

Redux: Arguing About Asian Americans and Affirmative Action at Harvard After *Fisher*

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INTRODUCTION

Affirmative action supporters hailed the Supreme Court’s affirmation of the constitutionality of the admissions program at the University of Texas in *Fisher v. University of Texas*¹ as a major victory for racial diversity. Yet *Fisher* may not be the last word on affirmative action as evidenced by the latest litigation against affirmative action at Harvard College and the University of North Carolina at Chapel Hill (UNC). What is new about this latest go around? Asian Americans are the plaintiffs.²

Undoubtedly Justice Samuel Alito’s fiery 51-page dissent in *Fisher* is a blueprint for Students for Fair Admission (SFFA) in its lawsuit against Harvard College. The dissent misused Asian Americans to advocate that

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1. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

2. *Regents of the Univ. of Cal. v. Bakke* involved a white male plaintiff, while *Hopwood v. Texas*, *Gratz v. Bollinger*, *Grutter v. Bollinger*, and *Fisher v. Texas* involved white female plaintiffs. White women are among the greatest beneficiaries of affirmative action programs and policies, but this fact is often overshadowed by the significant attention paid to the consideration of race. 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> [<https://perma.cc/U2WG-47W9>]; Sally Kohn, *Affirmative Action Has Helped White Women More than Anyone*, TIME (June 17, 2013), <http://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone> [<https://perma.cc/KA3S-YRBU>].

affirmative action discriminates against them and whites.³ At the dissent's core, and as a rejoinder to the majority's singular mention of Asian Americans, Alito over-relied on Asian Americans to avoid talking about white interests and white victimhood.⁴ In doing so, "Justice Alito 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."⁵

SFFA brought the Harvard lawsuit alleging that the university's admissions policy violates Title VI of the Civil Rights Act of 1964, which bars federally funded entities from discriminating based on race or ethnicity.⁶ For the uninitiated, SFFA is an arm of Edward Blum's Project on Fair Representation.⁷ Years before, Blum recruited plaintiff Abigail Fisher to be the face of the challenge to the University of Texas (UT) admissions program. Now he has recruited a rejected Chinese American applicant. The fifteen-day bench trial concluded in fall 2018, and the public is expecting a decision this year.⁸ Since both sides pledged to appeal the decision, court

3. See *Fisher*, 136 S. Ct. at 2217 (Alito, J. dissenting).

4. See *id.*

5. 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/opinion-affirmative-action-asian-americans-are-not-your-wedge-n610596> [<https://perma.cc/9JL8-6RF9>].

6. See *Fisher*, 136 S. Ct. at 2215, 2223 (Alito, J., dissenting); see also Complaint at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176 (D. Mass. 2015). Alito treated Asian Americans as honorary whites to advance his prolix arguments, including: (1) UT failed to define the term "critical mass" and explain how the use of race and ethnicity were used to achieve that goal; and (2) the UT program could not satisfy strict scrutiny because the university merely made vague amorphous definitions of critical mass and how it measures diversity on campus, and that the majority gives too much unearned deference to UT. *Fisher*, 136 S. Ct. at 2215, 2223.

7. The Project on Fair Representation is Blum's legal defense foundation that brings legal challenges to "racial ethnic classifications and preferences in state and federal court." PROJECT ON FAIR REPRESENTATION, <https://www.projectonfairrepresentation.org/cases/> (last visited Sept. 15, 2019). Blum, a long-time advocate for color-blindness, is credited with gutting the Voting Rights Act and orchestrating the lawsuit against the University of Texas. Blum was the architect behind *Shelby County, Ala. v. Holder*, which did away with the Voting Rights Act's pre-clearance regime, which was designed to protect and promote voting rights by requiring states and localities with a history of voting discrimination to get permission from federal authorities prior to any modifications to voting laws. See 570 U.S. 529 (2013). From 2010 to 2015, Blum's one-man efforts were bankrolled by almost \$2.9 million from conservative and libertarian contributors. See Anemona Hartocollis, *He Took On the Voting Rights Act and Won. Now He's Taking On Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> [<https://perma.cc/S36K-WWYY>].

8. Before trial, Judge Burroughs ruled for Harvard on the issue of the legality of race-based affirmative action. Jeannie Suk Gersen, *At Trial, Harvard's Asian Problem and a Preference for White Students from "Sparse Country"*, NEW YORKER (Oct. 23, 2018), <https://www.newyorker.com/news/our-columnists/at-trial-harvards-asian-problem-and-a-preference-for-white-students-from-sparse-country> [<https://perma.cc/2AX5-QNYV>]. During the trial Burroughs expressed skepticism about the relevancy of discrimination against Jews at Harvard. Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html> [<https://perma.cc/LU6J-92KN>]. SFFA did not offer testimony from Harvard Students, but Harvard presented testimony from students and alumni who spoke about their experiences as racial and ethnic minorities on and off campus. See Carrie Jung, *Harvard Discrimination Trial Ends, But Lawsuit Is Far*

watchers speculate that it is on a fast-track to the Supreme Court.

In two lawsuits, SFFA alleges that universities have implemented discriminatory practices against Asian Americans. SFFA's Complaint argues that Harvard intentionally discriminates against Asian American applicants by requiring them to score 140 points higher on the SAT than white or other minority applicants.⁹ SFFA asserts that Harvard caps the number of Asian Americans admitted in each class, akin to the early twentieth century quotas that were placed on Jewish students.¹⁰ The complaint further alleges that more whites and Asian Americans would be admitted into Harvard absent its reliance on "racial classifications" in its admission decisions.¹¹ In a separate litigation, SFFA alleges that UNC's use of race discriminates against white and Asian American applicants because it uses race as a determinative factor in admissions.¹²

The allegations made by the Asian American Coalition for Education (AACE) in complaint filed with the Department of Justice coincide with these cases.¹³ Sixty other Asian American groups opposed to affirmative action joined the complaint.¹⁴ AACE asked the Civil Rights Division to investigate unlawful discrimination against Asian American applicants in the admissions programs at Yale, Brown, and Dartmouth. AACE claims these universities are enforcing race-based quotas against Asian American applicants, and the universities' embrace of racial and cultural negative stereotypes facilitates anti-Asian bias. These stereotypes include notions that: (1) Asian Americans lack creativity and cannot think critically; (2) Asian Americans lack leadership skills; and (3) Asian Americans are not well-rounded because they overemphasize studying over extracurricular activities.¹⁵

While AACE lodged its complaint in 2015, the complaint laid dormant until summer 2017 when the Department of Justice renewed a federal effort in challenging affirmative action policies in college and university admissions by launching a civil rights investigation of Harvard admissions.¹⁶

From Over, NPR (Nov. 2, 2018), <https://www.npr.org/2018/11/02/660734399/harvard-discrimination-trial-is-ending-but-lawsuit-is-far-from-over> [<https://perma.cc/7HMW-GCKN>].

9. See Complaint, *supra* note 6, at 44.

10. *Id.* at 3.

11. *Id.* at 44.

12. See *Project on Fair Representation Announces Lawsuits Challenging Admissions Policies at Harvard Univ. and Univ. of North Carolina-Chapel-Hill*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/project-on-fair-representation-announces-lawsuits-challenging-admissions-policies-at-harvard-univ-and-univ-of-north-carolina-chapel-hill/> [<https://perma.cc/URD6-RNRW>] (last visited Sept. 15, 2019).

13. See *More than 60 Asian American Groups File Complaint Against Harvard University*, ASIAN AMERICAN COALITION FOR EDUCATION (May 15, 2015), http://asianamericanforeducation.org/en/pr_20150515 [<https://perma.cc/6JQU-N97B>].

14. *Id.*

15. *Id.* at 4.

16. See Nick Anderson, *Justice Department criticizes Harvard admissions in case alleging bias against Asian Americans*, WASH. POST (Aug. 30, 2018), <https://www.washingtonpost.com/education/2018/08/30/justice-dept-criticizes-harvard-affirmative->

This year, the Trump Administration openly voiced its support for the Asian American student plaintiffs by urging Federal Judge Allison D. Burroughs to make public six years of admission data. Harvard eventually provided this data, which contained hundreds of thousands of high school students and detailed Harvard admission procedures. Subsequently, the Department of Justice also filed a statement of interest brief critical of Harvard's admissions practices. The brief criticized Harvard's alleged scoring of Asian American applicants lower on personal ratings—an assessment of an applicant's qualities such as likability, maturity, and integrity—than other students and engagement in “racial balancing.”¹⁷ The SFAA and ACCE complaints coincided with then Attorney General Jeff Sessions and the Department of Education rescinding Obama-era policy guidelines on race and school admissions.¹⁸ These policies encouraged schools to consider race in order to increase student body diversity.¹⁹

This Article analyzes how the lawsuits brought by SFFA and AACE claiming discrimination against Asian Americans are actually the latest attacks on affirmative action by conservatives.²⁰ During the last few decades, conservatives, most of whom are white, have used Asian Americans as a wedge group to divide communities of color by arguing that affirmative action is not necessary, and that the consideration of race in university admissions helps African American and Latinos while hurting Asian

action-case [<https://perma.cc/HF75-JK5B>].

17. Anderson, *supra* note 16; see Maria Danilova, et al., *Trump administration backs Asian-Americans in Harvard case*, PBS (Aug. 30, 2018), <https://www.pbs.org/newshour/nation/trump-administration-backs-asian-americans-in-harvard-case> [<https://perma.cc/RyJ3-GK62>]; see also Gersen, *supra* note 8 (explaining that the personal rating is based on admissions officers' review of alumni interviews, students' essays, and letters of recommendation).

