
JUSTICE OR JUST US?:
SFFA V. HARVARD AND ASIAN
AMERICANS IN AFFIRMATIVE ACTION

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TABLE OF CONTENTS

INTRODUCTION	442
I. THE CURRENT AFFIRMATIVE ACTION STANDARD	446
II. THE ROLE OF ASIAN AMERICANS IN AFFIRMATIVE ACTION	451
A. HISTORY OF ASIAN AMERICANS AND AFFIRMATIVE ACTION	452
B. A HISTORY OF DISCRIMINATION AGAINST ASIAN AMERICANS	453
C. THE RACIAL BOURGEOISIE	457
III. <i>STUDENTS FOR FAIR ADMISSIONS V. HARVARD</i>	460
A. THE PROCEDURAL HISTORY AND CURRENT STATUS OF <i>SFFA V. HARVARD</i>	464
B. SFFA’S ARGUMENTS	466
1. Count I: Harvard Intentionally Discriminates Against Asian Americans	467
2. Count II: Harvard Engages in Racial Balancing	470
3. Count III: Harvard Considers Race as More than Just a “Plus Factor”	472
4. Count V: Harvard Has Failed to Show There Are no Workable Race-Neutral Alternatives	473
D. CRITICISMS OF SFFA’S ARGUMENTS	474
1. The Arguments in the Complaint Are Flawed	474

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2. Logical Fallacies.....	477
IV. ASIAN AMERICANS AND AFFIRMATIVE ACTION	
IN THE FUTURE	479
A. DIVERSITY RE-EVALUATED	479
B. UNITY WITH OTHER MINORITIES.....	483
CONCLUSION	485

INTRODUCTION

Here is what I sometimes suspect my face signifies to other Americans: an invisible person, barely distinguishable from a mass of faces that resemble it. A conspicuous person standing apart from the crowd and yet devoid of any individuality. An icon of so much that the culture pretends to honor but that it in fact patronizes and exploits. Not just people “who are good at math” and play the violin, but a mass of stifled, repressed, abused, conformist quasi-robots who simply do not matter, socially or culturally.¹

I can recall excitedly filling out my college applications in the fall of 2010. I can recall writing my application essay about my experience at a private, all-girls Catholic high school. I can recall being told to volunteer more and to join speech and debate. I can recall being told that playing four years of varsity tennis would make me appear more well-rounded. I can recall being told to not check the “Asian” box when the application asked for my ethnicity. At eighteen years old, this sounds like being told it is better to be anything besides exactly who you are. I can recall feeling that it was not enough to be the daughter of a first-generation immigrant from China and the granddaughter of Japanese American citizens interned during World War II.² The appropriate box for me was apparently “Other.”³

1. Wesley Yang, *Paper Tigers: What Happens to All the Asian-American Overachievers When the Test-Taking Ends?*, N.Y. MAG. (May 8, 2011), <http://nymag.com/news/features/asian-americans-2011-5> (expressing the author’s perspective on the Asian American experience). This puts into context the complexity of the role that Asian Americans play not only in the affirmative action discussion, but also in American society as a whole. When the stereotype that attaches to Asian Americans is that they are all the same, what value can be placed on an individual Asian American’s conception of self?

2. Some of the experiences my maternal grandparents faced in the Japanese American internment camps are also discussed in an article published by USC Gould School of Law. *See 75 Years Later: The Impact of Executive Order 9066*, USC GOULD SCHOOL OF LAW (Feb. 16, 2017), <https://gould.usc.edu/about/news/?id=4352>.

3. This is not to diminish the experience of those applicants who have to check “Other” because the ethnicity or culture they identify with is not listed, which is a separate but serious issue as well. This is to highlight the feeling of being told that your chances of admission would be greater if the university does not know you are Asian American, indicating Asian Americans get deducted points in comparison to even white applicants. It is not a comforting notion when many applicants of Asian-American descent have first or last names that reveal their identity regardless of what ethnicity they mark on their application.

This revelation about my own experience was necessary to understand the frustration felt by the Asian American community regarding college admissions. While this frustration may be well-founded, the Asian American community is not unified on what the appropriate reaction to it should be. On one hand, the model minority myth⁴ perpetuates a stereotype that portrays Asian Americans as successful. But on the other hand, Asian Americans feel wide-spread discrimination that goes unrecognized due to an image of them as achievers of the “American Dream.” This places Asian Americans in a precarious middle ground as a “racial bourgeoisie”⁵—stuck between being viewed as “superior” but feeling inferior. Asian Americans should be cautioned, though, that serving in this racial middle ground runs the risk of “reinforc[ing] white supremacy if the middle deludes itself into thinking it can be just like white if it tries hard enough.”⁶ Asian Americans have long been left out of the white-black affirmative action debate, and this opportunity to speak out should not be tarnished by being used as a tool to further white images at elite universities.

This Note examines the arguments made in *Students for Fair Admissions v. Harvard College*, which allege that Harvard’s consideration of race is a violation of Title VI of the Civil Rights Act of 1964 because it is not narrowly tailored to a compelling interest of diversity.⁷ The complaint filed by Students for Fair Admissions (“SFFA”)⁸ came off the back of Justice

The description of my experience applying to colleges is not to insinuate that I should have been accepted to a specific university based upon my qualifications. The qualifications I describe are those of a typical applicant, whereas the suggestion of checking the “Other” box is a less universal experience. It is part of what helps me to understand the frustrations felt by many in the Asian-American community who are pushing back against Harvard’s admissions policies.

4. See *infra* note 57 and accompanying text.

5. The concept of a “racial bourgeoisie” was coined by Mari Matsuda. MARI J. MATSUDA, *We Will not be Used: Are Asian Americans the Racial Bourgeoisie?*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 149, 149–50 (1996). It refers to an idea that Asian Americans fall into a racial middle ground that acts as a buffer between whites and African Americans, with Asian Americans stuck being too privileged to be minorities and too foreign to be honorary whites. *Id.*

6. MATSUDA, *supra* note 5, at 150.

7. Complaint at 100–01, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. Nov. 17, 2014), 2014 WL 6241935. This Note is limited in scope and does not discuss whether the Supreme Court is likely to hear this case or any likely outcome. This Note is limited to critiquing the arguments set out in *Students for Fair Admissions’* (“SFFA’s”) complaint that were argued during the trial, which concluded in November 2018, trying to create background on why the Asian American community may be divided on this issue, and making a suggestion for the future of affirmative action as the discussion begins to include Asian Americans. See Chloe Foussianes, *A Timeline of the Harvard Affirmative Action Lawsuit*, TOWN & COUNTRY (Nov. 2, 2018), <https://www.townandcountrymag.com/society/money-and-power/a24561452/harvard-lawsuit-affirmative-action-timeline>.

8. SFFA is a “newly-formed, nonprofit, membership organization whose members include highly qualified students recently denied admission to [Harvard and the University of North Carolina at Chapel

Alito's comments in his dissent in *Fisher v. University of Texas at Austin* (*Fisher II*), which proposed the possibility that Asian Americans may face discrimination in admissions.⁹ While this was an important inclusion of Asian Americans in the discussion, Justice Alito's comments in *Fisher II* perpetuated the logical fallacy that Asian Americans¹⁰ are losing admission spots to African Americans and Hispanic Americans due to affirmative action, and may have encouraged the initiation of SFFA's action against Harvard College. However, while the frustration experienced by many in the Asian American community over what feels like racial ceilings on Asian American admissions at elite universities is valid, these ceilings are the result of negative action aimed against Asian Americans, not the result of affirmative action. Prohibiting universities from considering race as part of a holistic admissions process will not eliminate the negative action felt by Asian Americans.

SFFA's use of Asian Americans to target affirmative action is a parallel to the double movement that occurred in the nineteenth century. While there was a movement toward inclusion based on increased egalitarianism among white males to reduce barriers based on wealth and property ownership, there

Hill], highly qualified students who plan to apply to both schools, and parents." *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> (last visited Jan. 21, 2019). The president of Students for Fair Admissions is Edward Blum, who is also the president of the Project on Fair Representation, which was founded in 2005 "to support litigation that challenges racial and ethnic classifications and preferences." *About Us*, PROJECT ON FAIR REPRESENTATION, <https://www.projectonfairrepresentation.org/about> (last visited Jan. 21, 2019). The Project on Fair Representation has been involved in admissions lawsuits with other universities, including *Fisher v. University of Texas at Austin*. Brittany N. Ellis, *The Harvard Admissions Lawsuit, Explained*, HARV. CRIMSON (Nov. 7, 2016), <http://www.thecrimson.com/article/2016/11/7/harvard-admissions-lawsuit-explainer>.

9. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2227 n.4 (2016) (*Fisher II*) (Alito, J., dissenting) ("The majority's assertion that UT's race-based policy does not discriminate against Asian-American students . . . defies the laws of mathematics. UT's program is clearly designed to increase the number of African-American and Hispanic students by giving them an admissions boost vis-à-vis other applicants.").

10. I acknowledge that the term "Asian American" encompasses many different cultures and experiences, adding to some of the problems of Asian Americans being viewed as a monolithic group. However, the use of terms such as "Asian Americans," "African Americans," and "Hispanic Americans" is not intended to describe the experience of all individuals within such "groups," but as a way to discuss the larger-scale issues surrounding affirmative action within the context of *SFFA v. Harvard*. The terms "Asian Americans," "African Americans," and "Hispanic Americans" were chosen based on how college admissions categorize ethnicity. See *Admissions Statistics*, HARVARD C., <https://college.harvard.edu/admissions/admissions-statistics>. The discussion of stereotypes in this Note is used solely to acknowledge their negative impact and not to recognize them as truth, and while stereotypes in any context may be harmful, it may be necessary to discuss them in order to understand our own internal biases.

was also a movement toward exclusion of African Americans, women, Native Americans, and non-white immigrants.¹¹ SFFA and the organization's creator, Edward Blum, move to include Asian Americans as part of the group deemed worthy enough to "earn" spots at elite universities only to maintain the dominance needed to continue to exclude other groups. The status that is ascribed to different groups comes with a series of stereotypes and associations that the larger, dominant group naturalizes to determine whether the group is eligible for certain benefits, like admission to elite universities.¹² Asian Americans should be wary about their sudden inclusion in this larger group, when they had for so long been denied eligibility for status as citizens and still continue to be given the stereotype of "perpetual foreigner."¹³ Similar to the poor white males of the nineteenth century, the inclusion of Asian Americans could simply be used to maintain the dominance of wealthy white¹⁴ males and to perpetuate a "white image" in elite universities.

Part I of this Note examines the current standard of affirmative action: that the only acceptable justification for race-conscious admissions policies is one of educational diversity. Part II discusses the role of Asian Americans in the affirmative action discussion, with an understanding that Asian Americans have been subject to unrecognized historical discrimination and treated as a "racial bourgeoisie"¹⁵ due to perpetuation of the model minority myth. Part III describes the background and status of *SFFA v. Harvard*, analyzes the complaint's arguments, including those made at trial, and

11. See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 212–17 (1999). In order to maintain dominance and power, wealthy white males recognized they would need to expand the civic identity to include poor white males. *Id.* By creating a dissonance between poor whites and minority groups, wealthy white males were able to maintain their power in the political system. *Id.*

12. See *id.* at 197–242 (describing American ascriptivism). Smith offers a theory that the American political system developed with influence from an ascriptive tradition based on racist, sexist, and nativist assumptions that only allowed certain individuals to take part in the American civic identity. *Id.*

SFFA's complaint may be a reaction to the egalitarian civic reforms over the last few decades, showing that democratic principles have failed to create a shared sense of "peoplehood" and instead left people desiring for a return to some "superior culture" of the past. For Asian Americans to become included in those SFFA deem worthy enough to have earned their spots at Harvard, it comes at the cost of perpetuating stereotypes such as the model-minority myth, which are ultimately harmful to the Asian American community. SFFA may be willing to include Asian Americans in higher education, but does this inclusion also apply where it does not benefit the white community?

13. See *infra* notes 73, 76–77 and accompanying text.

14. Throughout this Note, the terms "minority" and "white" were chosen to label groups in the admissions process as opposed to terms like "preferred" and "non-preferred" applicants or any other potential distinction. This is not to say that the admissions experience of all white applicants or all minority applicants is the same.

15. See MATSUDA, *supra* note 5, at 149–50.

criticizes the bases for the complaint. Part IV suggests that the future role of Asian Americans in the affirmative action discussion is one of increased political activeness and unity and argues for a change in the way elite universities value Asian American diversity when assessing applicants in a holistic process.

