996) (last visited Jan. 2, 2024).

272. *See* Katy Murphy, *Affirmative action ban at UC, 15 years later,* MERCURY NEWS (June 21, 2013), https://www.mercurynews.com/2013/06/21/affirmative-action-ban-at-uc-15-years-later; Elie Mystal, *The Supreme Court Has Killed Affirmative Action. Mediocre Whites Can Rest Easier*, THE NATION (June 29, 2023), https://www.thenation.com/article/society/supreme-court-killed-affirmative-action/; Kevin Carey, *A Detailed Look at the Downside of California's Ban on Affirmative Action*, N.Y. TIMES (Aug. 21, 2020), https://www.nytimes.com/2020/08/21/upshot/00up-affirmative-action-california-study.html; Emma Bowman, *Here's What Happened When Affirmative Action Ended at California Public Colleges*, NPR (June 30, 2023, 5:01 AM), https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges.

273. See *Do Asian Americans Benefit From Race-Blind College Admissions Policies?*, NAT'L COMM'N ON ASIAN AM. AND PACIFIC ISLANDER RES. IN EDUC. (2015). Between 1997 and 1998, Asian American admission rates increased at UC Berkeley, UCLA, and UC Davis. *See id*.

274. *See* Andrew Lam, *White Students' Unfair Advantage in Admissions*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/opinion/white-students-unfair-advantage-inadmissions.html [https://perma.cc/97RD-Z3V2]. Black and Latino Americans students are more underrepresented at the nation's top universities than they were 35 five years ago. *See* Jeremy Ashkenas, *Even With Affirmative Action, Blacks and Hispanics are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html.

275. Janet Gilmore, *Affirmative action: What can other schools learn from UC Berkeley's experience*?, UC BERKELEY NEWS (June 29, 2023), https://news.berkeley.edu/2023/06/29/affirmative-action-what-can-other-schools-learn-from-uc-berkeleys-experience.

meritocracy grounded in equity, then no racial group will have to choose one color over another to access the powers and privileges of higher education.