18. This marks the Department of Justice's dramatic shift from its historic mission of enforcing civil rights protections of African Americans and other racial minorities, immigrants, gays, lesbians, and transgender people—to protecting people of faith, supporting state restrictive voting laws, and reducing oversight of police departments. See Anderson, *supra* note 16; see also Katie Benner, *Trump's Justice Department Redefines Whose Civil Rights to Protect*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/us/politics/civil-rights-justice-department.html> [<https://perma.cc/874G-ECTZ>]; Anya Kamantz, *Here's What's Going On With Affirmative Action And School Admissions*, NPR (July 7, 2018), <https://www.npr.org/sections/ed/2018/07/07/626500660/everything-that-s-going-on-with-race-ethnicity-and-school-admissions-right-now> [<https://perma.cc/N4TT-6RF4>].

19. See LILLIANA M. GARCES & OIYAN POON, ASIAN AMERICANS AND RACE-CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION'S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION 5 (Nov. 1, 2018), https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/asian-americans-and-race-conscious-admissions-understanding-the-conservative-opposition2019s-strategy-of-misinformatio-intimidation-racial-division/RaceCon_GarcesPoon_AsianAmericansRaceConsciousAdmi.pdf (“These changes by the Trump Administration discourages the use of constitutionally permissible race-conscious polices in higher education, and threatens colleges and universities with the possibility of DOJ investigations.”) [<https://perma.cc/UV2Z-TRUX>]; see also Benner, *supra* note 18; Kamantz, *supra* note 18.

20. See Shirley Leung, *Harvard Lawsuit is about affirmative action, not Asian Americans*, BOSTON GLOBE (July 17, 2018), <https://www.bostonglobe.com/business/2018/07/17/let-not-kid-ourselves-harvard-lawsuit-about-affirmative-action-not-asian-americans/mZ0tQiuNnKat7VnOsWSAvL/story.html> [<https://perma.cc/5UMU-V53S>].

Americans.²¹ Legal scholar Angelo Ancheta extolled, “Neoconservatives, who often couch their rhetoric in the language of color-blindness, become quite color-conscious when portraying Asian Americans to justify the abolition of affirmative action.”²²

This Article argues that this anti-affirmative action argument fails to protect Asian Americans and is a strategic ploy to preserve, and even strengthen, the current racial hierarchy with whites at the top, Asian Americans in the middle, and Latinos and African Americans near the bottom. Upon closer examination, the challenge Asian Americans face in admissions may in fact be due to legacy and wealth, not affirmative action.

This Article is divided into six Sections. Part I examines SFFA’s lawsuit against Harvard College. Part II explains how conservatives are repeating their same arguments about the harm caused to Asian Americans by affirmative action made two decades ago. Part III discusses the possibility of the Harvard lawsuit reaching the Supreme Court. Part IV surveys the lack of student diversity, at magnet high schools and universities across the country, absent the consideration of race in the admissions process. Part V explores potential alternatives to race-conscious affirmative action, including class-based schemes.

I. THE STUDENTS FOR FAIR ADMISSION AGAINST HARVARD COLLEGE LAWSUIT

The Harvard and UNC cases provide forums for conservatives to rehash old arguments against affirmative action. Likewise, these affirmative action opponents are using the present socio-political climate in the country as momentum for their cause. After *Fisher*, conservatives have practically nothing to lose, but much to gain.

Harvard has one of the most competitive undergraduate admissions processes in the country for good reason. Students admitted to Harvard gain access to opportunity and power, and can connect with the brightest minds while building lasting social and professional networks for the future. Indeed, Harvard graduates have gone on to be Supreme Court Justices, Presidents, Prime Ministers, CEOs, and billionaire entrepreneurs. The class

21. GARCES & POON, *supra* note 19, at 9 (“By using Asian Americans to challenge affirmative action . . . opponents cast Asian Americans as a racial minority in opposition to these policies, while simultaneously obscuring white interests, maintaining a monopoly on access to opportunities”); see Harvey Gee, *Asian Americans and the Dismantling of Affirmative Action*, 10 ASIAN L.J. 311, 322 (2002); see also Stacy J. Lee & Kevin K. Kumashiro, *Bias against Asian-American students is real. Affirmative action isn’t the problem*, VOX (June 27, 2018), <https://www.vox.com/the-big-idea/2018/6/27/17509140/admissions-bias-personalities-harvard-affirmative-action> [<https://perma.cc/T282-Z4H3>] (arguing that the framing of Asian Americans as a successful minority group is “driving a wedge between members of different ethnic groups and undermining the claims of systemic racism made by civil rights activists”); see also Frank H. Wu & William Kidder, *Asian Americans Aren’t White Folks’ ‘Racial Mascots,’ DIVERSE ISSUES IN HIGHER EDUC.* (Oct. 5, 2006), <https://diverseeducation.com/article/6451> [<https://perma.cc/JY34-F7MT>].

22. ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 159 (Rutgers Univ. Press, 2d ed. 2006).

of 2022 year's acceptance rate sat at 4.59 percent, a historical low for the college.²³ Approximately 23 percent of the 1,962 applicants admitted to Harvard's entering class this year identified as Asian American compared with 16 percent African American, 12 percent Latino, and 2 percent identified as Native Americans or Native Hawaiian. Whites represented the remaining 67 percent of students.²⁴

Make no mistake, the Harvard case is statistical and data driven. At trial, parties presented six years of Harvard's admissions data, including records and internal reports showing that Harvard consistently assigned Asian American applicants lower personal/social ratings despite them having higher grades and SAT scores.²⁵ Internal documents also show Harvard's awareness of the negative effects its admission policies had on Asian Americans, an awareness that nevertheless led to no action.²⁶ The parties used different methodologies to crunch his data. On the one hand, plaintiffs excluded recruited athletes, children of alumni and wealthy donors, and children of faculty from their analysis because such applicants received preferential treatment.²⁷ On the other hand, Harvard included them in its analysis.²⁸

SFFA argued that the documents support a pattern of discrimination against Asian Americans in admissions.²⁹ Harvard, in turn, rejected such claims and responded that SFFA's flawed statistical model, on which its claims rest, ignored factors such as personal essays and letters of recommendation, and omitted recruited athletes and legacy admits.³⁰

To support their respective claims, both SFFA and Harvard relied upon expert witnesses.³¹ SFFA retained lead data witness Peter Arcidiacono, a

23. Nik DeCosta-Klipa, *Harvard's acceptance rate hit an all-time low this year*, BOSTON GLOBE (Mar. 29, 2018), <https://www.boston.com/news/education/2018/03/29/harvard-acceptance-rate-2018> [https://perma.cc/4862-BHFT].

24. See Anderson, *supra* note 16.

25. 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/la-oe-lee-harvard-legacy-student-advantage-20180622-story.html> [https://perma.cc/H2KR-4PLB].

26. 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-scrutiny-over-how-it-evaluates-asian-american> [https://perma.cc/37T2-QZP9]; 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>. Other documents revealed low-income Asian Americans applicants as less likely to be admitted than higher-income African Americans [https://perma.cc/3UZ9-GE2Z].

27. Chloe Foussianes, *A Timeline of the Harvard Affirmative Action Lawsuit*, TOWN AND COUNTRY (Nov. 2, 2018), www.townandcountrymag.com/society/money-and-power/a24561452/harvard-lawsuit-affirmative-action-timeline [https://perma.cc/3AJJ-84ZR]; see also Gersen, *supra* note 8.

28. Foussianes, *supra* note 27.

29. 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> [hereinafter *Documents*] [https://perma.cc/2VXE-AXL8].

30. See *id.*

31. See Chris Fuchs, *Two sides in affirmative action case set to meet in court over sealed records*,

Professor at Duke, as well as Century Foundation Senior Fellow Richard Kahlenberg. Arcidiacono authored a report that described Harvard's admissions practices as unconstitutional, while Kahlenberg's report explained why Harvard should seek diversity by considering socioeconomic factors instead of race, a factor which Kahlenberg says fosters resentment and stigma on campus.³²

Arcidiacono testified that there is evidence of intentional racial discrimination against Asian Americans in the admissions process and asserted that racial preferences account for the admission of two-thirds of African-American applicants and half of Hispanic applicants.³³ However, David Card, a leading economist at the University of California, Berkeley testifying on behalf of Harvard, faulted Arcidiacono's analysis for focusing too much on academic achievement and failing to account for other factors such as the student's parents' occupation, the student's intended career, and the student's backgrounds and experiences.³⁴ According to Card, though Asian American applicants at Harvard had stronger academic ratings and slightly higher extracurricular ratings than white applicants, white applicants had stronger ratings in other nonacademic measures and were more likely to be "multidimensional."³⁵ In his report, Card explained that he found no evidence of discrimination and "no negative effect[s] of Asian-American ethnicity" in Harvard's admission process.³⁶

As a counterpoint, John Hughes, the lead lawyer for SFFA, honed in on the issue of why Asian Americans perform better in academic and extracurricular ratings in this system but fall behind other ethnic groups in the personal scores—the most subjective of the admissions criteria.³⁷ Here, Hughes argued that Harvard uses the important "personal" rating to give Asian Americans the lowest "personal" rating, while it awards African American applicants with the highest "personal" rating.³⁸ Harvard

NBC NEWS, (Apr. 11, 2018), <https://www.nbcnews.com/news/asian-america/two-sides-harvard-affirmative-action-case-set-meet-court-over-n864031> [<https://perma.cc/22FA-4B3G>].

32. Angela N. Fu & Lucy Wang, *Revelations in Harvard Admissions Suit Unlikely to Prove Discrimination, Experts Say*, THE HARVARD CRIMSON (June 19, 2018), <https://www.thecrimson.com/article/2018/6/19/admissions-lawsuit-analysis> [<https://perma.cc/XT5B-GDRA>].

33. Joan Biskupic, *Harvard students to testify as affirmative action trial nears end*, CNN (Oct. 29, 2018), <https://www.cnn.com/2018/10/29/politics/harvard-affirmative-action-trial/index.html> [<https://perma.cc/2HF9-VGX7>].