I. THE CURRENT AFFIRMATIVE ACTION STANDARD

All racial classifications are subject to strict scrutiny, even where the classification is non-invidious as it is for affirmative action. This requires the means to be “narrowly tailored” to a “compelling government interest.”¹⁶ For affirmative action, *Regents of the University of California v. Bakke* established that diversity, through its educational benefits, is a compelling state interest under strict scrutiny analysis.¹⁷ Diversity was originally conceived as simply racial diversity; however, Justice Powell’s majority opinion in *Bakke* advocates for a diversity that goes beyond race to include diversity of ideas, opinions, and backgrounds in order to improve the educational experience.¹⁸ The Court explicitly bans the use of a quota system where race is used as a dispositive factor in admissions, but it permits race to be used as one of many factors in the diversity consideration.¹⁹ There is a

16. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Strict scrutiny is the most stringent form of judicial review courts use in determining the constitutionality of laws. To pass strict scrutiny, the law must be “narrowly tailored” to achieve a “compelling state interest.” *Id.* Racial classifications are subject to strict scrutiny, and even where there is non-invidious motive, such as the case for affirmative action, strict scrutiny still applies. *See Korematsu v. United States*, 323 U.S. 214, 216–24 (1944) (representing the first official use of strict scrutiny for racial classifications, though the Court’s finding that the law was narrowly tailored to a compelling state interest of national security has been criticized for being based on unfounded data provided by the state and was expressly overruled in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)); *Adarand*, 515 U.S. at 227.

17. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–14 (1978). Justice Douglas’s dissenting opinion in *Defunis v. Odegaard*, 416 U.S. 312, 321–44 (1974), in which he argued that courts should give deference to educators in admissions policies, set the stage for Justice Powell’s opinion in *Bakke*. *See Bakke*, 438 U.S. at 311–14. The extent to which diversity would be able to apply as a compelling government interest to other areas outside of public education is uncertain. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).

18. *Bakke*, 438 U.S. at 323.

A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

Id.

19. *Id.* at 310, 315–17. A quota system using proportional representation to remedy a historical deficit was considered unconstitutional because racial balancing is unequal on its face. Acting as a counter-effect to societal discrimination is a valid reason, but it is not narrowly tailored enough to justify the unfairness to an “innocent” applicant. *Id.* at 308–09.

clear rejection of race being used as a permissible factor in admissions as a means to remedy past discrimination; instead, the Court focuses on the instrumental justification, which states that race can provide educational benefits by accepting candidates with diverse experiences. Justice Powell specifically cites to Harvard's admissions policy, which uses race as one of many "plus factors," in a holistic consideration of an applicant, as a permissible example of a policy that would allow an institution to maintain freedom in its academic goals.²⁰

Justice Powell's opinion in *Bakke* created the blueprint for the Court in *Grutter v. Bollinger* to firmly establish that diversity is the only justification for race-conscious admissions policies that would satisfy strict scrutiny.²¹ The Court continued to recognize that there were educational benefits²² from diversity that could satisfy a compelling government interest.²³ *Grutter* determined that admissions policies seeking to obtain a "critical mass" of diverse students were not a violation of the prohibitions against racial balancing and proportional representation.²⁴ Critical mass does not refer to a specific quota or percentage, but refers to "meaningful numbers" sufficient to "encourage[] underrepresented minority students to participate in the classroom and not feel isolated."²⁵ The Court gives institutions of higher education deference in deciding whether they need diversity to pursue their educational mission.²⁶ Once the university determines diversity to be one of

20. *Id.* at 316–18. "As the Harvard plan described by Justice Powell recognized, there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.'" *Grutter*, 539 U.S. at 336 (citing *Bakke*, 438 U.S. at 323).

21. *Grutter*, 539 U.S. at 325. ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.")

22. *Id.* at 328. Educational benefits of diversity include cross-racial understanding helping to break down racial stereotypes, livelier classroom discussion, better preparation for a diverse workforce and marketplace, and the creation of a military officer corps better suited to properly provide national security. *Id.* at 330–33. In *Grutter*, much of the support for the University of Michigan Law School's compelling interest claim was "bolstered by its *amici*, who point to the educational benefits that flow from student body diversity." *Id.* at 330.

The Court cites to *Plyler v. Doe*, 457 U.S. 202, 221 (1982) and *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) in acknowledging the Court's emphasis on education as fundamental in "sustaining our political and cultural heritage" as well as the "foundation of good citizenship." *Grutter*, 539 U.S. at 331. However, the Court fails to address the anti-subordination values of *Plyler* and *Brown* and simply focuses on the instrumental values of allowing an educational institution to create a policy that promotes a goal of diversity.

23. *Grutter*, 539 U.S. at 330–33.

24. *Id.* at 340.

25. *Id.* at 318.

26. *Id.* at 328.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is

its educational goals, a race-conscious admissions policy is permissible only if race is used as merely a “plus factor” in the context of a holistic process that involves individualized consideration.²⁷ Individualized consideration allows a university to balance academic selectivity with the need for diversity, without sacrificing academic excellence in attempts to achieve race-neutral alternatives.²⁸ *Grutter* established that “narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”²⁹ However, what this good-faith consideration would require and whether the threshold of critical mass for a university would be given deference were not addressed until *Fisher v. University of Texas (Fisher I)*.³⁰

Fisher I established that universities must show that the means used to achieve their diversity interest are narrowly tailored, as the court will not simply defer to the university on this issue.³¹ To satisfy the narrowly tailored requirement, a university must show its admissions policy is necessary to

no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

Id.

This deference only applies to the question of whether the specific institution finds diversity to be part of its own interest, not whether diversity itself is a compelling interest. This deference also does not apply to whether the means chosen to obtain the diversity are narrowly tailored.

27. *Id.* at 337–38.

28. *Id.* at 339 (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”).

29. *Id.* The Supreme Court reasoned that the district court’s criticism of the law school for failing to consider race-neutral alternatives such as “using a lottery system” or de-emphasizing the importance of GPA and LSAT scores for all applicants was unfounded because “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.” *Id.* at 339–40.

30. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*). In *Fisher I*, after being denied admission to the University of Texas at Austin, Abigail Fisher challenged the university’s admissions policy. *Fisher I*, 570 U.S. at 306–07. She did not qualify for the university’s Top Ten Percent Plan, which guaranteed admission to the top 10 percent of every in-state, high school graduating class. *Id.* at 304–05. For the remaining spots, the university’s admissions policy considered several factors, with race being one of them. *Id.* *Fisher I* centered around Abigail Fisher’s challenge of University of Texas’s use of race-conscious admissions as a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Supreme Court in *Fisher I* held that the appellate court erred by not properly applying the strict scrutiny standard because narrow tailoring requires a showing that no race-neutral alternative was available and remanded the matter. *Id.* at 311–15. *Fisher II* then determined the constitutionality of the admissions policy based on the findings from the university on what race-neutral alternatives were plausible. *Fisher II*, 136 S. Ct. at 2198.

31. *Fisher I*, 570 U.S. at 312 (“Although ‘[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,’ strict scrutiny does require a court to examine with care, and not defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’” (citing *Grutter*, 539 U.S. at 339–40)).

achieve the educational benefits of diversity and that no race-neutral alternative is workable.³² The Court in *Fisher I* ordered the University of Texas at Austin to show that they had exhausted race-neutral alternatives and reviewed the findings in *Fisher II*.³³ In *Fisher II*, the Court determined that the University of Texas at Austin had to show that a critical mass had not already been achieved through its race-neutral Top Ten Percent Plan.³⁴ However, the University of Texas's goals did not need to be a precise number because a critical mass of diversity is qualitative, not quantitative.³⁵ The Court ultimately gave deference to the university's good-faith efforts to achieve diversity and accepted the argument that the university had not achieved critical mass.³⁶ Although *Fisher I* seemed to be arguing that the Court would require proof that there were no workable race-neutral alternatives, the Court in *Fisher II* seemed to give deference to the university on whether the race-neutral alternatives were good enough, or "workable," to achieve its diversity goals.³⁷ This leaves the state of affirmative action in a similar place to where it was in *Grutter*.

Grutter's conception of diversity is the current model³⁸ under which

32. *Id.* ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.")

33. *Fisher I*, 570 U.S. at 314–15 ("[A] university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity . . . and the case is remanded for further proceedings consistent with this opinion."); *Fisher II*, 136 S. Ct. at 2208 ("*Fisher I* set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case.")

34. *Fisher II*, 136 S. Ct. at 2211–12 ("[A] university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan."). As discussed in *supra* note 30, the University of Texas's Top Ten Percent Plan (the "Plan") guaranteed admission to the top 10 percent of every in-state, high school graduating class. *Id.* at 2205–06. The Plan was introduced by the University of Texas at Austin as a way to improve *intra*-racial diversity by increasing the amount of diversity within racial groups. *Id.* The Plan hoped to achieve this by accepting the top 10 percent from every Texas high school given the understanding that the racial and socioeconomic makeup of each school district may not already be diverse. *Id.*

35. See *Grutter*, 539 U.S. at 318–20 ("[T]here is no number, percentage, or range of numbers or percentages that constitute critical mass. . . . [C]ritical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." (citations omitted)).

This is problematic because the "university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them," while the conception of "critical mass" requires there be no quantitative measure in order to prevent it from appearing like a quota. *Fisher II*, 136 S. Ct. at 2211. This creates an issue for how to determine when "critical mass" for the purpose of achieving a diversity goal has been achieved.

36. *Fisher II*, 136 S. Ct. at 2212 ("Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.")

37. Compare *Fisher I*, 570 U.S. at 312–15, with *Fisher II*, 136 S. Ct. at 2210–12.

38. The conception of diversity established in *Grutter* has shifted slightly because *Fisher II* introduced the incorporation of *intra*-racial diversity, noting that "critical mass" may require something

affirmative action is able to fulfill the function of a compelling interest,³⁹ but this has several limitations. *Grutter* specifically connects the value of diversity to education,⁴⁰ while also inflating the idea of critical mass as something that can be both a quantitatively meaningful number and a means of addressing diversity's qualitative benefits.⁴¹ It pursues diversity for its instrumental value and rejects any remedial justification, leading to the conception of diversity as one of integration rather than an effort to provide equal opportunity.⁴² It does not distinguish "exploitative" from "egalitarian" objectives, which creates an equal opportunity problem—one that will continue to exist so long as there are hindrances unique to minorities that prevent any given admission "spot" from being fungible.⁴³

besides just a critical mass of each race, specifically, experiences within each race may be considered as well. *See Fisher II*, 136 S. Ct. at 2110–11. However, the test for diversity has remained the same as it was in *Grutter*, with specific emphasis on the Court's continued efforts to give deference to the university's good faith. *Id.* at 2211–14.

39. *Grutter*, 539 U.S. at 325.

40. *Id.* at 330–32; Stephen M. Rich, *What Diversity Contributes To Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1034–36 (2016) ("[I]t begs the question why the Court insisted on drawing such close connections between education and the value of diversity, and does not establish that diversity generally is sufficiently important to sustain the use of racial preferences when the success of a university's educational mission is not at stake.").

41. Rich, *supra* note 40, at 1031–33 ("A more robust verification requirement, however, would have risked undermining the value of academic freedom that has provided the foundation for the Court's diversity rationale."); *see also Grutter*, 539 U.S. at 318–20.

42. *See* Rich, *supra* note 40, at 1031–46. The goal of diversity may go beyond just a "critical mass" of racially and ethnically diverse individuals toward a goal of creating equal opportunity through the understanding of historical discrimination. If the true goal is to break down racial stereotypes, simply achieving "critical mass" of racial numbers in an attempt to integrate may not be enough. It may require going beyond the racial make-up of an applicant pool toward including diverse faculty, learning methods, and mentorship in order to truly achieve the educational benefits of diversity. *Id.* The concept of "critical mass" is unstable because the goals of diversity beyond integration may require a decrease in the quantity associated with critical mass. However, it is also argued that *Grutter's* formulation of diversity may do more than just promote integration because it embodies anti-subordination values that look to the future in attempting to ensure there is no creation of a second-class status. *Id.*

43. *Id.* at 1035–37 ("The current doctrine's failure to distinguish between exploitative and egalitarian uses of diversity . . . is a direct consequence of this shift; the doctrine now focuses on whether a university's pursuit of diversity advances the university's educational mission, not on whether a university's enrollments reflect an effort to provide equal opportunity."). The exploitative use of diversity is to simultaneously profit from the educational benefits diversity can provide to a university and buy into the instrumental justification that diversity is only a compelling interest based on what it can contribute to the mission of a university. *See id.* at 1031–37. The egalitarian use of diversity is to pursue the belief that people deserve equal opportunities. *Id.* The current doctrine of diversity does not distinguish between these two objectives and places a larger focus on the instrumental value of how a university's mission can be served by diversity. *Id.* at 1035–37. This creates an equal opportunity problem because unless diversity is viewed with an understanding of the unique challenges minorities face in education, minorities will not have a fair shot at the admitted student spots. Without equal opportunity to admission at elite universities, each admission spot becomes non-fungible and broken down into spots reserved for whites, African Americans, Asians, etc.