34. Foussianes, *supra* note 27.

35. Eric Hoover, *Dueling Economists: Rival Analyses of Harvard's Admissions Process Emerge at Trial*, CHRON. OF HIGHER EDUC., (Oct. 30, 2018), <https://www.chronicle.com/article/Dueling-Economists-Rival/244964> [<https://perma.cc/X7ZZ-EDBF>].

36. See *Documents*, *supra* note 29; see also Lee & Kumashiro, *supra* note 21 (claiming a well-designed holistic admissions policy recognizes social class diversity within Asian ethnic groups and benefits Southeast Asian Americans and low-income East and South Asian American).

37. See Collen Walsh, *Admissions lawsuit enters second week*, THE HARV. GAZETTE (Oct. 22, 2018), <https://news.harvard.edu/gazette/story/2018/10/more-harvard-officials-to-testify-in-trial-challenging-colleges-admissions-process> [<https://perma.cc/28BP-96TQ>].

38. See Joan Biskupic, *Harvard Affirmative Action Trial Arguments Come to a Close*, CNN, (Nov.

subsequently countered that Hughes's conclusion falsely assumes that academic superiority aligns with a personal character assessment.³⁹

Illuminating testimony came from Dean of Admissions William Fitzsimmons, who denied knowledge of any discrimination against Asian American applicants and rejected the notion that Asian Americans have worse personal qualities than whites.⁴⁰ Fitzsimmons testified that if there were any potential implicit bias, it could be traced to high school teachers and guidance counselors who write stronger recommendations for whites than for Asian Americans.⁴¹ He also spoke about how Harvard considers other factors, which increase an applicant's chances of admission such as living in a rural state. Specifically, Harvard sends recruitment letters to twenty predominantly rural states that it calls "Sparse County."⁴² In those areas, students who identified as "White" or "Unknown" with PSAT scores of 1310 could receive interest letters from Harvard. Asian American males living in rural states needed a 1370 score to get the same letter.⁴³

Significantly, the trial went beyond data analysis and the court also considered student perspectives. Eight students testified for Harvard about their experiences, including Thang Q. Diep, who spoke about his belief that the Harvard's admission process was not discriminatory.⁴⁴ In contrast, Diep attributed his acceptance to his personality and his background.⁴⁵

Diep's story probably resonates with many Asian Americans. Diep immigrated from Vietnam to the San Fernando Valley when he was eight and graduated from Cleveland High School at the top of his class. Diep's SAT score of 2060 ranked in the 95th percentile relative to other applicants in 2015. His weighted GPA was 4.325 on a 4.0 scale.⁴⁶ Diep was given a "2" rating (with "1" being the highest score on the scale) for his extracurricular activities as president of the Key Club, an officer of his student government, a hospital volunteer, and an avid filmmaker.⁴⁷ The reviewer gave him relatively high scores for his "personal qualities" and commented on his personality and social skills.⁴⁸ The reviewers further noted Diep's first-

3, 2018), <https://www.cnn.com/2018/11/03/politics/harvard-trial-wrap/index.html> [<https://perma.cc/B4RS-XKP8>]; see also Adam Harris, *The Stakes for the Harvard Trial Are Higher Now Than It's Over*, THE ATLANTIC, (Nov. 2, 2018), <https://www.theatlantic.com/education/archive/2018/11/harvard-affirmative-action-trial-wraps-boston/574795> [<https://perma.cc/2QJ7-ZZZY>].

39. *Id.*

40. Gersen, *supra* note 8.

41. *Id.*

42. *Id.*

43. *Id.*; see also Jung, *supra* note 8.

44. See Neil Gluckman, *Harvard Senior Who Testified at Admissions Trial Says Many Asian-American Students Support Affirmative Action*, CHRON. OF HIGHER EDUC. (Oct. 29, 2018), <https://www.chronicle.com/article/Harvard-Senior-Who-Testified/244956> [<https://perma.cc/B682-RJUK>].

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

generation, low-income, and immigrant Vietnamese identity. Diep's essay emphasized the linguistic challenges he overcame after moving to the United States as well as his incredibly strong work ethic and commitment to pushing himself academically and personally in the face of obstacles.⁴⁹

When the trial ended, many questions remained. Perhaps one of the most intriguing was: Did the admissions officers hold unconscious or conscious biases against Asian American applicants? Before the trial began, Asian American Advancing Justice attorney Nicole Gon Ochi, who also represented Diep, professed that, "We don't believe there is any credible evidence of discrimination against Asians Americans, even if there were, it wouldn't be caused by affirmative action . . . any negative effects are the result of policies that benefit white student or implicit bias."⁵⁰

Ochi might be on to something about implicit bias. Implicit Association Tests (IAT) show that individuals subconsciously express preferences for and attribute positive characteristics to those who are alike or similar.⁵¹ On the flipside, individuals tend to react negatively toward and attribute negative characteristics to those outside of their social and racial groups.⁵² According to a 2015 Pew Research Center Report, two IAT studies show that 50 percent of white subjects tested held subconscious preferences for other whites over Asian Americans, and 48 percent of the white subjects held subconscious preferences for other whites over African Americans.⁵³ An even higher percentage of biracial black-white and biracial Asian-white study participants were biased in favor of whites.⁵⁴

If nothing else, the trial provided insight into the Harvard admissions process. The trial also confirmed that Harvard continues to have strong admissions preferences for legacy applicants, who tend to be white.⁵⁵ Other successful applicants typically came from privileged backgrounds. Wealthy Harvard students outnumber low-income ones, 23 to 1.⁵⁶ Although many criticize granting preferential treatment to legacy and/or high-income applicants, such criticism never amounts to the vitriolic reaction that race-based policies create.⁵⁷ As one academic observed, "More than one-fifth of white applicants admitted to Harvard between 2010 and 2015 were

49. *Id.*

50. *See* Leung, *supra* note 22.

51. *See* Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. OF L. & SOC. CHANGE, 415, 475 (2018).

52. *Id.*

53. *See* Nick Kim Sexton, *Study Reveals American's Subconscious Racial Biases*, NBC NEWS (Aug. 21, 2015), <https://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferences-americans-n413371> [<https://perma.cc/EW4U-NAMU>].

54. *Id.*

55. *See* Lee, *supra* note 25.

56. Deirdre Fernandes, *Harvard's well-off outnumber low-income Students 23 to 1*, BOSTON GLOBE (Oct. 23, 2018), <https://www.bostonglobe.com/metro/2018/10/22/harvard-children-wealthy-families-vastly-outnumber-poor-that-problem/dC8NG2jViPGfgLWaB2wEZO/story.html> [<https://perma.cc/Y2A4-FH3G>].

57. *Id.*

legacies . . . The number of white legacy students admitted to Harvard exceeded the number of African Americans, Hispanic and Asian American legacy students combined.”⁵⁸ In response, Professor Frank Wu opined that, “[T]he evidence suggests that Whites have been given preferences, directly and indirectly, and that factor more than anything else is the cause of the problem.”⁵⁹

Along a similar line, scholar-activist Robert Chang has argued that Harvard perpetuates power and privilege through legacy admissions.⁶⁰ According to Chang, preferences given to legacy admits constitute another form of affirmative action for whites as Harvard has historically offered preference for sons of white alumni and has employed subjective characteristics to suppress Jewish and Catholic admission rates.⁶¹ Chang reasoned 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.”⁶² Richard Kahlenberg’s finding underscores Chang’s point that Harvard’s admissions program grants legacy applicants a forty percentage point boost over a much smaller nine percentage point bump for low-income students.⁶³

II. REPEATING TIRED OLD ARGUMENTS

The added payoff for life success from motivation, apart from innate abilities, can be seen in the remarkable performance of Asian students in American schools and professions . . . In short, a strong cultural work ethic translates into higher motivation, zeal, and persistence—an emotional edge.⁶⁴

The attack on affirmative action takes place within a larger context of anti-immigration and anti-multiculturalism sentiment . . . in an attempt to return to an (imaginary) America past, to restore America to its former glory.⁶⁵

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

58. See Jaschik, *supra* note 26; Lee, *supra* note 25; Peter Wood, *Harvard’s defense of admissions policies doesn’t stand up*, THE HILL (June 24, 2018), <https://thehill.com/opinion/education/393821-harvards-defense-of-anti-asian-admissions-policies-doesnt-stand-up> [<https://perma.cc/2WCL-S7LR>].

59. See Frank Wu, *Asian Americans: Right to Be Angry at Harvard, Not African-Americans*, DIVERSE EDUC. (June 20, 2018), <https://diverseeducation.com/article/118491> [<https://perma.cc/5D2S-B3WP>] (discussing how whites are the primary beneficiaries of legacy admissions at Harvard).

60. See ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 121 (1999).

61. See *id.* at 115, 117; Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 40 (1996).

62. CHANG, *supra* note 60, at 121.

63. See Richard D. Kahlenberg, *A Better Way to Diversify Harvard*, SLATE (June 22, 2018), <https://slate.com/news-and-politics/2018/06/harvard-should-use-socio-economic-not-racial-preferences-in-admissions.html> [<https://perma.cc/3UFL-C84Y>].

64. DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 80 (1994).

65. CHANG, *supra* note 60, at 121.

victims” of affirmative action, are not new.⁶⁶ In fact, such arguments harken back to the Reagan Administration’s argument that affirmative action unfairly limited opportunities of whites.⁶⁷

This section analyzes the argument made by conservatives that affirmative action harms Asian Americans. In my view, mirror claims, made in the Harvard and UNC lawsuits by affirmative action opponents, are analogous to the times when Hollywood decides to reboot older films. Often, these movie studios obfuscate the real reason why they are making a “new version” by claiming that they are seeking to introduce a new generation to a classic movie using new technology. But the truth is, they are just lacking original ideas. Similarly, affirmative action opponents recycle the now classic trope of Asian Americans as being victims of affirmative action.⁶⁸ But like most rebooted films, this almost shot-by-shot remake is unnecessary. Resurrecting old 1980s arguments and arguing against affirmative action even after *Fisher* should be met with similar criticism and skepticism. Stuck in a loop, these affirmative action opponents are offering current arguments indistinguishable from the ones they made in the 1990s.