II. THE ROLE OF ASIAN AMERICANS IN AFFIRMATIVE ACTION

Asian Americans have a complicated history with affirmative action that has developed into a divided stance on the topic within the Asian American community.⁴⁴ Adding to this complexity is the difficulty in establishing whether the objective of affirmative action is to seek equality in *outcomes* for a racial group or equality in *opportunity* for individual applicants.⁴⁵ For Asian Americans, the way in which the purpose of affirmative action is conceived greatly impacts what “side” of the debate feels fair.⁴⁶ There is confusion among the Asian American community about what affirmative action actually entails, leading some to misplace blame for what may be “hidden quotas to keep down Asian admissions” on affirmative action policies.⁴⁷ The misunderstanding of affirmative action within the

44. See Lauren Camera, *A Community Divided: Asian-Americans Are Divided Over an Affirmative Action Case that Argues Harvard Discriminates Against Them*, U.S. NEWS & WORLD REP. (Oct. 12, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-10-12/affirmative-action-case-drives-wedge-in-asian-american-community>.

45. If the objective is equal outcomes, this may lead to a solely integration-based conception of affirmative action where comparably “equal outcomes” rely on proportionate representation. If this is the case, there may be “equal outcomes” for a racial group, such that the group is represented by a “meaningful number” of individuals, but this fails to take into consideration histories of discrimination and the impact this historical oppression may have on the ability for individuals within groups to achieve “success.” If the objective is equal opportunity, then similarly situated minority groups should receive the same treatment. In order to understand what would create equal opportunities, an anti-subordination principle that takes into account remedial justifications for affirmative action may be necessary. However, this anti-subordination principle may fail to bring about true equal opportunity if the historical discrimination of some groups is not acknowledged or is undervalued. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73, 1532–33 (2004).

The recognition of a group’s history of discrimination should by no means be used to invalidate or undermine the patterns of oppression that plague other groups. Specifically, it should not be used to claim that Asian Americans have suffered equal oppression as other groups, particularly African Americans, when it is widely understood that Asian Americans do not face the same systematic racism and obstacles faced by African Americans.

46. The ideal would be for affirmative action to be a discussion that includes minority voices to determine what diversity should look like in an admissions process, rather than an all-or-nothing debate. Giving voice to Asian Americans, who have largely been left out of the white–black discussion until recently, is necessary in order to create any solution that would further the goals affirmative action is based upon.

47. MATSUDA, *supra* note 5, at 153–54.

When university administrators have hidden quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we cannot let in all those Asian over-achievers and maintain affirmative action for other minority groups. We cannot do both because that will mean either that our universities lose their predominantly white character or that we have to fund more and better universities. To either of those prospects, I say, why not? and I condemn the voices from my own community that are translating legitimate anger at ceilings on Asian admissions into unthinking opposition to affirmative-action floors needed to fight racism.

Id.

Asian American community may stem from several legitimate concerns, involving a combination of an unrecognized history of discrimination in the United States, the role of Asian Americans as a “racial bourgeoisie,”⁴⁸ the perpetuation of the model minority myth, negative action policies, and the stereotype of Asian Americans as a “reticent minority.”⁴⁹

A. HISTORY OF ASIAN AMERICANS AND AFFIRMATIVE ACTION

Affirmative action was first enacted in a federal program under President Lyndon B. Johnson’s Executive Order 11246 as an “affirmative step” in remedying a history of excluding minority workers, including Asian Americans, from employment in contracting firms that accepted federal funding.⁵⁰ In the educational context, affirmative action programs led to significant increases in enrollment for African Americans, Hispanic Americans, and Asian Americans.⁵¹ However, following the decision in *Bakke*, the growth in enrollment for African Americans and Hispanic Americans stopped and retreats from affirmative action programs swept the country.⁵²

The flexible, “holistic” review idealized by the Harvard Plan⁵³ led to admissions programs that considered race without using strict quotas; some Asian Americans believed that this created an admissions ceiling, as Asian American admissions rates reached a constant plateau.⁵⁴

In the most recent affirmative action decision in *Fisher II*, a significant number of amicus briefs were filed in support of the University of Texas at Austin’s admissions policy and diversity goals, including some by several

48. *Id.* at 149–50.

49. See Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 4 (1994).

Asian Americans are a “reticent” minority group. Compared to the other major ethnic groups in this country, for instance, Asian Americans are less politically organized and vocal. Their reticence, combined with other cultural factors, has made it difficult for all Americans—whites, Asian Americans and other minority groups—to understand who Asian Americans are.

Id. at 4–5 (footnotes omitted).

50. Shaun R. Harper, Lori D. Patton & Ontario S. Wooden, *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80 J. HIGHER EDUC. 389, 397 (2009).

51. DANA TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* 21–22 (1992). From 1976 to 1982, enrollment increased nationwide by 1.3% for African Americans, 5% for whites, 32% for Hispanic Americans, and 62% for Asian Americans. *Id.* at 21.

52. *Id.* at 77–78.

53. For detailed discussion of the Harvard Plan, see *supra* note 20 and accompanying text.

54. *Id.* at 51. Asian Americans began challenging admissions policies at elite universities nationwide, including Brown, Harvard, Princeton, Stanford, and UC Berkeley, but have yet to see any concrete judicial success. *Id.* at 23–51.

Asian American organizations.⁵⁵ However, the Asian American Legal Foundation and the Asian American Coalition for Education (claiming to represent 117 Asian American organizations) filed an amicus brief in support of Abigail Fisher, indicating an increasing divide within the Asian American community on the issue of affirmative action.⁵⁶

B. A HISTORY OF DISCRIMINATION AGAINST ASIAN AMERICANS

There is a tendency for the historical discrimination against Asian Americans to go unrecognized due to a perpetuation of the model minority myth. The model minority myth paints Asian Americans as successful, particularly in an educational context, and as immigrants who have achieved the American dream. This conception of Asian Americans is problematic because it creates racial dissonance between Asian Americans and other minorities by implying that the barriers to success do not stem from systematic and structural oppression of some groups, but rather from individuals within a minority group failing to progress. The model minority myth is dangerous because it is used to underscore institutional racism while simultaneously de-emphasizing Asian American success.⁵⁷ In addition, Asian Americans are not a monolithic group, and many ethnicities within the

55. *E.g.*, Brief for Asian Am. Legal Def. & Educ. Fund et al. as Amici Curiae Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for Asian Ams. Advancing Justice et al. as Amici Curiae Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981); Brief for 39 Undergraduate and Graduate Student Orgs. within the Univ. of Cal. as Amici Curiae Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

56. Brief for the Asian Am. Legal Found. & the Asian Am. Coal. for Educ. et al. as Amici Curiae Supporting Petitioner at 23–28, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (discussing studies and anecdotal evidence to support the claim that Asian Americans are frequently discriminated against in the application of the SAT test score standard though none of these reported included references or data to University of Texas at Austin).

57. The model minority myth underscores institutional racism because it pins Asian Americans as successful *in comparison* to other minorities. It perpetuates an assumption that all minorities face the same experiences and barriers to success when it is clear that they do not. While some Asian Americans may have found success in America, it is in no way due to some inherent “Asian quality” that makes them more likely to succeed. To compare Asian Americans against other minorities is to discount the very real, lingering effects of slavery, Jim Crow laws, and mass incarceration that do not create obstacles for Asian Americans the same way they do for African Americans. Asian American successes are de-emphasized when those successes are attributed to simply being Asian and not from the individual’s hard work and sacrifice. When the stereotype is that Asian Americans cannot fail because of something inherent in “being Asian,” their successes appear less impressive. When one hears that the valedictorian of a high school is Asian American, and the response is “of course” as opposed to hearing that the valedictorian is white, then that Asian American valedictorian is harmed by some perception of the model minority myth. For further discussion of the model minority myth, see Kat Chow, *‘Model Minority’ Myth Again Used as a Racial Wedge Between Asians and Blacks*, NPR: CODE SWITCH (April 19, 2017, 8:32 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks>.

Asian American community have different experiences and suffer inequality in income and corporate hierarchies in different ways.

For much of the nineteenth century, Asian Americans were subject to exclusionary immigration laws.⁵⁸ Naturalization rights were not granted to people of Asian ancestry until the mid-twentieth century⁵⁹—1943 for Chinese, 1946 for Asian Indians and Filipinos, and 1952 for all other Asians.⁶⁰ Even for those born in the United States, the Fourteenth Amendment did not allow citizenship for Asian Americans until 1898,⁶¹ and this was challenged as recently as 1942.⁶² Though not to the same extent as African Americans, Asian Americans were affected by segregation laws and anti-miscegenation laws as well.⁶³ In addition, the Alien Land Laws forbade Asians from owning land by prohibiting “aliens ineligible for citizenship” from owning property.⁶⁴ Asian Americans were also subjected to targeted discrimination by all levels of government, from San Francisco’s laundry licensing authority which allowed white laundries to stay open while closing

58. Asian Americans were the first group of immigrants to be explicitly excluded from the United States, with the passage of the Chinese Exclusion Act of 1882. Yuning Wu, *Chinese Exclusion Act*, ENCYCLOPEDIA BRITANNICA (Nov. 13, 2013), <https://www.britannica.com/topic/Chinese-Exclusion-Act>. Then, Japanese immigration was specifically restricted in the Gentleman’s Agreement in 1907, and the 1924 Immigration Act barred immigrants from several other Asian countries. UNIV. OF DEL., COMPARISON OF ASIAN POPULATIONS DURING THE EXCLUSION YEARS & SUMMARY OF KEY LAWS REGARDING THE IMMIGRATION AND CITIZENSHIP OF ASIANS IN THE UNITED STATES (2006), http://www1.udel.edu/readhistory/resources/2005_2006/summer_06/hsu.pdf [hereinafter SUMMARY OF KEY LAWS].

59. See generally *United States v. Thind*, 261 U.S. 204 (1923) (holding Asian Indians were not eligible to apply for U.S. citizenship); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding Japanese were not eligible to apply for U.S. citizenship).

60. SUMMARY OF KEY LAWS, *supra* note 58.

61. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

62. *Regan v. King*, 49 F. Supp. 222 (N.D. Cal. 1942) (plaintiff argued for *United States v. Wong Kim Ark* to be overruled and the removal of all individuals of Japanese ancestry born in the United States from voter rolls).

63. The Supreme Court did not strike down anti-miscegenation laws, which applied to Asian Americans, as unconstitutional until *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The “separate but equal” doctrine’s application to Asian Americans was sanctioned by the Supreme Court in *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (allowing Mississippi to prevent a Chinese student from enrolling at an all-white school).