Note the resemblance: in her seminal book about the intractability of Asian Americans and affirmative action published in 1992, Sociologist Dana Takagi wrote:

Beginning in late 1988 conservative and neoconservatives suggested that discrimination against Asian Americans was sympathetic of deeper problems with the university: affirmative action . . . discrimination against Asians was the logical and inevitable outcome of preferences for ‘other’ minorities (that is, Blacks and Chicanos/Latinos).⁶⁹

Blum applied a similar tactic in his commentary about the Harvard lawsuit and the use of racial classifications in university admissions in a summer 2017 *Washington Post* op-ed:

Today, Harvard’s discriminatory policies harm Asian Americans—call it the Asian problem. . . . From 1992 through 2013, the percentage of Asians admitted to Harvard each year has been remarkably stable. In 1992, 19 percent of Asian admitted to Harvard each year has been remarkably stable. In 1992, 19 percent of admitted students were Asian, while in 2013, 18

66. A survey administered by Inter-university Consortium for Political and Social Research showed that 63.1 percent of Asian Americans supported affirmative action while a vocal minority, mostly Chinese Americans, oppose affirmative action. See *The Attitudes of Asian Americans Toward Affirmative Action*, NAT’L COMM’N ON ASIAN AM. AND PAC. ISLANDER RES. IN EDUC. 1 (2017), <https://files.eric.ed.gov/fulltext/ED573712.pdf>; *Asian Americans and Affirmative Action: We Will Not Be Your Wedge*, ADVANCING JUSTICE L.A., <https://www.advancingjustice-la.org/what-we-do/policy-and-research/educational-opportunity-and-empowerment/affirmative-action/not-your-wedge> [<https://perma.cc/C6H6-YKFX>] (last visited Sept. 15, 2019); *Affirmative Action: Diversity and Equity*, CHINESE FOR AFFIRMATIVE ACTION (July, 20, 2018), <http://www.caasf.org/2018/07/affirmative-action-simply-not-racist> [<https://perma.cc/P94J-2VFP>].

67. See JEFF CHANG, *WE GON’ BE ALRIGHT: NOTES ON RACE AND RESEGREGATION* 26 (2016).

68. See Lee & Kumashiro, *supra* note 21 (asserting “The affirmative action debate is shifting again, with new faces but old arguments”).

69. DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN AMERICAN ADMISSIONS AND RACIAL POLITICS* 8–9 (1992).

percent were Asian. This is true even though the number of Asian applicants to elite schools have disproportionately risen in recent decades. . . . This rate of admission of Asians cannot be a coincidence. . . . Harvard isn't alone. The same flat rate of Asian admissions is evidenced at all of the Ivy League schools.⁷⁰

Blum's argument echoes the charges made by certain Asian Americans in the 1980s claiming that University of California, Berkeley (UC Berkeley), University of California, Los Angeles (UCLA), Brown, Stanford, Harvard, and Princeton intentionally discriminated against them because Asian American applicants were "overrepresented." Then and now, these tired affirmative action tropes about "reverse discrimination" are misguided. But nevertheless, affirmative action opponents use them to separate Asian Americans from other communities of color on this issue.

At this time, affirmative action opponents believe that they will be victorious because they can sail with the same socio-political winds that enabled Trump to win the presidency. The next few passages explain how the Trump Administration's alliance with the plaintiffs in the Harvard case is just another example of the president's use of Asian Americans as a political football in service of a conservative agenda to abolish affirmative action.⁷¹

The public noticed Trump's insensitivity to Asian American issues early on during his Presidential campaign when Trump invoked the model minority stereotype, disingenuously referring to Asian immigrants as being more desirable than others who he characterized as criminals.⁷² Because this caught the attention of many Asian Americans who closely followed the campaign, it was no surprise when some members of the White House Initiative on Asian Americans and Pacific Islanders advisory commission resigned upon his inauguration. Fourteen additional members later resigned in protest of President Trump's immigration policies.⁷³

70. Edward Blum, *Harvard's discrimination against Asian Americans must end*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/opinions/harvards-discrimination-against-asian-americans-must-end/2017/08/08/446ebd6a-7bb1-11e7-a669-b400c5c7e1cc_story.html?utm_term=.ae81a2c7da46 [https://perma.cc/K7CT-F2DX].

71. See Jay Willis, *The Trump Administration Is Hell-Bent on Ending Affirmative Action*, GQ (July 3, 2018), <https://www.gq.com/story/jeff-sessions-affirmative-action-supreme-court> [https://perma.cc/HE4Y-A2Z6].

72. See Catie Edmondson, *Sonia Sotomayor Delivers Sharp Dissent in Travel Ban Case*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/sonia-sotomayor-dissent-travel-ban.html> (reporting that during his Presidential campaign when Trump invoked the model minority stereotype when he disingenuously referred to Asian immigrants being more desirable than others who he characterized as criminals) [https://perma.cc/Z3Q5-H49D]. Just as was the case in the 1990s, Republicans rallied against affirmative action to appeal to Asian American voters in 2018 midterm election cycle. See Benjamin Wermund, *GOP courts Asian-Americans with drive to end affirmative action*, POLITICO (Oct. 14, 2018), <https://www.politico.com/story/2018/10/14/asian-americans-affirmative-action-898521> [https://perma.cc/5VHT-282R].

73. See Walbert Castillo, *16 quit commission for Asian American, Pacific Islanders since Trump's election*, USA TODAY (Feb. 21, 2017), <https://www.usatoday.com/story/news/politics/2017/02/20/asian-americans-pacific-islanders/98137484> [https://perma.cc/KZG3-NQRQ]. According to a fall 2018 survey, fifty-eight of Asian Americans disapprove of Trump's performance. While 36 percent of Trump's support

Next, President Trump's deeper pattern of affronting Asian Americans and running roughshod over issues important to them emerged. First, Trump has not learned the lessons of the World War II internment of 120,000 individuals of Japanese ancestry without due process. As pointed out by Justice Sotomayor, dissenting from the Court's decision to uphold Trump's travel ban on several Muslim majority countries, a parallel can be drawn between Trump's Muslim ban and the Japanese internment.⁷⁴ Second, the Trump Administration cited to *Hirabayashi v. United States*,⁷⁵ which upheld the exclusion order against Japanese Americans in its argument to prevent a Guantanamo Bay detainee from distributing his artwork to his attorney and the public.⁷⁶ Third, last summer, the Japanese Americans Citizens League lambasted Trump Administration officers who were in Arkansas scouting potential locations to house up to 20,000 migrant children separated from their families crossing the US–Mexico border under the Trump administration's "zero-tolerance" policy. These officers considered a location two miles away from the former site of the Rohwer internment camp as the location for detention center for the Mexican children.⁷⁷

Fourth, the Trump Administration considered a plan to send some select high-value ISIS fighters to a US detention facility in Guantanamo Bay to join the forty remaining detainees who seek release from indefinite detention.⁷⁸

comes from Vietnamese immigrants, Filipino Americans were split, and Japanese Americans were the least approving of Trump's performance. See Agnes Constante, *Asian-American voter enthusiasm up despite little contact from parties, survey finds*, NBC NEWS (Oct. 10, 2018), <https://www.nbcnews.com/news/asian-america/asian-american-voter-enthusiasm-despite-little-contact-parties-survey-finds-n918591> [<https://perma.cc/L8K7-PWV7>]; Traci G. Lee, *10 Resign from President's Advisory Commission on Asian Americans and Pacific Islanders*, NBC NEWS (Feb. 16, 2017), <https://www.nbcnews.com/news/asian-america/10-resign-president-s-advisory-commission-asian-americans-pacific-islanders-n721386> [<https://perma.cc/HEG9-5NFU>].

74. See *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337 (U.S. June 26, 2018) (upholding Trump's travel ban on travels from several Muslim majority countries, overturning *Korematsu*, and responding to Sotomayor's dissent which accused the Court of overlooking the parallels between the Muslim ban and the internment).

75. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1943).

76. See Nicole Goodkind, *Trump Administration Uses Japanese Internment Example to Deny Rights to Detainees*, NEWSWEEK (June 15, 2018), <https://www.newsweek.com/guantanamo-bay-donald-trump-japanese-internment-980049> [<https://perma.cc/8PEB-7HC9>] (stating that in a leaked brief, the Department of Defense extensively cited to *Hirabayashi v. United States* in *Korematsu*, 323 U.S. at 223–24, upholding the exclusion order against Japanese Americans in its argument to prevent Guantanamo Bay detainee from distributing his artwork to their attorney and the public).

77. See Kimberly Yam, *Migrant Kids Could Be Held Disturbingly Near A Japanese-American Camp*, HUFFINGTON POST (June 29, 2018), https://www.huffingtonpost.com/entry/migrant-kids-japanese-american-internment-camp_us_5b33bae2e4b0b745f17a07cc [<https://perma.cc/6JKV-JZ95>]; see also *Trump Administration Learned All the Wrong Lessons from History*, JAPANESE AM. CITIZENS LEAGUE, (June 26, 2018), <https://jacl.org/trump-administration-learned-all-the-wrong-lessons-from-history> [<https://perma.cc/32RN-NMNC>] (relaying that during the summer, the Japanese Americans Citizens League lambasted Trump Administration officers were in Arkansas scouting potential locations to house migrant children separated from their families crossing the US–Mexico border under the Trump administration's "zero tolerance" policy).