64. Brian Niiya, *The Last Alien Land Law*, DENSHO BLOG (Feb. 7, 2018), <https://densho.org/last-alien-land-law>. The large-scale economic disenfranchisement of Asian Americans was fueled by an increased threat of Asian competition in farming. Amy K. Buck, *Alien Land Laws: The Curtailing of Japanese Agricultural Pursuits in Oregon 1–4* (1999) (unpublished M.A. thesis, Portland State University), https://pdxscholar.library.pdx.edu/open_access_etds/3988. These Alien Land Laws exacerbated the negative effects of the Japanese internment because many of the Japanese Americans were unable to own their land, so their land was taken from them by the time they returned from the internment camps. *Id.*

Chinese laundries⁶⁵ to the federal government-sanctioned internment of more than 120,000 people of Japanese descent during World War II.⁶⁶

Even though the Supreme Court has, in some instances, struck down laws racially prejudicial against Asian Americans, societal prejudice remains a constant issue. In 1982, two white men in Detroit murdered Vincent Chin, a Chinese-American man, because they thought he was Japanese and were upset over American automakers losing business to the Japanese auto industry.⁶⁷ In 1992, the killer of Japanese student Yoshihiro Hattori was

65. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (facially race-neutral law applied in racially prejudicial manner violated Fourteenth Amendment). The San Francisco ordinance made it illegal to operate a laundry in a wooden building without a permit, but the Board of Supervisors had discretion in determining to whom to grant permit. *Id.* at 357–59. Of the 320 laundries at the time, about 95% of them were operated in wooden buildings, and approximately two-thirds of those laundries were owned by Chinese people. *See id.* at 358–59. The Board of Supervisors denied all two hundred applications that were submitted by Chinese owners. *Id.* at 359. At the same time, virtually all of the non-Chinese applicants were granted a permit with the exception of one applicant. *Id.*

66. The Supreme Court upheld Executive Order 9066 in *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944), which authorized the internment of more than 120,000 people of Japanese descent, two-thirds of which were U.S. citizens. Executive Order 9066 was signed by President Franklin D. Roosevelt on February 19, 1942. *Id.* at 226–27. Japanese Americans were given between 48 hours to one week to pack one bag and report to an assembly center. *Exploration: Japanese-American Internment*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/internment_menu.cfm (last visited Jan. 3, 2019). From there, they were sent to internment camps that were “surrounded by barbed wire and armed guards.” *Id.* The Japanese Americans were detained in these camps for three to four years and given a mere \$25 upon their release. Ron Grossman, *Flashback: When Japanese-Americans Were Sent to Internment Camps*, CHI. TRIB. (Feb. 9, 2017), <https://www.chicagotribune.com/news/opinion/commentary/ct-japanese-internment-camps-war-trump-roosevelt-flashback-perspec-0212-jm-20170208-story.html>. There were zero reported incidents of traitorous activity by Japanese Americans during this time, despite the government using this to support their “military necessity” justification. Bill Ong Hing, *Lessons to Remember from Japanese Internment*, HUFFINGTON POST (Apr. 22, 2012), https://www.huffingtonpost.com/bill-ong-hing/lessons-to-remember-from-_b_1285303.html. The compelling government interest of “military necessity” was later found to be based on unsubstantiated facts after a group of young Asian American attorneys filed a writ of *coram nobis*. *Dale Minami: A Chance of a Lifetime*, FRED T. KOREMATSU INST. (Jan. 6, 2009), <http://www.korematsuinstitute.org/news/dale-minami-a-chance-of-a-lifetime>. Over forty years later, reparations of \$20,000 and a formal apology were awarded to survivors, though most of those who had been interned were deceased by this time. *Id.* The Japanese internment is important because it reveals a lot about the nature and dangers of anti-Asian prejudice creating a stereotype of Asians as a “perpetual foreigner.” It begs the question of whether the mass imprisonment of U.S. citizens would have been executed against other groups who are not stigmatized by the concept of “foreignness.” ROGER DANIELS, *CONCENTRATION CAMPS: NORTH AMERICA—JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II*, at xvi (Robert E. Krieger Publ’g Co. 1981) (1971) (“[T]he legal atrocity which was committed against the Japanese Americans was the logical outgrowth of over three centuries of American experience, an experience which taught Americans to regard the United States as a white man’s country.”).

67. For this hate crime, the two men received three years of probation and a fine of \$3,780 each, which sparked a movement toward political awareness and advocacy for the Asian American community. Lynette Clemetson, *A Slaying in 1982 Maintains Its Grip on Asian-Americans*, N.Y. TIMES (June 18, 2002), <https://nyti.ms/2lqriDq>.

acquitted on the basis of “reasonable” self-defense arguments,⁶⁸ but the validity of the self-defense claims were based on the jury’s racial prejudice in determining what a reasonable threat was.⁶⁹ In some cities, such as Boston and Philadelphia, as recently as the 1990s, Asian Americans suffered the highest per capita hate crime rate of all racial minorities.⁷⁰ Today, Asian Americans continue to be the target of discrimination and hate crimes.⁷¹ Racist actions and violence against Asian Americans have seen a disturbing increase recently.⁷² These hate crimes tend to be perpetuated by stereotypes of Asian “foreignness”⁷³ and create fear within the Asian American

68. *Acquittal in Doorstep Killing of Japanese Student*, N.Y. TIMES (May 24, 1993), <https://nyti.ms/2GK2ZuK>. Hattori was attempting to attend a party with a fellow student, but they knocked on the wrong door. *Hattori v. Peairs*, 662 So. 2d 509, 511–13 (La. 1995). The owner of that property shot Hattori, but claimed it was in self-defense because he was reasonable to view Hattori as a threat. *Id.*

69. See Chew, *supra* note 49, at 59 n.263 (“What if Hattori was black? One wonders if American society is more likely to attend to black/white confrontations than to confrontations between other groups.”). Had Hattori been white, would the jury be more likely to find this story unreasonable? *Id.* at 59. Does it make the fear the owner felt more reasonable because Hattori was Japanese? If Hattori was black, would the jury be more likely to be receptive to claims that it was the owner’s racism that made him fear Hattori and not a reasonable fear? We cannot be fooled into thinking that “reasonableness” is an objective standard when it is clearly influenced by what that jury views as reasonable, all of which is permeable to racism and negative stereotypes. *Id.*

70. See U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 46 (1992).

71. This is not to say that Asian Americans face the largest number or most violent hate crimes. It is attempting to bring attention to current manifestations of prejudice against Asian Americans that often go unreported or unacknowledged. Jenny J. Chen, *First-Ever Tracker of Hate Crimes Against Asian-Americans Launched*, NPR (Feb. 17, 2017), <https://www.npr.org/sections/codeswitch/2017/02/17/515824196/first-ever-tracker-of-hate-crimes-against-asian-americans-launched>.

72. Chen, *supra* note 71; *Anti-Asian Hate Crimes in Los Angeles Surge After Trump Deems China an Enemy*, ASIAN AM. ADVANCING JUST. (Jan. 30, 2017), <https://advancingjustice-aajc.org/news/anti-asian-hate-crimes-los-angeles-surge-after-trump-deems-china-enemy>; Kamal S. Kalsi, *Xenophobia Towards Asian Americans and Pacific Islanders Persists Under Trump Administration*, HUFFINGTON POST (June 2, 2017), https://www.huffingtonpost.com/entry/xenophobia-towards-asian-americans-and-pacific-islanders-persists-under-the-trump-administration_us_592f1075e4b09ec37c313e66.

73. Asian Americans are perceived as “perpetual foreigners.” This stems from Asian Americans arriving in America as immigrants, much like other ethnic groups. However—unlike European immigrants and, to some extent, Hispanic American immigrants—Asian Americans’ facial characteristics cannot provide them any possibility of being “white-passing.” In addition, Asian culture is often seen as exotic and not assimilable to American culture.

My mother’s family has lived in the United States for three generations; her own parents barely spoke Japanese and had never been to Japan. Yet I continue to get asked “why is your English so good?” or “where are you *really* from?” as though I am not equally as American as a fourth-generation immigrant from a European country. How often are those questions asked of a white person or even an African American person?

I recognize that many of these issues are not unique to Asian Americans. For example, Middle Eastern Americans and, to some extent, Hispanic Americans also do not have the benefit of being “white-passing” or being viewed as part of American culture.

The caveat of being “foreign” means Asian Americans are accepted into American society so

community that stretches beyond the immediate victims.

C. THE RACIAL BOURGEOISIE

University of Hawaii Law Professor Mari Matsuda writes of Asian Americans being a “racial bourgeoisie”:

If white, as it has been historically, is the top of the racial hierarchy in America, and black, historically, is the bottom, will yellow assume the place of the racial middle? The role of the racial middle is a critical one. It can reinforce white supremacy if the middle deludes itself into thinking it can be just like white if it tries hard enough. Conversely, the middle can dismantle white supremacy if it refuses to be the middle, if it refuses to buy into racial hierarchy, and if it refuses to abandon communities of black and brown people, choosing instead to forge alliances with them.⁷⁴

As a racial bourgeoisie, Asian Americans could take on a significant role in the affirmative action discussion. The danger of a racial bourgeoisie is that it places Asian Americans as “middlem[e]n,” too different to be white but not different enough to be “true minorities.”⁷⁵ “Racial triangulation” of Asian Americans describes the view in American society that places Asians in a middle ground between whites and African Americans on a level of superiority but on the opposite end of the spectrum from both groups in a level of “foreignness.”⁷⁶ This conception of Asian Americans as “perpetual

long as they don’t pose a threat. The minute the country of their ancestors does something “against America,” they are no longer American, they are Japanese or Chinese, or in the current climate, Muslim.

74. MATSUDA, *supra* note 5, at 150. Asian Americans act as a “racial bourgeoisie” because they are never going to be “white enough” to be white, but other people of color view them as too privileged to truly be considered minorities. This means that Asian Americans are neither accepted by whites nor people of color. See Emily S. Zia, Note, *What Side Are We On? A Call to Arms to the Asian American Community*, 23 *ASIAN AM. L.J.* 169, 169–75 (discussing her experience as an Asian American trying to participate in a “die-in” as part of a “Boalt With Ferguson” protest at UC Berkeley School of Law) (“All of these events made me feel like the other students of color did not view Asian Americans as allies, let alone people of color. . . . [W]hy did my fellow students of color view us as closer to White than to Black?”). Although her point about being viewed as closer to white than African American is valid, it is important to make clear that it is not Asian Americans’ place to intrude on an experience that does not affect them the same way it does African Americans. The goal is not to tell African Americans how to lead a Ferguson protest, but there should be room to include those who are willing to be active listeners. The danger of being in a racial middle ground is that Asian Americans are often excluded from the discussion, but it also means Asian Americans have a powerful position to effect change.

75. FRANK H. WU, *YELLOW: RACE IN AMERICAN BEYOND BLACK AND WHITE* 58 (2002) (“DePaul University law professor Sumi Cho has explained that Asian Americans are turned into ‘racial mascots’ giving right-wing causes a novel messenger, camouflaging arguments that would look unconscionably self-interested if made by whites about themselves.”); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 *MICH. J. RACE & L.* 605, 621 (2006); Chew, *supra* note 49, at 66.

76. See generally Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *POL. & SOC’Y* 105 (1999) (explaining racial triangulation). Racial triangulation is the concept of having “foreignness”

foreigners”⁷⁷ means that it is easy to discount them, which allows people to place blame on Asian Americans for acts attributable to actual foreigners.⁷⁸

Part of what enables Asian Americans to be a racial bourgeoisie is the perpetuation of the model minority myth.⁷⁹ This conception of Asian Americans as a “model minority” not only unfairly criticizes other minorities, but it also is based on false premises that lead to the diminution of those Asian American individuals who achieve success in the face of great adversity.⁸⁰ The dangers of the model minority myth and the conception of

and “superiority” on x-y axes. *Id.* at 107–08. Whites and African Americans are on opposite ends of the “superiority” y-axis spectrum but at the lowest end of the x-axis “foreignness,” while Asian Americans are on the peak of “foreignness” and lie in the middle on the “superiority” axis. *Id.* This creates a triangle that place Asian Americans in a racial bourgeoisie between whites and African Americans that no amount of success (attributable to the model minority myth) can overcome due to the conception of foreignness. *Id.* The use of this racial triangulation may be used to benefit conservative groups looking to preserve a “white image” and create a pitting of racial minorities against each other in order to maintain political dominance. *Id.* at 122–23.

This payoff is so rich that conservatives have actually manufactured conflicts between Blacks and Asian Americans in order to achieve it. . . . [In the 1980s, conservative affirmative action opponents] shifted public debate from the real issue at hand—whether or not several leading universities imposed racial quotas on Asian American students to preserve the whiteness of their student bodies—to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans.

Id.

77. The concept of Asian Americans as perpetual foreigners has occurred throughout history and continues to exist in American culture. *Plessy v. Ferguson*, 163 U.S. 537, 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.”); *Schutte v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”

Schutte, 572 U.S. at 381.

78. This was seen during World War II, where Italian and German Americans were not conflated with their ancestor country to the same extent as Japanese Americans, who were placed in internment camps. Asian Americans are easy targets for this type of discrimination because they are seen as different and inherently un-American. It brings into question whether this is something that Muslim Americans and Middle Eastern Americans face in twenty-first century America.

79. It is intentional that the term is “model minority” and not “model American.” See Chew, *supra* note 49, at 32–35.

80. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 149 (1996) (“[Asian Americans] generally have more individuals contributing to household income than the national average . . .”). Asian Americans also tend to live in geographic areas that tend to have higher costs of living and above-average incomes for all residents, indicating that Asian Americans are no more successful than any other race. *Id.* Immigration laws historically favored highly-educated Asian professionals, which greatly influenced the Asian immigrant demographics, which could affect the

Asian Americans as too different to be a true minority are that they create the assumption that Asian Americans cannot face discrimination. However, not only do Asian Americans continue to face racial violence,⁸¹ but they also face negative action in admissions policies. While Asian Americans have benefited and continue to benefit from affirmative action,⁸² the creation of ceilings on Asian Americans, particularly in university admissions policies, is a separate, unrelated issue that works to keep Asian Americans in a racial bourgeoisie.⁸³ No amount of success that is perceived to be enjoyed by Asian Americans through the stereotype of the model minority myth should be used to defend any use of negative action, and while Asian Americans may not merit affirmative action preferences, they should be subject to the same “neutral action” associated with white applicants. A misunderstanding of the distinction between negative action and affirmative action has led many in the Asian American community to use statistics that indicate Asian Americans require higher test scores to get into the same colleges as applicants of other races in order to oppose affirmative action.⁸⁴ While there may be legitimate concern over intentional caps against Asian Americans, it should not allow the Asian American community to be confused by the goals and outcomes of affirmative action. It should be the goal of the Asian American community to prevent our own personal experiences from being manipulated into promoting outcomes that ultimately seek to maintain a

average income levels and perceived socioeconomic mobility of Asian Americans. *Id.* at 150.

81. See *supra* notes 67–68.

82. See Chin et al., *supra* note 80, at 154 (discussing how Asian Americans are “under-parity” in numerous fields and would not have their current representation in those areas without the aid of affirmative action policies).

83. Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590, 629 n.153 (2017).

My point is that accusing Harvard of racial balancing is a promising means of convincing the federal court to strike down the institution’s racial affirmative action policy but, if Harvard admissions officials have an either conscious or unconscious enrollment limit they are inclined to impose on Asian American enrollment to preserve Harvard’s predominantly white character, eliminating racial affirmative action will neither expose or rectify that type of anti-Asian bias in admissions.

Id.; 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, 14–18 (discussing that negative action rather than affirmative action is the main source of any limits in admissions for Asian Americans).

84. Jaweed Kaleem, *Asian Americans Are Divided After the Trump Administration’s Move on Affirmative Action*, L.A. TIMES (Aug. 3, 2017), <http://www.latimes.com/nation/la-na-asian-americans-affirmative-action-20170803-story.html> (“Affirmative action opponents often cite a 2009 study that found Asian Americans had to score 140 points higher on SAT exams in order to be on equal footing with whites in private university admissions—a difference they sometimes call the ‘Asian tax.’”) (“But the test score phenomenon exists regardless of whether the university considers race in its admission. So there is something else happening.”) (quoting Asian Americans Advancing Justice Attorney Nicole Gon Ochi).

“white image.”⁸⁵

III. STUDENTS FOR FAIR ADMISSIONS V. HARVARD

In the 1920s, people asked: will Harvard still be Harvard with so many Jews? Today we ask: will Harvard still be Harvard with so many Asians? Yale’s student population is 58 percent white and 18 percent Asian. Would it be such a calamity if those numbers were reversed?⁸⁶

SFFA filed an action against Harvard College, alleging the use of racially discriminatory policies in violation of Title VI of the Civil Rights Act of 1964.⁸⁷ To successfully challenge Harvard College’s admission policy under Title VI, SFFA must establish discriminatory intent, mirroring the constitutional standard, rather than the disparate impact standard.⁸⁸ Although the plaintiff originally argued six counts for relief, the suit ultimately relies on four main reasons that Harvard’s admission policy is racially discriminatory: (1) uses racial “quotas,” (2) “engage[s] in racial balancing,” (3) “fail[s] to use race merely as a ‘plus factor’” in its undergraduate admissions process, and (4) fails to use race-neutral

85. *Id.*

This is primarily about conservative leaders protecting the privilege of access to society’s resources and opportunities for certain white constituents . . . Such leaders’ purported concern for discrimination against Asian Americans is politically opportunistic. . . I don’t see many of them concerned about discrimination against Asian Americans in other contexts . . . such as the “bamboo ceiling” in corporate America, where such discrimination does not harm white interests.

Id. (quoting Professor Kim Forde-Mazrui, University of Virginia School of Law).

86. Carolyn Chen, Opinion, *Asians: Too Smart for Their Own Good?*, N.Y. TIMES (Dec. 19, 2012), <https://nyti.ms/2jKMeQF> (“For middle-class and affluent whites, overachieving Asian-Americans pose thorny questions about privilege and power, merit and opportunity. Some white parents have reportedly shied away from selective public schools that have become ‘too Asian,’ fearing that their children will be outmatched.”). For the Harvard class of 2022, the numbers are approximately 23% Asian and 47% white. *Harvard Admitted Students Profile*, HARV. C.: ADMISSIONS & FIN. AID, <https://college.harvard.edu/admissions/admissions-statistics> (last visited Jan. 21, 2019).

87. Complaint, *supra* note 7, at 1. The action is being brought under Title VI of the Civil Rights Act of 1964 because Harvard College is a private university and would not be subject to constitutional challenges under the Equal Protection Clause. However, because Harvard College accepts federal funding, it is subject to the statutory obligations under Title VI. *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last updated Sept. 25, 2018); see also Complaint, *supra* note 7, at 94.

88. *Alexander v. Sandoval*, 532 U.S. 275 (2001) (deciding that Title VI regulations did not include a private right of action based on evidence of disparate impact).

It seems the Court will likely allow a private right of action under Title VI. See generally *Lau v. Nichols*, 414 U.S. 563 (involving the Court allowing a private right of action under Title VI to non-English speaking Chinese students seeking relief against the San Francisco School District, but the existence of a private right of action was never disputed in this case); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (involving four justices assuming, without deciding, that a private right of action was available under Title VI, one justice denying a private right of action could be implied, and the remaining four justices concluding that the private action was available).

alternatives sufficient to achieve Harvard's diversity goals.⁸⁹ SFFA asserts that it has "at least one member . . . who applied for and was denied admission to Harvard's 2014 entering class."⁹⁰ This unnamed applicant is described as being Asian American, having parents who are first-generation immigrants from China; graduating with a ranking of one out of 460 students in a high school that *U.S. News and World Report* places in the top 5 percent in the United States; obtaining a perfect score of 36 on the ACT; and being named an AP Scholar with Distinction, a National Scholar, and a National Merit Scholarship Finalist.⁹¹ In addition to the applicant's academic achievements, this applicant was

captain of the varsity tennis team, volunteered at a community tennis camp, volunteered for the high school's student peer tutoring program, was a volunteer fundraiser for National Public Radio, and traveled to China as part of a program organized by the United States Consulate General and Chinese American Students Education and Exchange to assist students in learning English writing and presentation skills.⁹²

The Harvard admissions process involves application evaluations by a first reader, a docket chair, and a final review by the full forty-person

89. Complaint, *supra* note 7, at 3–5, 100–01.

90. *Id.* at 8. When the complaint was filed, the unnamed applicant was the only Standing Member (other than his father). *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *37 (D. Mass. Sept. 28, 2018). SFFA has since added additional members to the suit, including several that it identified as "Standing Members," several of whom were Asian American applicants rejected from Harvard. *Id.* These members filed affidavits and testified in court stating they would be able and ready to transfer if Harvard ceases using race-conscious admissions. *Id.* at *39–41. Harvard alleged that the Standing Members ability to challenge has become moot because they are now ineligible to transfer or no serious intention to. However, based on the testimony of two Standing Members still eligible for transfer, the court found there was enough to support SFFA's associational standing. *Id.* at *41.

91. Complaint, *supra* note 7, at 8. It is of note that the plaintiff is unnamed, and the suit is being brought on behalf of an organization that is claiming to represent the interests of its members, including the unnamed plaintiff. Whether the Supreme Court will determine SFFA has standing to bring the suit is uncertain since equal protection is generally to provide individual relief and all other affirmative action cases have been brought by named individuals rather than a curated "litigation vehicle." Defendant's Motion for Summary Judgment at 1, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Sept. 28, 2018), ECF No. 417. According to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995), the right to equal opportunity is a personal right, so what matters is the treatment of the individual plaintiff not the average Asian American plaintiff. However, the district court denied Harvard's motion for summary judgment based on lack of standing. *See SFFA*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *41. There is skepticism that using one unnamed Asian American plaintiff shows Asian Americans are being manipulated in an effort to eliminate affirmative action on behalf of a non-Asian American membership. While this may have merit, it is also important that the concerns voiced by Asian Americans not be dismissed by supporters of affirmative action simply because they are being wielded by a group like SFFA.

92. Complaint, *supra* note 7, at 8.

admissions committee.⁹³ When first readers review an application, they give numerical scores in the following categories: overall, academic, extracurricular, athletic, personal, teacher recommendations, school support recommendation, staff interview ratings, and alumni interview ratings.⁹⁴ The personal rating is based on the admissions officer's "assessment of the applicant's 'humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities.'"⁹⁵ The overall rating represents the officer's view of the application as a whole, but instead of being determined "by a formula [or] . . . adding up the other ratings," the first readers simply take "all the factors into account," including race.⁹⁶ Once the full committee meets and makes its decisions, the dean and director confirm the final target of admitted students and consult a "one-pager" with race, gender, geographic region, and other statistics about the potential new class to determine whether some applicant need to "lopped" from the admitted list.⁹⁷

In 2013, Harvard's Office of Institutional Research ("OIR") produced an internal report showing that the admission rate for Asian Americans was highest where the criteria for admission was solely based on academics and progressively decreased the more variables that were added.⁹⁸ In OIR's second report, it found that the only category in which non-legacy, non-athlete white applicants performed significantly better than their similarly situated Asian American applicants was the personal rating, but the report failed to explain why.⁹⁹ This second report also found that non-legacy, non-athlete white applicants were admitted at higher rates than non-legacy, non-

93. *SFFA*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *16–23 (describing the undisputed facts regarding the Harvard admissions process).

94. *Id.* at *18–21.

95. *Id.* at *20. The assessment of an applicant's personal rating is subject to racial bias if unconscious stereotypes are able to affect an officer's view of whether a candidate possesses these traits.

96. *Id.* at *20–21. By not having a specific formula, there is a possibility that some categories may be given more weight than others. While it may be useful to allow a university to have discretion to view every candidate holistically, there may be reason for skepticism if there is a large disparity between the overall ratings given to Asian Americans and what the summed total of their other ratings would have been. If Asian Americans were to score higher than white applicants in the other categories, including extracurricular, personal, and interview ratings, but still receive lower overall ratings, it may be an indication that Asian Americans' race negatively affects how they are viewed overall.

97. *Id.* at *22–23.

98. *Id.* at *28–31. Is the reason for Asian American admission decreasing with the consideration of non-academic variables truly due to Asian Americans only being good at academics or is it because their other traits and activities are undervalued in comparison to other racial groups?

99. *Id.* at *30. If the only difference accounting for the higher admittance rates of non-legacy, non-athlete white applicants is the personal rating, it begs the question of whether white applicants receive a biased preference over Asian American applicants based on amorphous personal traits that may be subject to cultural differences.

athlete Asia American applicants with the same academic scores and further concluded that Asian Americans were the only racial group with a negative association between being admitted and their race.¹⁰⁰ In 2015, Harvard established a Committee to Study the Importance of Student Body Diversity, which concluded in its report that student body diversity creates positive impacts and “is fundamental to the effective education of the men and women of Harvard College.”¹⁰¹ In 2017, Harvard established the Smith Committee, which was dedicated to study whether race-neutral alternatives were workable for achieving the benefits concluded in the 2015 committee.¹⁰² The Smith Committee concluded that there were no workable race-neutral alternatives that would allow Harvard to achieve the benefits of educational diversity without sacrificing other important educational objectives.¹⁰³

An important step in understanding this case requires a closer look into SFFA and its goals. The President of SFFA, Edward Blum, has been instrumental in challenging affirmative action and voting rights laws in more than two dozen lawsuits.¹⁰⁴ He orchestrated *Fisher I* and *II*¹⁰⁵ as well as *Shelby County v. Holder*,¹⁰⁶ which successfully contested the Voting Rights Act of 1965. Blum challenges “racial policies he thinks are unfair” under the names of his several organizations, including SFFA, which have been criticized as being nothing more than Blum’s own “alter ego.”¹⁰⁷ Blum’s work from 2010 to 2015 received \$2.9 million from several non-profits and

100. *Id.* at *30–31.

101. *Id.* at *26.

102. *Id.* at *26–27.

103. *Id.* at *27–28.

104. Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He’s Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://nyti.ms/2jFMkOb>.

105. *Id.* Blum chose the University of Texas at Austin, his own alma mater, as the subject of the challenge. *Id.* Abigail Fisher was the daughter of Blum’s friend. *Id.*

106. *Id.* The Voting Rights Act of 1965 was a response to the deep-rooted history of discrimination in voting. *Shelby County v. Holder*, 570 U.S. 529, 529–30 (2013). The Act required certain “eligible” districts with a history of voting discrimination to gain official authorization before they could enact any changes to their election laws. *Id.* at 537–39. To gain authorization, these districts had to prove that the new changes did not have the purpose nor the effect of negatively impacting any individual’s right to vote based on their race. *Id.* The Supreme Court determined that this Section of the Act was unconstitutional because it imposes current burdens that are no longer responsive to the current conditions of the voting districts. *Id.* at 555–57.