78. See Tess Bridgeman, et al., *Gitmo Is Not the Answer*, SLATE (Aug. 31, 2018), <https://slate.com/news-and-politics/2018/08/the-question-of-what-to-do-with-isis-detainees-is-tricky-that-doesnt-mean-we-should-send-them-to-gitmo.html> [<https://perma.cc/PH5G-ZWXB>] (reporting that

Fifth, Trump's pattern of cultural incompetence reached new heights when he tried to suspend asylum rights for all immigrants entering into the United States illegally.⁷⁹ Sixth, Trump pledged to end birthright citizenship via an executive order in complete disregard of the seminal ruling in *Wong Kim Ark*,⁸⁰ which established that right during the racist Chinese Exclusion Era.⁸¹ Against this backdrop, it would just be simply naïve to believe that Trump has ever acted in the best interest of the Asian American community.

Within this same social, political, and historical context, legal scholars Nancy Leong and Erwin Chemerinsky see through Blum's ploy and recognize his disingenuous arguments as strategically made to further a conservative agenda rather than to protect Asian Americans.⁸² Unveiled, this feigned concern for Asian Americans is a way to limit admissions to other racial minorities and continue the steady admission of whites under the auspices of a race-neutral admissions policy.⁸³ Likewise, an amicus brief supporting Harvard College filed by Harvard students and alumni argued that "Plaintiff's lawsuit uses Asian Americans as a cover to force every institution of higher education in the United States to ignore the reality of society where certain ethnic-racial minorities, Asian Americans among them, encounter structural racism and implicitly bias because of their identity."⁸⁴ In addition, author Jeff Chang has similarly acknowledged, "[C]onservatives only seem concerned with discrimination against Asian Americans when it serves the ideology of colorblindness and allegations of discrimination against whites."⁸⁵

Trump Administration is considering a plan to send some select high-value ISIS fighters to US detention facility in Guantanamo Bay to join the 40 remaining detainees who seek release from indefinite detention).

79. .See Maria Sacchetti & Isaac Stanley-Becker, *In blow to Trump's immigration agenda, federal judge blocks asylum ban for migrants who enter illegally from Mexico*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/nation/2018/11/20/blow-trumps-immigration-agenda-federal-judge-blocks-asylum-ban-migrants-who-enter-illegally-mexico/?utm_term=.fcab7c788d7d (reporting that federal judge temporarily blocked the Trump administration from denying asylum to migrants entering into the US illegally) [<https://perma.cc/6ZC7-RYA8>]; *Donald Trump wants to scrap birthright citizenship. The Wong Kim Ark Chinese legal case from 1898 complicates it*, SOUTH CHINA MORNING POST (Oct. 31, 2018), <https://www.scmp.com/news/world/united-states-canada/article/2170975/donald-trump-wants-scrap-birthright-citizenship-wong> (analyzing Trump's claim that he can abolish birthright citizenship with in an executive order) [<https://perma.cc/3W6H-7EE8>].

80. See 169 U.S. 549 (1898) (holding that the Constitution automatically grants citizenship to a child born in the U.S. of parents of Chinese nationality).

81. .See Sacchetti & Stanley-Becker, *supra* note 79.

82. 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-to-justify-anti-affirmative-action-politics> [<https://perma.cc/G7UF-4Q9H>].

83. *Id.*

84. See Memorandum of Amici Curiae in Support of Defendant's Motion for Summary Judgment on Remaining Counts II, III, V. at 1–2, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corporation)*, No. 1:14-cv-14176-ADB (D. Mass. July 30, 2018).

85. Jeff Chang, *Diversity Is Not Equity*, SLATE (June 27, 2016), <https://slate.com/news-and-politics/2016/06/the-supreme-courts-fisher-decision-is-a-hollow-victory-for-affirmative-action.html> [<https://perma.cc/L6AK-5A86>]; see also John C. Yang, *Affirmative Action Benefits Everyone—Including*

Add to this mix Harvard Law Professor Jeannie Suk Gersen's commentary about the Harvard lawsuit, which criticized the arguments for ending race-conscious affirmative action.⁸⁶ For Gerson, the real problem is "sub-rosa deployment of racial balancing in a manner that keeps the number of Asians so artificially low relative to whites who are less strong on academic measures."⁸⁷ Vanita Gupta, former head of the Department of Justice's Civil Rights Division, characterized the Harvard lawsuit as "an intentional effort to end race-conscious admission programs that are the law of the land and have been continually upheld by the Court."⁸⁸

These narratives show how, both historically and modernly, Asian Americans are not neatly positioned in the traditional, yet outmoded, black/white racial binary in America. As gleaned from the affirmative action debate, and the Harvard and UNC lawsuits in particular, the social and ideological constructions of Asian Americans as "model minorities" continue to be shaped and manipulated for political reasons.⁸⁹ Specifically, conservative political actors are propping up Asian Americans as a threat to whites while simultaneously arguing that other racial groups should follow the example set by Asian Americans.

Indeed, the exaggerated stories of Asian American success have even manifested themselves to claims of "Asian privilege" as espoused by former Fox News pundit, Bill O'Reilly, who used Asian Americans to support his disingenuous claim of "Asian privilege" in America. He supported this claim by arguing that Asian Americans have higher median home incomes than other racial groups, including whites, because Asian Americans are educated and "keep their families intact."⁹⁰ According to O'Reilly, Asian Americans should be lauded for overcoming language barriers and are "succeeding more than African-Americans and even more than white Americans."⁹¹ A recent Fox News opinion piece is an example of how conservatives only seem concerned with discrimination when it serves the color-blindness ideal. The author propped up the model minority stereotype and asserted that "Asian-Americans give the lie to the entire narrative that marginalized, 'subordinate'

Asian Americans, HUFFINGTON POST (May 14, 2018), https://www.huffingtonpost.com/entry/opinion-young-asian-american-affirmative-action_us_5af5e145e4b0e57cd9f951c4 (arguing that conservative group are disingenuous in their self-professed claim that they are interested in protecting Asian Americans against discrimination) [<https://perma.cc/6TAX-HDRW>].

86. See Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian-Americans*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> [<https://perma.cc/Q4V4-2GRQ>].

87. *Id.*

88. See *Documents*, *supra* note 31.

89. See Angelo Ancheta, et al., *The Asian American Nexus to Civil Rights*, 2 AAPI NEXUS v (2004) (stating, "Asian Americans are frequently absent from the largely black-white civil rights discourses, and when they are considered, they are often relative to secondary or tertiary roles."). Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 129 (1999).

90. See Bill O'Reilly, *Bill O'Reilly: The truth about white privilege*, FOX NEWS (Aug. 26, 2014), <http://www.foxnews.com/transcript/2014/08/27/bill-oreilly-truth-about-white-privilege> [<https://perma.cc/7X2N-MZZG>].

91. *Id.*

groups cannot get ahead in American society, cannot play by the established rules, cannot assimilate.”⁹²

Unfortunately, those two examples blurred important facts, just as they whitewashed discrimination and racism against Asian Americans. These exaggerated stories of Asian American success obfuscate issues facing Asian American students on several fronts. First, according to the National Commission on Asian American and Pacific Islander Research in Education, Asian American students at UCLA, especially Southeast Asian students, were subjected to racial bullying and racial slurs. Additionally, these students have been excluded from curricular and co-curricular activities.⁹³

Second, many Asian Americans who do experience success climbing the corporate ladder still encounter discrimination through subconscious biases and racial preferences.⁹⁴ The Pew Research Center reported that 50 percent of whites held subconscious preferences for other whites over Asians, the highest level of implicit racial preference tracked.⁹⁵ 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.⁹⁶ Non-Asians

92. See Mike Gonzalez, *FOX News: Yes, It's Time for Affirmative Action to End—Finally*, NEWS WORLD (Aug. 20, 2018), <https://breakingnewssworld.blogspot.com/2018/08/fox-news-yes-its-time-for-affirmative.html> [<https://perma.cc/X5T9-K9NK>].

93. See *The Racialized Experiences of Asian American and Pacific Islander Students: An Examination of Campus Racial Climate at the University of California, Los Angeles*, ICOUNT: A DATA QUALITY MOVEMENT FOR ASIAN AMERICANS AND PACIFIC ISLANDERS 10; 12 (2016).

94. See ROSALIND S. CHOW & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* (2010) (discussing discrimination based on citizenship and foreign-status, and describing the perpetual foreigner stereotype placed on Asians in the country).

95. See Sexton, *supra* note 53.

96. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 51 (2002) (“[Asian Americans] are underrepresented in management, and those who are managers earn less than white Americans in comparable positions”); 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* 153 (1996) (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 Sharon S. Lee, *The De-Minoritization of Asian Americans in Affirmative Action Admission Policies at the University of California*, 15 *ASIAN AM. L. J.* 129, 150 (2008) (noting that Asian Americans are underrepresented in Congress, corporate boards, and in top-level administrative positions in colleges and universities). See also, *PRESIDENT OBAMA’S RECORD WITH THE ASIAN AMERICAN AND PACIFIC ISLANDER COMMUNITY* 2 (May 2016) (regarding the efforts made by the Executive Branch, President Obama’s Justice Department worked with local community leaders and law enforcement to address discrimination, violence, and harassment against Asian Americans) [<https://perma.cc/GBF9-DWDR>].