Blum’s challenge of the Voting Rights Act of 1965 was rooted in his experience in losing a race for Congress in Houston as a Republican. Hartocollis, *supra* note 104. He was bothered by the district’s “tortured shape, designed to make it easier for a minority candidate to win the seat.” *Id.*

Affirmative action sits in a uniquely similar position to the Voting Rights Act of 1965 in that it may be vulnerable to accusations of unconstitutionality based on a court’s determination that the historical discrimination that created the need for such protections are no longer a concern.

107. Hartocollis, *supra* note 104.

the DonorsTrust, “which distributes money from conservative and libertarian contributors,” leading many to consider Blum a “tool of rich conservatives trying to extinguish efforts to help historically oppressed minorities overcome the long shadow of racism.”¹⁰⁸ Given the background of Blum, it seems likely that the overall goal of SFFA and Blum seems to be to eliminate race-conscious admissions policies altogether, not just negative action against Asian Americans.

A. THE PROCEDURAL HISTORY AND CURRENT STATUS OF *SFFA v. HARVARD*

Since the complaint was filed in November 2014, future applicants and current students at Harvard petitioned to intervene as defendants but were denied and subsequently given amicus status.¹⁰⁹ The presiding judge, Judge Allison D. Burroughs, determined that each side would have a ten to twelve month discovery process, beginning in May 2015 but denied SFFA’s explicit request for access to Harvard admissions data.¹¹⁰ The case was temporarily stayed in anticipation of the Supreme Court’s ruling on *Fisher II*.¹¹¹ However, in September 2016, Judge Burroughs ordered that Harvard provide six cycles of admissions data as well as any information relating to any internal or external investigations into allegations of discrimination against Asian Americans in the undergraduate admissions process.¹¹²

Both sides have filed several motions to seal that have been granted by the Judge Burroughs, thus limiting the amount of evidence that is available to the public at this time.¹¹³ Harvard filed a motion to dismiss for lack of subject matter jurisdiction in September 2016 that was denied in June 2017.¹¹⁴ However, in June 2017, Judge Burroughs did grant Harvard’s motion for partial judgment on the pleadings of Count IV and VI, which respectively claimed violations based on Harvard’s failure to use race to merely fill the “last few spots” in an incoming class and “any use of race as

108. *Id.*

109. Ellis, *supra* note 8.

110. *Id.*

111. *Id.* It is of note that Justice Kennedy was the swing vote in *Fisher II*, but he has since been replaced by Justice Brett Kavanaugh. Chas Danner, *Brett Kavanaugh Sworn in as 114th Supreme Court Justice*, INTELLIGENCER (Oct. 7, 2018), <http://nymag.com/intelligencer/2018/10/brett-kavanaugh-sworn-in-as-114th-supreme-court-justice.html>.

112. Ellis, *supra* note 8.

113. *See generally* Docket, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 1:14-cv-14176 (D. Mass.).

114. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F. Supp. 3d 99, 102 (D. Mass. 2017).

a factor in admissions.”¹¹⁵

In September 2017, the Department of Justice (“DOJ”) formally notified Harvard that it was under investigation for its use of race in its admissions policies.¹¹⁶ The DOJ’s Civil Rights Division sent a letter to Harvard on November 17, 2017, stating that Harvard was “not complying with its Title VI access requirements,” and if Harvard failed to provide the requested documents by December 1, 2018, the agency might file a lawsuit against the university.¹¹⁷ Harvard challenged the agency’s authority to investigate and was willing to “provide the Justice Department with documents produced for the federal court case, ‘with redactions for relevance, privacy, and privilege/work product protection.’”¹¹⁸ The core of the investigation was related to the same issues argued in the *SFFA v. Harvard* complaint. In 2015, the Obama administration dismissed the request to investigate without evaluating the merits due to the parallel lawsuit; however, in 2017, the Trump administration pursued the investigation, creating skepticism about the party divide and political motivations plaguing affirmative action policies.¹¹⁹ In August 2018, the DOJ offered SFFA a public show of support through its statement of interest in court.¹²⁰ The DOJ did not make any conclusions of illegality, but it did urge the court to deny Harvard’s request for summary judgment.¹²¹ From October

115. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176, 2017 U.S. Dist. LEXIS 84656, at *2–3 (D. Mass. June 2, 2017); *see also* Complaint, *supra* note 7, at 109–11, 114–19; Ellis, *supra* note 8.

116. Laura Jarrett, *Justice Department Investigating Harvard Over Affirmative Action Policies*, CNN (Nov. 21, 2017), <http://cnn.it/2hGzjj7>.

117. Merrit Kennedy, *Justice Department Threatens to Sue Harvard in Admissions Probe*, NPR (Nov. 21, 2017), <https://n.pr/2mNx1UY>.

118. *Id.*

119. Kirk Carapezza, *DOJ Looks Into Whether Harvard Discriminates Against Asian-Americans*, NPR (Aug. 3, 2017), <https://www.npr.org/541430130> (“Civil rights groups and legal experts are skeptical. ‘It seems entirely consistent with President Trump’s campaign rhetoric,’ says Tomiko Brown-Nagin, a constitutional law professor at Harvard. Brown-Nagin points out that the Trump administration’s decision to target affirmative action policies comes as racial tensions are rising on many campuses.”).

120. David Shortell, *Justice Department Sides With Asian-Americans Suing Harvard Over Admissions Policy*, CNN (Aug. 30, 2018), <https://cnn.it/2POYxf9> (“The record evidence demonstrates that Harvard’s race-based admissions process significantly disadvantages Asian-American applicants compared to applicants of other racial groups—including both white applicants and applicants from other racial minority groups” (quoting United States’ Statement of Interest in Opposition to Defendant’s Motion for Summary Judgment, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 1:14-cv-14176 (D. Mass. Sept. 28, 2018), ECF No. 497)).

121. *Id.* It is uncertain what impact the DOJ’s involvement will have on the outcome of *SFFA v. Harvard* or affirmative action in general, though if a federal judge finds Harvard has violated Title VI, the court could order the university to change its admissions policies. Melissa Korn & Nicole Hong, *Harvard Faces DOJ Probe Over Affirmative-Action Policies*, WALL ST. J. (Nov. 21, 2017, 3:12 PM), <https://www.wsj.com/articles/harvard-faces-doj-probe-over-affirmative-action-policies-1511260380>.

to November 2018, Judge Burroughs heard oral arguments on the four remaining Counts, namely I, II, III, and V, from both SFFA and Harvard.¹²² During the trial, there was a large reliance on student anecdotes and expert testimony, with SFFA using Peter S. Arcidiacono, an economics professor from Duke University,¹²³ and Richard D. Kahlenberg, a senior fellow at the Century Foundation,¹²⁴ and Harvard primarily relying on David E. Card, an economics professor from UC Berkeley.¹²⁵ In closing arguments, SFFA highlighted the expert testimony to demonstrate a “statistically significant Asian penalty,” while Harvard countered that SFFA had failed to prove any bias against Asian Americans but was instead a tool to take down “decades-old efforts toward racial diversity that enhances the educational experience.”¹²⁶ Although Judge Burroughs’s “decision doesn’t have a definitive timeline,” she is expected to release it in early 2019, and the decision is likely to be “appealed by the losing side.”¹²⁷ While a ruling at the district court in favor of SFFA would likely not eliminate the possibility of race-conscious admissions altogether, it could force Harvard, and other elite universities, to create policies that limit the consideration of race. It is quite possible the case could reach the Supreme Court of the United States, where the environment is drastically different from what it was when *Fisher II* was decided in 2016 given Justice Kennedy’s swing vote has been replaced by Justice Kavanaugh and the presidential administration’s view of affirmative action has shifted.¹²⁸

B. SFFA’S ARGUMENTS

SFFA makes several arguments describing why Harvard’s admissions policies are intentionally discriminatory on the basis of race and ethnicity in

122. Foussianes, *supra* note 7.

123. Expert Report of Peter S. Arcidiacono at 5, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. June 15, 2018), ECF No. 415-1. Professor Arcidiacono has an extensive background in studying admissions decisions in higher education. *Id.*

124. Expert Report of Richard D. Kahlenberg, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. June 15, 2018), ECF No. 416-1.

125. Report of David Card, Ph.D., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. June 15, 2018), ECF No. 419-33; *see also* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *44–68 (D. Mass. Sept. 28, 2018). Professor Card specializes in labor economics. Colleen Walsh, *Attorney Appears Confident Admissions Case Ruling Will Favor Harvard*, HARV. GAZETTE (Nov. 4, 2018), <https://news.harvard.edu/gazette/story/2018/11/harvard-attorney-appears-confident-in-admissions-case-ruling>.

126. Joan Biskupic, *Harvard Affirmative Action Trial Arguments Come to a Close*, CNN (Nov. 3, 2018, 10:00 AM), <https://cnn.it/2QbHaVw>.

127. Foussianes, *supra* note 7.

128. *Id.*

violation of Title VI. SFFA and Harvard filed a joint statement asking “that the requirement for a trial brief be stricken” based on their extensive summary judgment filings¹²⁹ and since SFFA’s motion for summary judgment was solely based on Counts I, II, III, and V of the complaint, which ultimately formed the basis of SFFA’s arguments at trial.¹³⁰ First, SFFA argues that Harvard’s holistic review process is historically discriminatory and is now being used to intentionally discriminate against Asian Americans.¹³¹ Second, SFFA contends that Harvard is engaged in racial balancing based on evidence of stable admission percentages across races even as the application rates change over time.¹³² Third, SFFA claims that Harvard’s pursuit of critical mass does not adhere to the Harvard Plan that was idealized in *Bakke* because it considers race as more than just a “plus factor.”¹³³ SFFA argues that critical mass is an amorphous term that creates a delusion of pursuing diversity when it is really used “to achieve numerical goals indistinguishable from quotas” and results in race being used as more than just a plus factor.¹³⁴ Fourth, SFFA argues that Harvard’s race-conscious admissions policy is not narrowly tailored because there are race-neutral alternatives that could be used to achieve diversity based on policies used by other elite universities.¹³⁵

1. Count I: Harvard Intentionally Discriminates Against Asian Americans

In the first argument, SFFA contends that Harvard’s admissions policies were historically developed for “the specific purpose of discriminating against disfavored minority groups.”¹³⁶ SFFA points to the 1920s and 1930s when then Harvard President A. Lawrence Lowell placed a cap on Jewish enrollment through the use of an admissions system that was based on discretion rather than academic achievement.¹³⁷ Harvard began

129. Joint Statement Regarding the Submission of Trial Briefs at 1, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. Aug. 13, 2018), ECF No. 478.

130. Plaintiff’s Motion for Summary Judgment at 2, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Sept. 28, 2018), ECF No. 412.

131. Complaint, *supra* note 7, at 3–4.

132. *Id.*

133. *Id.*

134. *Id.* at 4–5 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting)).

135. *Id.* at 5–6.

136. *Id.* at 11.

137. *Id.* at 12–22 (“In 1920, in a letter to William Hocking, a Harvard philosophy professor, President Lowell wrote that the increasing number of Jewish students enrolling at Harvard would ultimately ‘ruin the college.’”). A Harvard alum wrote a letter to President Lowell indicating desires to maintain the school’s “white image” through the reduction of Jewish students, claiming

using legacy preferences and a subjective admissions system gauging “character and fitness and the promise of the greatest usefulness in the future as a result of a Harvard education” as strategies to reduce the number of Jewish students admitted.¹³⁸

SFFA argues that Harvard’s current admissions plan uses the same subjective system to consider “race or ethnicity itself—not other factors that may be associated with race or ethnicity—[as] a distinguishing characteristic that warrants consideration in the admissions process” in order to create a quota of African American students.¹³⁹ SFFA goes on to claim that Harvard has a long history of intentional discrimination against Asian Americans, ranging from refusing to recognize Asian Americans as a minority by describing them as “over-represented” to holding Asian Americans to a higher standard of admissions.¹⁴⁰ In July 1988, the Office of Civil Rights of the U.S. Department of Education investigated the treatment of Asian American applicants at Harvard in comparison to white applicants and found that while Asian American applicants were accepted at a significantly lower rate than “similarly qualified” white applicants, the disparity was attributed to legacy preferences, not the byproduct of racial discrimination as claimed by SFFA.¹⁴¹ SFFA continues by referencing the Espenshade–Radford study¹⁴² on the role of race in elite undergraduate admissions, which found that “Asian-American students were dramatically less likely to be admitted

[t]he Jew is undoubtedly of high mental order, desires the best education he can get CHEAPEST, and is more persistent than other races in his endeavors to get what he wants. It is self evident, therefore, that by raising the standard of marks he can’t be eliminated from Harvard, whereas by the same process of raising the standard “White” boys ARE eliminated. . . . Are the Overseers so lacking in genius that they can’t devise a way to bring Harvard back to the position it always held as a “white man’s” college?