Unconscious preferences for whites may partly explain the findings in California Supreme Court Associate Justice Goodwin Liu’s co-authored 2017 study of Asian Americans in the law showing that Asian Americans lag behind other racial groups in attaining leadership roles in the legal profession. The survey crunched publicly available statistics on Asian American law students and attorneys to reach these conclusions: (1) whites are about twelve times as likely than Asian Americans to land federal clerkships, and whites are seventeen times as likely than Asian Americans to secure state clerkships; (2) there is a dearth of law school deans and law professors relative to the significant number of Asian American law students; (3) and Asian American associates lag behind whites in promotion to the

perceived Asian Americans as intelligent and industrious yet quiet and introverted, lacking interpersonal skills and charm.⁹⁷

Ultimately, the privilege that O'Reilly spoke of was white privilege.⁹⁸ Any Asian American socio-racial shift to whiteness, academic Min Zhou has said, is merely a façade. “On a superficial level, Asian Americans seem to be on their way to becoming white through acculturation, education, achievement, intermarrying whites, and achieving professionally.”⁹⁹

partnerships in large law firms. See Goodwin Liu, et al., A PORTRAIT OF ASIAN AMERICANS IN THE LAW 12, 14 (2017). The study also suggests that implicit biases contribute to the way Asian Americans are evaluated on criteria like leadership, liability, specialty, and access to contacts. *Id.* at 18. The news is not much better in Silicon Valley. According to a spring 2018 *Harvard Business Review* article, Asian Americans are the last likely racial group, behind African Americans and Latinos, to be promoted to management and executive positions. See Buck Gee & Denise Peck, *Asian Americans Are the Least Likely Group in the U.S. to Be Promoted to Management*, HARV. BUS. REV. (May 31, 2018), <https://hbr.org/2018/05/asian-americans-are-the-least-likely-group-in-the-u-s-to-be-promoted-to-management>. [https://perma.cc/D7CC-SAZ9]. Noticing this pattern, the article theorized that Asian Americans are often overlooked in glass-ceiling discussions about the lack of minority representation because Asian American men and white men are often lumped in the “non-underrepresented” category just as Asian women are combined with women of all races. *Id.* Chris Lu, former US Deputy Secretary of Labor calls “a dearth of representation” of Asian Americans cited to the high attrition rates of Asian Americans in law firms and the obstacles Asian Americans face working in Silicon Valley technology companies to discuss how Asian Americans are rendered invisible, and underscore the need for Asian Americans to have a platform for expressing their views on important social, political, and policy issues that affect them. See Chris Lu, *What We Miss When We Ignore Asian Americans*, TIME (Oct. 20, 2017), <http://time.com/4992021/asian-americans-pacific-islanders-representation> [https://perma.cc/5QFQ-UZRB].

97. See Adeel Hassan, *Confronting Asian-Americans Stereotypes*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/confronting-asian-american-stereotypes.html> [https://perma.cc/N2W9-8KXQ]; Pavithra Mohan & Anisa Purbasari Horton, *Asian-Americans on being “likeable” in the modern workplace*, FAST COMPANY (July 5, 2018), <https://www.fastcompany.com/40590269/asian-americans-on-being-likable-in-the-modern-workplace> [https://perma.cc/9PXT-Y8YU].

98. See Marie Myung-Ok Lee, *Bill O’Reilly’s “Asian Privilege” disgrace: The Fox News host needs some basic history lessons*, SALON (Aug. 29, 2014), http://www.salon.com/2014/08/29/bill_oreillys_asian_privilege_disgrace_the_fox_news_host_needs_so_me_basic_history_lessons [https://perma.cc/RW9W-XZB8]; see also, CHOW & FEAGIN, *supra* note 94 (explaining that the model minority myth maintains white privilege while also encouraging anti-Asian hatred animosity); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian Americans Legal Identity*, 4 ASIAN L.J. 71, 93 (1997) (observing that “[T]he model minority myth divides minority groups from each other . . . [and] justifies subordinated position of each of these groups” and arguing that “[D]ebates on affirmative action illustrate how the purported success of Asian Americans has been used to justify the elimination of remedial programs.”). White privilege allows whites to experience privileges benefiting them. These same benefits are not afforded to non-whites, who are situated in the same social, political, and economic circumstances. See Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, 246–48 (2005).

99. Min Zhou, *Are Asian Americans Becoming “White”?*, CONTEXT 3, 4 (2004); see also ERIC K. YAMAMOTO, ET. AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 11 (2001) (describing the viewpoint of [neoconservative legal scholars who “view law as neutral and objective” and claims “present inequality is not the result of discrimination because society no longer discriminates against people of color.”]; see also Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 814 (1996) (arguing that Asian Americans have only been successful on a superficial level); Frank H. Wu, *Are Asian Americans Now White?*, 23 ASIAN AM. L. J. 201, 205 (2016). This ideal stands in contrast to the classical quip of “anti-affirmative action forces . . . [characterizing] affirmative action as reverse discrimination or reverse racism, and tell the story of the innocent white male.” Robert S. Chang, *Reverse Racism!: Affirmative*

Moving forward, Professor Frank Wu has argued that Asian Americans should not blame African Americans and Latinos. After all, Asian Americans are competing against whites in most affirmative action programs, and it is whites with lower test scores that are being admitted over them.¹⁰⁰ Regarding the Harvard lawsuit, Professor Kimberly West-Faulcon analyzed the SFFA's claims against Harvard and UNC and has suggested that white students would benefit most from an Asian American admissions ceiling:

The SFFA complaint fails to acknowledge the conceptual and practical reality that admission practices with the purpose and effect of increasing the number of African American and Latino students admitted usually affect too few admission slots to be the policy that imposes an Asian penalty. . . . [I]mposing an Asian American admissions ceiling would mean opening up more spots for whites.¹⁰¹

To obfuscate this reality, and promote an optic of solidarity, SFFA grouped whites and Asian Americans in their Harvard brief. The aligning of whites with Asian Americans is even more explicit in the UNC Complaint:

UNC-Chapel Hill's racial preference for each underrepresented minority student (which equates to a penalty imposed upon *white and Asian-American applicants*) is so large. . . . [U]sing race or ethnicity as a dominant factor in admissions decisions could, for example, account for the disparate treatment of *high-achieving Asian Americans and white applicants*, and underrepresented minority applicants with inferior academic credentials. UNC-Chapel Hill admission decisions simply were not explainable on grounds other than race. *High-achieving Asian-American and white applicants* are as broadly diverse and eclectic in their abilities and interests as another group seeking admission to UNC-Chapel Hill.¹⁰²

Finally, suggesting that a combination should be struck between having one predominant racial group with an underrepresentation of whites and a majority Asian student body, Professor Jeannie Suk Gersen has argued for

Action, the Family, and the Dream That is America, 23 HASTINGS CONST. L.Q. 1115, 1117 (1996); see Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 658 (2015) (stating, "Asian Americans have become the new face of affirmative action").

100. See Frank H. Wu, *The Truth About Asian Americans And Affirmative Action*, HUFFINGTON POST (Jan. 31, 2017), https://www.huffingtonpost.com/entry/the-truth-about-asian-americans-and-affirmative-action_us_588fdec1e4b04c35d5835199 [<https://perma.cc/JG94-7M5Z>].

101. See Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. 590, 628 (2017). But see Note, *The Harvard Plan That Failed Asian Americans*, 131 HARV. L. REV. 604, 605 (2017) (arguing that the Supreme Court's diversity rationale for affirmative action is flawed and has been harmful for Asian American students).

102. See Complaint at 4–5, *Students for Fair Admissions Inc. v. Univ. of N.C.*, No. 1:14-cv-954 (M.D.N.C. 2017) (emphasis added). But an *Atlantic* commentary urges that whites and Asian Americans in the Harvard case are misaligned because the suit focuses in on Asian Americans from higher than average socioeconomic backgrounds, which ignores the vast diversity in income and ethnicity among Asian Americans.102. See Iris Kuo, *The 'Whitening' of Asian Americans*, THE ATLANTIC (Aug. 31, 2018), <https://www.theatlantic.com/education/archive/2018/08/the-whitening-of-asian-americans/563336> [<https://perma.cc/3FQB-L5QM>].

“race-conscious affirmative action, to address discrimination and underrepresentation of blacks and Latinos, in combination with far less severity in the favoring of whites relative to Asians.”¹⁰³

III. DESTINATION: SUPREME COURT?

Fisher is the law of the land. Universities have great discretion in the design and implementation of their affirmative action programs. These programs can include or exclude Asian Americans depending on the unique needs and goals of the university, and some of the programs will withstand constitutional challenges if they are appropriately structured. When considering whether to include or exclude Asian Americans in affirmative action programs, there is a need to disaggregate Asian groups to cover all subgroups. Absent such action, an admissions committee could place blanket assumptions on all Asian groups. For example, admissions committees may think there are enough Chinese American or Korean American applicants without appreciating the differences between the Asian immigrant and Asian American experience and the diversity amongst the major and subgroups of Asian Americans.¹⁰⁴ This point was made by Justice Alito in his *Fisher* dissent when he raised questions about whether Asian Americans are considered “overrepresented” at UT due to the lumping together of the major and subgroups of Asian Americans: Chinese, Japanese, Korean, Vietnamese, Hmong, and Indians on campus.¹⁰⁵ He was also skeptical about whether the UT admissions policies appropriately accounted for the different admission rates of Asian American subgroups.¹⁰⁶

In the end, it is possible that the Harvard lawsuit will reveal some evidence of discrimination against Asian Americans. Or, akin to the admissions controversies of the 1980s, which showed that some universities were guilty of discrimination while some were absolved, Harvard might be cleared of any wrongdoing. Professor Takagi reported that the Department of Education’s Office of Civil Rights exonerated Harvard of charges of discrimination against Asian Americans, while internal investigations at

103. See Gersen, *supra* note 86.

104. A true holistic admissions process also recognizes that Asian Americans are not a single not a monolithic group but rather a community with a broad range of Asian ethnic groups with diverse socio-economic backgrounds. See Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 25 (1994); Lee & Kumashiro, *supra* note 23.