Id. at 17–18. President Lowell accepted the perpetuation of these stereotypes in order to protect a “white image” that would be achieved through a subjective, “character” based admissions policy that was undoubtedly created with a purpose to discriminate. *Id.* at 20 (“President Lowell was elated by these changes, realizing that they ‘provided a tremendous opportunity to impose, at long last, the policy of restriction he had favored since 1922.’”).

138. *Id.*

139. *Id.* at 28–34.

140. *Id.* at 34–36. However, the former Dean of Admissions Fred Jewett, explained that the 112-point disparity in average SAT scores of admitted Asian Americans compared to admitted white students were due to “choosing people who bring talents underrepresented in the applicant pool.” *Id.* at 36. In addition, the current Dean of Admissions, William Fitzsimmons, recognized the slightly stronger academics of Asian Americans as compared to white applicants, but “blamed the disparity in admissions on Asian Americans, as a group, being ‘slightly less strong on extracurricular criteria.’” *Id.*

141. *Id.* at 36–37. However, the complaint stipulates that the Office of Civil Rights’s report was highly criticized for allowing “racial balancing” and creating a pretext for intentional discrimination. *Id.* at 37.

142. See generally THOMAS J. ESPENSHADE & ALEXANDRIA W. RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE ADMISSION AND CAMPUS LIFE (2009) (analyzing college admissions data to explore the composition of applicant pools to selective universities).

than otherwise similar students who identified themselves as white or Caucasian.”¹⁴³ SFFA also cites to Ron Unz’s study¹⁴⁴ which found “sheer constancy of [Asian American enrollment] percentages, with almost every year from 1995-2011 showing an Asian enrollment within a single point of the 16.5 percent average, despite high fluctuations in the numbers of applications and the inevitable uncertainty surrounding which students will accept admission,” and this “exactly replicates the historical pattern . . . in which Jewish enrollment rose very rapidly, leading to the imposition of an informal quota system, after which the numbers fell substantially, and thereafter remained constant for decades.”¹⁴⁵ SFFA then cites to studies indicating that elite schools with race-neutral admissions policies have higher Asian American enrollment, with a table comparing Asian American enrollment at Harvard and the California Institute of Technology.¹⁴⁶ The complaint also refers to personal anecdotes of admission staff at Harvard and other elite universities, college counselors, and Asian American applicants, describing how “Asian Americans face difficulty because they cannot distinguish themselves within their community.”¹⁴⁷

During the trial, each party relied on its own expert reports “to show the presence or absence of a negative effect of being Asian American on the likelihood of admission, highlight[ed] the purported flaws of its opponent’s

143. Complaint, *supra* note 7, at 40–50.

144. Ron Unz, *The Myth of American Meritocracy*, AM. CONSERVATIVE, Dec. 2012, at 14.

145. Complaint, *supra* note 7, at 49–50 (alteration in original).

146. *Id.* at 53–55 (specifically referencing Table B).

147. *Id.* at 56–67. *Princeton Review*, the “leading guide to college admissions,” gives recommendations for Asian American students applying to elite colleges, stating “the more you sound like”

Asian Joe Bloggs . . . an Asian American applicant with a very high math SAT score, a low or mediocre verbal SAT score, high math- or science-related SAT II scores, high math and science grades, few credits in the humanities, few extracurricular activities, an intended major in math or the sciences, and an ambition to be a doctor, an engineer, or a research scientist,

“the more likely admissions officers will be to treat you as part of the ‘Asian invasion’ and reject your application, or at the very least make you compete against other Asian applicants with similar characteristics, rather than against the applicant pool as a whole.” *Id.* at 57–58. According to *Princeton Review*, suppressing one’s ethnic background is important to better an Asian American applicant’s chances of acceptance at elite institutions. *See id.* at 58–59.

If you’re given an option, don’t attach a photograph to your application and don’t answer the optional question about your ethnic background. . . . Do not write your application essay about the importance of your family or the positive/negative aspects of living in two cultures. These are Asian Joe Bloggs topics, and they are incredibly popular. Instead, write about something entirely unrelated to your ethnic background.

Id.

There is danger in anecdotal testimony because it is based on personal perception and can be susceptible to bias. While the stories told by the individuals and groups in SFFA’s complaint are useful to understand the way a community of applicants may feel and may potentially be accurate reflections of a situation, it should not be considered direct evidence of discrimination in an admissions policy.

statistical analysis, and claim[ed] that there is substantial—or zero—documentary and testimonial evidence of discriminatory intent.”¹⁴⁸ SFFA specifically relied on Arcidiacono’s testimony which concluded that Harvard gave lower personal ratings to Asian Americans at every level of academic achievement than applicants of all other racial groups and further showed that among applicants with the same overall rating, Asian Americans were the least likely to be admitted.¹⁴⁹ However, Harvard’s expert, Card, reviewed the same admissions data but found “no negative effect of being Asian American on the likelihood of admission to Harvard” because disparities were due to Asian American applications being “slightly less strong than those submitted by White applicants across a range of *observable* non-academic measures.”¹⁵⁰ Arcidiacono and Card reach different results from the same data due to divergent modeling choices, with Card criticizing Arcidiacono for excluding certain applicant information.¹⁵¹ SFFA also uses the Harvard OIR reports to indicate that Harvard’s own internal research division found results consistent with Arcidiacono then took no further steps to investigate the potential bias, but Harvard claims that Card’s more comprehensive and reliable study contradicts the OIR report.¹⁵² Lastly, SFFA uses personal anecdotes, specifically from an OIR employee and alumni interviewers, to demonstrate discriminatory intent, but Harvard asserts that statements made by non-decisionmakers or decisionmakers not involved in the process are insufficient to demonstrate discriminatory animus.¹⁵³

2. Count II: Harvard Engages in Racial Balancing

In the second argument, SFFA contends that Harvard’s current admissions policy engages in “racial balancing” in order to ensure a fixed quota of Asian American enrollees or proportional representation in its student body.¹⁵⁴ SFFA points to statistical data indicating that the racial

148. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *43–44 (D. Mass. Sept. 28, 2018).

149. Expert Report of Peter S. Arcidiacono at 1–10, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. June 15, 2018), ECF No. 415-1.

150. *SFFA*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *43–46.

151. See Walsh, *supra* note 125 (describing Card’s criticisms and some basis for what other experts in the field may believe the proper modeling choice is) (“Lawyers for Harvard also cited an *amicus* brief filed by 16 economists, including two Nobel laureates and former chair of the Federal Reserve Janet Yellen, who backed Card’s approach and labeled Arcidiacono’s findings ‘implausible.’”). Although Arcidiacono’s model may be subject to criticism, there may also be some bias in Card’s approach which includes factors in his regression that are already subject to racial bias.

152. *SFFA*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *48.

153. *Id.* at *49–51.

154. Complaint, *supra* note 7, at 67–72.

demographics of Harvard's admissions and enrollment have remained stable over approximately the last decade,¹⁵⁵ despite fluctuations in application rates.¹⁵⁶ SFFA contends the following:

[B]etween 2003 and 2012, the percentage of Asian Americans at Harvard wavered only slightly above and below approximately 17 percent. . . . [D]espite the fact that, by 2008, Asian Americans made up over 27 percent of Harvard's applicant pool, and approximately 46 percent of applicants with academic credentials in the range from which Harvard admits the overwhelming majority of students.¹⁵⁷

SFFA points to the "one-pagers" that provide statistics of the present representation of various racial groups as compared to the prior year as proof of Harvard's quota for Asian Americans.¹⁵⁸ SFFA alleges that Harvard reconsiders applications from particular groups after receiving the one-pager in order to align the current class demographics with the prior year, which would effectively create a cap on Asian American enrollment regardless of the application rate or level of qualifications.¹⁵⁹ In the "lopping" process, the admissions committee allegedly takes into account the applicant's race and whether it is currently underrepresented in the prospective class.¹⁶⁰ Harvard contends that the one-pagers break down applicants not only by race but also by gender, geography, intended concentration, legacy status, socioeconomic status, and other categories.¹⁶¹ Harvard argues that the lopping process is an unbiased, necessary part of a process that involves an "overabundance of qualified applicants" for a limited availability of spots.¹⁶² While SFFA points to a somewhat consistent admitted class breakdown for each racial group to show racial quotas, Harvard counters

155. This approximation is from when the complaint was originally filed. The admissions statistics are from 2006 to 2014, and the enrollment statistics are from 2003 to 2013. *Id.* at 67–69 (specifically referencing Table C, Table D, and Table E).

156. *Id.* at 65–66 (“[T]he proportion of Asian Americans with top SAT scores . . . who sent their scores to the most selective Ivy League schools fell from 39.7 percent in the mid-1990s to only 27.4 percent during the 2008, 2010, and 2012 cycles.”). This could indicate that Asian American applicants believe there is some bias in the application process and choose not to even apply to elite Ivy League schools because the perceived odds are against them despite their top SAT scores.

157. *Id.* at 70.

158. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *51–52 (D. Mass. Sept. 28, 2018).

159. *Id.* at *52–53.

160. *Id.* Are Asian Americans more likely to be “lopped” than applicants from other racial groups? If there is evidence that Asian Americans have consistently higher rates of “lopping,” then there may be an indication that Asian Americans receive some negative action when their race is considered.

161. *Id.* at *53–54.

162. *Id.* at *54.

by claiming that there was a significant 11% increase in Asian American enrollment when it went from 18% (Class of 2014) to 20% (Class of 2017).¹⁶³

3. Count III: Harvard Considers Race as More than Just a “Plus Factor”

In its third argument, SFFA claims that Harvard is not considering race for the purpose of achieving “critical mass” because it considers race as more than just a “plus factor.”¹⁶⁴ Although the Supreme Court gives deference to a university in determining if diversity is part of their educational goals and deference in determining if critical mass has already been achieved, SFFA argues that Harvard’s admissions policy fails in its methods for attaining educational diversity because they are not narrowly tailored to a goal of reaching critical mass.¹⁶⁵ In addition, SFFA argues that since Harvard is not pursuing a goal of critical mass, the race-conscious admissions could be used in perpetuity even though there may be some point in time where the “use of racial preferences will no longer be necessary to further the interest” in diversity.¹⁶⁶ Harvard has an obligation to “continually reassess its need for race-conscious review,” but Harvard claims that the Smith Committee evaluated the current need for race-conscious admissions and a re-evaluation would be done again five years after the Smith Committee issued its report.¹⁶⁷

SFFA argues that Harvard uses race as more than just a “plus factor.”¹⁶⁸ However, Harvard counters with testimony from Card stating that the variability in admissions is better explained by an “applicant’s academic, athletic, extracurricular, and personal ratings,” rather than race.¹⁶⁹ Similar to the arguments for Count I, the outcome of this issue is heavily dependent on

163. *Id.* at *54–55. For SFFA to show a racial quota, stable enrollment numbers may not be enough. It may be necessary for SFFA to show that Asian American application rates substantially increased in comparison to white application rates, but their enrollment stayed the same. Indicating that Asian Americans make up a larger portion of the qualified applicant pool but the same proportion of the admitted class would be more helpful than just stable enrollment rates.

164. *Id.* at *56.

165. *Id.* at *57.

166. *Id.* at *59 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003)). This is a similar argument to the one made by Edward Blum in *Shelby County v. Holder*, 133 S. Ct. 2612, 2630–31 (2013), which invalidated the Voting Rights Act of 1965 based on reasoning that the historical discrimination that led to the passage of the act is no longer an issue. *See supra* note 106 and accompanying text.

167. *SFFA*, No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *59–60 (quoting *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2212 (2016) (*Fisher II*)).

168. *Id.* at *61–62.

169. *Id.* at *62.

which expert is given greater credibility and the reliability of the anecdotal testimony of admissions office employees.