105. See *Fisher v. Texas*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting).

106. See *id.* at 2229 (Alito, J., dissenting); Liliana M. Garces & Oiyen Poon, *Asian Americans and Race-Conscious Admissions: Understanding the Conservative Opposition’s Strategy of Misinformation, Intimidation & Racial Division*, CIVIL RIGHTS PROJECT (Oct. 31, 2018), <https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/asian-americans-and-race-conscious-admissions-understanding-the-conservative-opposition2019s-strategy-of-misinformation-intimidation-racial-division> [<https://perma.cc/H33J-VZL5>] (“Justice Alito’s numerous references in his dissent to Asian Americans reflects the way conservative organizations have shifted framing to focus on discrimination against Asian Americans as the logical outcome of ‘preferences’ for other minorities”).

Cornell and Princeton found no evidence of bias.¹⁰⁷ However, the Department of Education ordered UCLA to admit particular mathematics graduate students who it initially denied admissions, and UC Berkeley apologized for restricting the admission of Asian Americans in favor of white applicants.¹⁰⁸ Whatever the outcome of this litigation, the Harvard and UNC lawsuits shine a spotlight on the current hyper-competitive college admissions process, as well as the divergent opinions held by Asian Americans on affirmative action.¹⁰⁹

Justice Kennedy's retirement followed by Judge Brett Kavanaugh's confirmation to the Court, an arrangement of which could tilt the majority to the right, spurred on speculation that the Harvard and UNC cases are on the appellate fast track, Kavanaugh's confirmation an arrangement of which could tilt the majority to the right with a new conservative wing.

Kavanaugh may view the Harvard lawsuit as an opportunity to strike down affirmative action once and for all.¹¹⁰ With Alito's dissent available as a template, the Court could return to the traditionally rigid application of strict scrutiny as opposed to the seemingly more relaxed test in *Grutter v. Bollinger*¹¹¹ and *Fisher*, to challenge the defenses raised by Harvard concerning their admissions policies and reject the diversity rationale for affirmative action. But maybe none of these predictions will come into fruition.

107. See TAKAGI, *supra* note 71.

108. See Garces & Poon, *supra* note 108, at 9.

109. A recent UCLA Civil Rights Project study recommends more comprehensive media coverage on Asian American views towards affirmative action because it would address misperceptions and attempts to create racial division on affirmative action and targeted outreach to educate the Asian Americans and the community about the benefits of affirmative action. *See id.* at 3.

110. Kavanaugh will be the second most conservative Justice after Justice Thomas. *See* Andrew Witherspoon & Harry Stevens, *Where Brett Kavanaugh sits on the ideological spectrum*, AXIOS (July 10, 2018), <https://www.axios.com/brett-kavanaugh-conservative-ideological-political-views-9d009f84-0e0a-4ebf-ac82-084489a108f2.html> [<https://perma.cc/785C-UCCU>]. *See also* Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/supreme-court-conservatives-trump.html> [<https://perma.cc/2H6Z-UZ4H>]; Emily Bazelon, *We're About to Find Out How Bad It Will Get Without Justice Kennedy*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/kennedy-retire-supreme-court-trump.html> [<https://perma.cc/4TNG-DRCM>]; Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/TL5Z-ASQY>]; Vann R. Newkirk II, *What Kennedy's Absence Means for Civil Rights*, THE ATLANTIC (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-future-of-civil-rights-in-the-supreme-court/563957/> [<https://perma.cc/Q5TQ-3TQL>]; Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/L3EX-PYEN>]; *Editorial: Mr. Trump Courts the Right*, N.Y. TIMES, July 10, 2018 at A22; *Statement from National Asian Pacific American Women's Forum Executive Director Sung Yeon Choimorrow re: Announcement of Supreme Court Nominee Brett Kavanaugh*, NAT'L ASIAN PAC. AM. WOMEN'S F. (July 9, 2018), <https://www.napawf.org/2018-07-09pr.html> [<https://perma.cc/D9Y3-QN6G>].

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

IV. BEYOND HARVARD: RACE, ADMISSIONS, AND THE LACK OF STUDENT DIVERSITY

Diversity in schools is critical because differences in race, ethnicity, gender, religion, sexual orientation, socioeconomic status, and age facilitate the dispelling of stereotypes by expanding worldliness, enhancing social development, promoting creative thinking, and enhancing self-awareness.¹¹² Conversely, by not considering race, the schools preserve historical and modern power differential between whites and non-whites. The Army, Navy, and Air Force Military academies realize such a bleak outcome, and are aware that race is critical to ensuring a diverse student body. These academies have aggressively embraced affirmative action, while still maintaining rigorous standards to increase diversity at the officer ranks in the armed forces.¹¹³ For example, applicants must show leadership qualities, hold high academic standing, and meet physical fitness standards.¹¹⁴ Judging by West Point's 2019 graduating class, which will be the most diverse in the academy's 214-year history, these efforts appear to be paying off.¹¹⁵

This section expands beyond the Harvard lawsuit to discuss how removing race from the admissions process can hinder racial diversity on at least three levels. First, without any consideration of race in the admissions process, it is likely that diversity and equity will suffer. The harsh reality of present race-blind admission policies at some of the nation's top high schools, which are the main pipelines to top universities, confirms this. For example, San Francisco's Lowell High School controversy pitted Asian American civil rights groups against one another and resulted in a settlement that eventually resulted in the school having a student body lacking diversity—the current student body is 57 percent Asian, 14 percent white, 10 percent Latino, and 2 percent African American.¹¹⁶ Lowell High School set a national trend that high schools have followed by implementing race-blind and merit-focused policies that look only at standard test scores: Stuyvesant in New York, Monta Vista High School in Cupertino, Thomas Jefferson High School for Science and Technology in Alexandria, and Boston Latin School. Asian American students significantly outnumber students from

112. See Jeremy S. Hyman and Lynn F. Jacobs, *Why Does Diversity Matter at College Anyway?*, U.S. NEWS (Aug. 12, 2009), <https://www.usnews.com/education/blogs/professors-guide/2009/08/12/why-does-diversity-matter-at-college-anyway> [<https://perma.cc/X8ED-95DC>].

113. See Adam Cylmer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES (Jan. 28, 2003), <https://www.nytimes.com/2003/01/28/us/service-academies-defend-use-of-race-in-their-admissions-policies.html> [<https://perma.cc/KGJ2-2PS2>].

114. See Sarah Sicard, *How Affirmative Action Works At West Point*, TASK AND PURPOSE (July 19, 2016), <https://taskandpurpose.com/race-factors-west-point-admissions> [<https://perma.cc/W6NX-U3K8>].

115. *Id.*

116. See *The daunting struggle to diversify elite public high schools*, PBS NEWSHOUR (June 15, 2016), <https://www.pbs.org/newshour/show/the-daunting-struggle-to-diversify-elite-public-high-schools> [<https://perma.cc/2U5Z-D9T3>]; Clarissa Wan, *Finding Equity, Part 2: Latino students share stories about Lowell's lack of diversity*, THE LOWELL (Oct. 25, 2016), <http://thelowell.org/562/features/finding-equity-part-2-latino-students-share-stories-about-lowells-lack-of-diversity> [<https://perma.cc/ZP7E-PYWV>].

other racial backgrounds at these schools.¹¹⁷

This lack of diversity compels the question of: How can these schools admit more students who are not Asian or white to their student body? Some action has been taken to answer this question. New York Mayor Bill De Blasio plans to make the city's eight elite high schools—including Stuyvesant, Bronx Science, and Brooklyn Tech—more diverse.¹¹⁸ This summer New York City adopted almost all of the preliminary recommendations made in the Diversity Advisory Group's report.¹¹⁹ The plan proposes a two-prong selection process that aims to eventually phase out via state legislation the current single test criteria of admitting students with the highest middle school grades combined with the highest state test scores. De Blasio also wants 20 percent of the seats reserved for low-income students starting September 2019.¹²⁰ Asian American groups were outraged because they believed it would result in fewer Asian Americans admitted to the most selective public high schools.¹²¹

Second, if schools abolished affirmative action at the collegiate level, major university campuses would likely have predominantly white and Asian American student bodies. There would resultantly be fewer African Americans, Latinos, and Southeast Asians such as Vietnamese, Hmong, and Filipinos.¹²² Consequently, students on college campuses with student bodies

117. See Anemona Hartocollis & Stephanie Saul, *Affirmative Action Battle Has a New Focus: Asian-Americans*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/affirmative-action-battle-has-a-new-focus-asian-americans.html> [<https://perma.cc/9A8L-LTMQ>].

118. See, e.g., James Ford, *De Blasio's plan to make city's elite high schools more diverse meets opposition, criticism*, PIX 11 (June 4, 2018), <https://pix11.com/2018/06/04/de-blasios-plan-to-make-citys-elite-high-diversity-advisory-group-recommendations/> (describing De Blasio's plans changing the way students are admitted to New York's eight elite public high schools) [<https://perma.cc/3KUZ-S3XB>]; Chris Fuchs, *Plan to Diversify New York's Top High Schools Divides Asian-American Groups*, NBC NEWS (June 18, 2018), <https://www.nbcnews.com/news/asian-america/plan-diversify-new-york-s-top-high-schools-divides-asian-n884316> [<https://perma.cc/9DPP-PRFW>]; Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html> [<https://perma.cc/9NZS-W73B>] (same).

119. See Office of the Mayor, *Mayor de Blasio, Schools Chancellor Carranza Announces Adoption of School Diversity Advisory Group Recommendations*, NYC (June 10, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/292-19/mayor-de-blasio-schools-chancellor-carranza-adoption-school-diversity-advisory-group> [<https://perma.cc/53SG-L63F>] (reporting that New York City will adopt 62 of 67 preliminary recommendations by the School Diversity Group).

120. See, e.g., Ford, *supra* note 120 (same); Fuchs, *supra* note 120 (same); Harris & Hu, *supra* note 120 (same). De Blasio's plan seems to treat race/diversity as merit, which could lead to competition amongst racial groups, which Viet Dinh, former Deputy Attorney General in the Bush Administration, claims foster "division among the races." Viet D. Dinh, *Multiracial Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 287 (1994). Similar arguments are refuted by Professor Richard Delgado who says such programs would only have marginal effects on applicants who would not have been admitted even if there were no affirmative action. See Richard Delgado, *Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 145 (1998).

121. See, e.g., Ford, *supra* note 120 (same); Fuchs, *supra* note 120 (same); Harris & Hu, *supra* note 120 (same).

122. The 2010 US Census showed that more than 60 percent of Cambodian, Lao, and Hmong Americans lack a bachelor's degree, as do more than 50 percent of Vietnamese Americans. See Elaine

largely comprised of Asian Americans and whites would be denied opportunities to corroborate with students from different backgrounds and participate in the robust exchange of ideas. Because of Proposition 209's ban on the consideration of race by state universities, there was a significant drop in the admission rates of African American and Latino freshman applicants at UC Berkeley and UCLA.¹²³ In 1998, Asian American admission rates significantly declined at five of the eight University of California campuses.¹²⁴ Today, Asian Americans currently represent 42 percent of the student body at the UC Berkeley.¹²⁵

Third, class-based affirmative action is not a feasible alternative to considering race despite its initial appeal. Richard Kahlenberg's research shows first-generation college students comprised a mere 10 percent of the Harvard student body in graduating classes from 2007 to 2016.¹²⁶ Referring to this statistic, Kahlenberg insists that consideration of race without regard to social class is not the answer because "racial preferences" benefit "socio-economically advantaged" minorities.¹²⁷ He alternatively advocates for socio-economic preferences or class-based affirmative action instead of using race as a means to diversify the Harvard student body.¹²⁸

But class-based affirmative action is not as ideal of a solution as

Sanchez Wilson, *Media Miss the Mark on Southeast Asian American Students and Impact of Affirmative Action*, SOUTHEAST ASIA RESOURCE ACTION CENTER (June 22, 2018), <https://www.searac.org/our-voices/press-room/media-miss-the-mark-on-southeast-asian-american-students-and-impact-of-affirmative-action/> [https://perma.cc/VFR6-CCVD]. Southeast Asians including refugees from Vietnam, Laos and Cambodia are underrepresented in higher education. See Janie Har, *Diversity Among Asians Divides Them on Affirmative Action*, U.S. NEWS (Nov. 2, 2018), <https://www.usnews.com/news/us/articles/2018-11-02/diversity-among-asians-divides-them-on-affirmative-action> [https://perma.cc/C3XS-GLW8]. Filipino Americans are underrepresented at University of California schools and at UC Berkeley their admittance rate of 9 percent is less than half of the other Asian American applicants. See *Filipinos Are Underrepresented at Most Selective of UC Campuses* #BlockBlum #IAMNotYourWedge, REAPPROPRIATE (Dec. 8, 2014), <http://reappropriate.co/2014/12/filipinos-are-underrepresented-at-most-competitive-of-uc-campuses-blockblum-iamnotyourwedge> [https://perma.cc/W8XP-7WMN].

123. 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> [https://perma.cc/QA4W-TK8Y].

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

125. 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-in-admissions.html> [https://perma.cc/97RD-Z3V2]. African American and Hispanic 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> [https://perma.cc/9PHD-BEJB].

126. See Kahlenberg, *supra* note 63.

127. *Id.*

128. See *id.*; Richard D. Kahlenberg, *Higher Education's Biggest Scam Is Legacy Admissions Policies*, NBC NEWS (Oct. 19, 2017), <https://www.nbcnews.com/think/opinion/higher-education-s-biggest-scam-legacy-admissions-policies-ncna812116> [https://perma.cc/3SM8-TPAU].

Kahlenberg makes it out to be. Other scholars counter that class-based affirmative action is an inadequate substitute for race because it ignores the problem of racism and serves as an anti-poverty measure addressing socioeconomic disparities.¹²⁹ It can also impose significant financial burdens on the universities that have to forgo tuition.¹³⁰ Furthermore, the argument for class-based affirmative action downplays how an admissions program based on socioeconomic disadvantage benefits whites and possibly Asian Americans over other racial groups.¹³¹

Instead of thinking strictly in binary terms of “race” and “class,” a better alternative is one that combines race, ethnicity, and class.¹³² In such a matrix, institutions that holistically consider race as a plus factor would commit to considering socioeconomic disadvantage in admissions.¹³³ Currently about two-thirds of the nation’s universities that already consider race in their admissions programs also consider socioeconomic disadvantage. For example, in the West, the University of Colorado, Boulder embraces a “class-plus-race admissions program that increases low-income admission, while maintaining minority representation.¹³⁴ CU-Boulder, a university with low number of minority students and not particularly selective in its admissions, goes beyond grades and test scores, and considers extracurricular activities, strength of senior schedule, race, socioeconomic disadvantage, and extraordinary overachievement while experiencing socioeconomic hardship.¹³⁵

Back East, the fifty-year old Minority Student Program (MSP) at Rutgers Law School pioneered the diversification of the legal education and legal profession. It does so by being open racial or ethnic minorities who are underrepresented in the legal profession and any student demonstrating a history of socioeconomic or educational disadvantage.¹³⁶ This highly successful post-admission program proactively helps students by offering

129. See ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 165 (1998).

130. See William C. Kidder, *How Workable Are Class-Based Race-Neutral Alternatives at Leading American Universities?* 64 UCLA L. REV. DISC. 100, 131–32 (2016).

131. See ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 118 (1999).

132. *Id.*

133. See Kidder, *supra* note 130, at 100.

134. See *id.* at 120–21. The CU-Boulder Fall 2018 Overall Enrollment Profile shows that 24 percent of the 34,510 students enrolled in fall 2018 are racial/ethnic minority groups. The demographics of the students enrolled was 1.6 percent American Indian, 7.8 percent Asian American, 2.5 percent Black/African American, 11.4 percent Hispanic/Latino, 0.6 percent Pacific Islander, 65.9 percent White, 9.0 percent International, and 1.2 percent unknown. Office of Data Analytics, *Overall Enrollment Profile Fall 2018*, <https://www.colorado.edu/oda/sites/default/files/attached-files/overallprofilefall2018.pdf> [https://perma.cc/JBA3-VKF8] (last visited Sept. 15, 2019).

135. See Sophie Walsh, *What If Colleges Embraced Affirmative Action for Class Instead of Race?*, THE ATLANTIC (Oct. 21, 2013), <https://www.theatlantic.com/education/archive/2013/10/what-if-colleges-embraced-affirmative-action-for-class-instead-of-race/280733>. [https://perma.cc/PA89-JLBD]

136. *Rutgers Minority Student Program*, RUTGERS, <https://law.rutgers.edu/minority-student-program> [https://perma.cc/6DBH-WL7P] (last visited Sept. 15, 2019).

legal skills development, academic support, alumni mentoring and networking, and internships.¹³⁷

In the Southwest, UT uses an individualized holistic review process and considers:

Special circumstances that put the applicant's academic achievements into context, including his or her socioeconomic status, experience in a single parent home, family responsibilities, experience overcoming adversity, cultural background, race and ethnicity, the language spoken in the applicant's home, and other information in the applicant's file.¹³⁸

Later, UCLA borrowed recruiting ideas from UT's review processes for its own holistic review of undergraduate admissions. This process considers the full record of each application, including achievements and experiences.¹³⁹ The UCLA admissions criteria gives weight to students showing resiliency in overcoming obstacles. It has aggressively recruited African Americans and other underrepresented minorities by providing college prep training to high school teachers and counselors, along with funneling billions of dollars into recruitment over the past two decades. Yet UCLA still has a long way to go in recruiting African Americans. Presently, 31.6 percent of the student body are Asian American, 26.1 percent are whites, 21.3 percent are Hispanic, and only 5.2 percent are African American.¹⁴⁰

CONCLUSION

Diversity does not happen on its own, and moreover, the lawsuits brought by SFFA and AACE claiming discrimination against Asian Americans are just the latest attacks by conservatives opposed to affirmative action. However, these anti-affirmative action arguments serve not to protect Asian Americans, but to preserve the current racial hierarchy. Undoubtedly, the Harvard lawsuit, like the University of Michigan and University of Texas cases that preceded it, has ignited Asian American activism on both sides of the affirmative action debate. Asian Americans are in their right to litigate against Harvard and UNC—or any other institution—if they believe it discriminated against them, just as other Asian Americans can take a principled stand defending affirmative action and supporting diversity. Mindful of this ideological split in the Asian American community, John

137. *Id.*

138. See *Texas Admissions: University of Texas at Austin, Holistic Application Review*, <https://admissions.utexas.edu/apply/decisions/holistic-review> [<https://perma.cc/3C94-JKW4>] (last visited Sept. 15, 2019).

139. UC Berkeley also review students using a Holistic Review process considering an applicant's personality qualities like leadership ability, character, and motivation and extracurricular activities and community involvement. See *Berkeley Office of Undergraduate Admissions: Freshman Requirements*, <https://admissions.berkeley.edu/freshmen-requirements> [<https://perma.cc/8MZK-ASD8>] (last visited Sept. 15, 2019).

140. See *Quick Facts About UCLA*, <http://www.admission.ucla.edu/campusprofile.htm> [<https://perma.cc/7CC8-REZN>] (last visited Sept. 15, 2019).

Yang, Executive Director of Asian American Advancing Justice has cautioned, “Asian Americans should not allow our community to be used as a pawn in efforts to dismantle the hallmark achievements and the civil rights movement.”¹⁴¹ I second that.

141. See John C. Yang, *Affirmative Action Benefits Everyone—Including Asian Americans*, HUFFINGTON POST (May 14, 2018), https://www.huffingtonpost.com/entry/opinion-young-asian-american-affirmative-action_us_5af5e145e4b0e57cd9f951c4 [<https://perma.cc/Z94Y-B3MD>].