4. Count V: Harvard Has Failed to Show There Are no Workable Race-Neutral Alternatives

In its last argument, SFFA offers race-neutral alternatives that Harvard could use to achieve student body diversity.¹⁷⁰ SFFA argues that Harvard should implement an admissions policy that creates diversity by placing emphasis on socioeconomic factors, including parental education and wealth, which are not specifically tied to race even though they may be strongly correlated.¹⁷¹ In addition, SFFA proposes that Harvard use financial aid and scholarships for socioeconomically disadvantaged students to incentivize minority enrollment.¹⁷² SFFA suggests that increasing recruitment into the applicant pool for “highly qualified, socioeconomically disadvantaged minorities” would lead to an increase in student body diversity and be sufficient to achieve Harvard’s educational goals.¹⁷³ SFFA contends that the need for race-conscious policies would not be necessary if other admissions policies that explicitly disadvantage minority applicants, such as legacy and wealthy donor preferences, were eliminated.¹⁷⁴ SFFA uses testimony from their expert Kahlenberg to support that Harvard “can easily achieve diversity” by race-neutral policies, such as “increasing socioeconomic preferences; increasing financial aid;” and reducing legacy and donor preferences.¹⁷⁵ In response, Harvard asserts that the Smith

170. Complaint, *supra* note 7, at 72–93.

171. *Id.* at 72–73. SFFA argues that Harvard fails to give proper weight to these socioeconomic factors in its admissions policy based on the lack of socioeconomic diversity in comparison to racial diversity that exists in its student body. *Id.* at 76.

172. *Id.* at 77–78.

173. *Id.* at 78–81 (“Harvard focuses its recruitment in parts of the country with small numbers of socioeconomically disadvantaged achievers and neglects regions with a significant number of such students. . . . This failure to recruit socioeconomically disadvantaged students is reflected in Harvard’s applicant pool.”).

174. *Id.* at 81–86. Harvard’s acceptance rate for legacy applicants is “about 30 percent, which is roughly five times the rate at which all other applicants are admitted to Harvard.” *Id.* at 81. Legacy preferences tend to “give a competitive advantage to mainly white, wealthy applicants, while undermining the chances for admission of socioeconomically disadvantaged and minority applicants.” *Id.* Harvard’s propensity to give preferences to non-legacy, wealthy donor applicants also gives a competitive advantage to mainly white applicants. *Id.* at 83 (“Minority students are far less likely to be children of wealthy donors.”).

This creates a separate discussion about the use of legacy preferences and whether they are merely a thinly-veiled way for universities to give admissions preferences to a group of applicants that tend to be whiter and wealthier than the general applicant pool.

175. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-cv-14176, 2018 U.S. Dist. LEXIS 167901, at *66 (D. Mass. Sept. 28, 2018).

Committee satisfied strict scrutiny when it determined that there were no available race-neutral alternatives.¹⁷⁶ Lastly, SFFA argues that Harvard has not considered race-neutral alternatives in good faith because the Smith Committee was developed after they became aware of the imminence of a lawsuit.¹⁷⁷

D. CRITICISMS OF SFFA'S ARGUMENTS

1. The Arguments in the Complaint Are Flawed

The complaint, as previously discussed, lays out four main arguments: (1) intentional discrimination; (2) racial balancing; (3) not using race as merely a plus factor; and (4) the existence of race-neutral alternatives. First, the argument surrounding the racial quota is flawed because SFFA uses evidence of a quota against Jewish Americans in the 1920s as an indication of a discriminatory intent currently in place against Asian Americans. The existence of a past discriminatory intent in the creation of the policies affecting Jewish applicants in the 1920s does not prevent Harvard from claiming to have benign intentions in the use of its policies now.¹⁷⁸ Since the discriminatory impact is not so severe as to allow a presumption of discriminatory intent as in *Yick Wo*, in which all permit applications by Chinese owners to set up a laundry business were denied,¹⁷⁹ SFFA would be required to show that constant admission rates of Asian Americans are due to a discriminatory intent to have an upper limit of Asian Americans at Harvard. Because SFFA's proof is heavily reliant on the court finding its expert's method of statistical analysis to be more compelling, it will be difficult to show that Arcidiacono's conclusions are enough to prove discriminatory intent. Even if a racial quota is found to exist, it would only prove that Harvard itself is participating in an impermissible form of discrimination through the use of quotas against Asian Americans; that finding would not invalidate affirmative action in all higher education admissions or prevent the consideration of race in admissions policies

176. *Id.* at *64–66.

177. *Id.* at *66–67.

178. See *Shelby County v. Holder*, 570 U.S. 529, 551–52 (2013) (reevaluating the legality of policies under the lens of their current existence, even if there was a “long history as a tool for perpetuating the evil”).

179. *Yick Wo v. Hopkins*, 118 U.S. 356, 360 (1886). The constant admission rates of Asian Americans are unlikely to be a severe enough discriminatory impact to allow a presumption of discriminatory intent as it was in *Yick Wo*, so SFFA will have to find other evidence to indicate Harvard's intent to discriminate against Asian Americans in their admissions policy. This is a high burden for SFFA to meet. See *supra* note 65 (describing how all two hundred applications that were submitted by Chinese owners were denied while virtually all of the non-Chinese applicants were granted a permit).

elsewhere. SFFA's use of statistics, such as those from the Espenshade–Radford study,¹⁸⁰ to support the existence of this racial quota falsely manipulates the data to conflate the negative action experienced by Asian Americans with affirmative action. In fact, an upper limit quota on Asian Americans is more likely to benefit white applicants than any minority applicants.¹⁸¹ While the assertion of an upper limit quota against Asian Americans is highly possible given the constant admission rates of Asian Americans, it would not be due to affirmative action. Rather, it would be due to a combination of efforts to maintain a “white image” at elite universities, enflamed by the use of legacy preferences and the devaluation of Asian American diversity.

Second, SFFA's argument that Harvard is conducting racial balancing in its admissions policy based on the same stable admission percentages used to indicate the racial quota in the first argument is flawed because diversity itself gains value from balance. Although critical mass is an immeasurable number, its definition inherently requires that it be attached to some ideal balance. While this balance should not solely be based on race, race does play a factor in contributing to the educational benefits of diversity, such that critical mass could definitely not be achieved if an elite university were made up entirely of one race. Any university that limits its number of accepted applicants requires a balance of diversity because not all qualified candidates can be accepted, so to claim there is impermissible racial balancing would be to argue that admissions policies instead need to be attached to something more quantitative like proportionate representation or application rates. The Supreme Court has not found this to be necessary given that *Fisher II* gave deference to universities in determining whether their admissions policies were narrowly tailored to achieving diversity. Unless there is evidence that Asian Americans are being “lopped” based on the one-pagers and a desire to create a racial demographic that is the same year after year, it will be difficult to show that Harvard is partaking in impermissible racial balancing. However, the balance universities achieve through their admissions policies

180. See ESPENSHADE & RADFORD, *supra* note 142, at 412.

181. Kidder, *supra* note 75, at 614–16.

The upshot of the fact that White admittees outnumber Blacks/Latinos 3-to-1, and the aforementioned discussion about the composition of actual and likely pool of admittees is that Espenshade and Chung's study contains a “yellow peril causation fallacy” that misidentifies [Asian Americans] as the group poised to be the biggest numerical winners if affirmative action ended at elite universities. In other words, when an [Asian American] applicant in their dataset is denied admission because of negative action despite a strong transcript and say a 1510 or 1430 or 1360 on the SAT, it is exceedingly more likely that the student admitted instead was a White applicant with slightly lower academic credentials, not a Black or Latino applicant given an affirmative action plus factor.

Id. at 615–16.

should be subject to some scrutiny. While a balance may be inherently necessary, the conception of over-representation can lead to an unfair suppression of some groups in the consideration of this balance. The conception of over-representation is an issue because it leads to the idea that there can be too many of a certain group. While this may be true if the goal is to create a diverse class of individuals, it should be questioned when over-representation is only attached to minority groups.¹⁸² Ultimately, there is distrust that SFFA would be welcoming to an outcome that eliminated racial balancing entirely if it meant that Harvard only accepted Asian Americans.¹⁸³

Third, SFFA contends that Harvard does not use race as merely a plus factor because its consideration of race in admissions is not for the purpose of achieving critical mass. While Harvard's creation of the Smith Committee seems correlated to the filing of the lawsuit, there is no indication that Harvard does not intend to follow its recommendation to re-evaluate in five years, which would be compliant with *Fisher II*'s mandate to continue reassessing critical mass.¹⁸⁴ Harvard's admissions policy is to consider race as one factor among many, and almost all of the categories it creates ratings for do not allow the officers to consider race in their scores. While it is misguided for SFFA to challenge the consideration of race in Harvard's policies as they exist on paper, there should be scrutiny placed on whether admissions officers allow unconscious bias and stereotypes about Asian Americans to influence the ratings of the other categories. When personal ratings of Asian American applicants are consistently lower than white applicants, it should lead to questions about whether admissions officers are more likely to undervalue humor, leadership, courage, and other traits that the personal ratings are based on when they are attached to an Asian American.

182. Is it possible for schools to consider an over-representation of white students? There is a perception that schools can be "too Asian," damaging the appeal of a university, but the same is not said for schools that are predominately white. Does the conception of over-representation apply the same to other minorities? Because while it seems that our society would be appalled at the prospect of a school being considered "too black" or "too Hispanic," why doesn't our society believe calling a school "too Asian" is equally racist?

183. If there was a hypothetical where diversity was deemed not to be a compelling interest and the entire Harvard class consisted only of Asian Americans accepted by "objective" criteria, would SFFA be satisfied with the result? What if the entire Harvard class consisted only of white students? If neither of these outcomes are satisfactory to a society, we cannot deny the compelling interest of diversity and the potential "balancing" required to achieve it.

184. See *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2211–15 (2016) (*Fisher II*) ("[A] university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.") ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admission policies.").

Fourth, SFFA suggests that Harvard could achieve diversity through race-neutral alternatives, such as socioeconomic status. Although socioeconomic disadvantage and race may overlap, they do not target identical problems, and thus, the consideration of race should not be completely replaced by solely considering socioeconomic status. They are both to be considered in the admissions process, among a multitude of other diversity factors. The Court in *Fisher II* allowed universities to use race-conscious admissions where there are no workable race-neutral alternatives that would sufficiently achieve their goals for educational diversity, so Harvard would not be required, under the current law, to adopt an inadequate socioeconomic status-based alternative. Admissions policies based on socioeconomic status may also be offered as a subtle way to assist race and gender-based affirmative action, but they should not be considered as a cure-all in college admissions.¹⁸⁵

2. Logical Fallacies

SFFA's arguments are flawed due to their susceptibility to logical fallacies, such as the "causation fallacy"¹⁸⁶ and the "average-test-score-of-admitted-students"¹⁸⁷ fallacy. The causation fallacy is a term coined by California Supreme Court Justice Goodwin Liu to describe when "the fallacy erroneously conflates the magnitude of affirmative action's instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small."¹⁸⁸ For unsuccessful applicants, there is a reflex to blame affirmative action, but in a selection process as rigorous as the ones at elite universities, the likelihood of success for any candidate is low, regardless of affirmative action. Because white applicants greatly outnumber minority applicants and a large number of factors are considered, the average white applicant is not significantly more

185. Chin et al., *supra* note 80, at 161.

A genuine commitment to class equality would lead one to target resources at an individual's formative years as with anti-poverty programs that provide adequate housing, nutrition, and education to children. But oddly enough, the programs mentioned so far would instead give mild preferences late in life, in admissions or employment. This should give us cause for skepticism.

Id.

186. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1048 (2002).

187. West-Faulcon, *supra* note 83, at 594.

188. Liu, *supra* note 186, at 1048. "Many white students who were denied admission did not lose out because of minority students, but because of tight limits on enrollment. In other words, many qualified white applicants probably would have been turned down even if no minority students had applied." *Id.* at 1048 n.13 (quoting John Iwasaki, *Affirmative Action Aids White Students Too; Stereotype False, State Study Says*, SEATTLE POST-INTELLIGENCER, Nov. 19, 1995, at A9).

likely to be selected under a race-neutral process than a race-conscious one.¹⁸⁹ Although there are racial gaps in test scores, it is not evidence that affirmative action creates discriminatory acceptance rates, given that non-objective factors also play a role in admissions.¹⁹⁰ The causation fallacy leads to “a distortion of statistical truth, premised on an error in logic. . . . But that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action.”¹⁹¹ Therefore, any presence of a racial quota or ceiling against Asian American admission cannot be due to affirmative action because the number of spots is too few to account for a constant admission rate despite increased application rates.¹⁹²

The average-test-score-of-admitted-students fallacy is employed by SFFA in its argument that blames affirmative action for statistics showing Asian Americans need to score higher on standardized tests in order to be accepted. Because academic merits are only one factor of many in a holistic admissions process, “it is incorrect to infer Asian American applicants are required to meet a higher test standard even if the group average SAT score of all admitted Asian American students to a given university is higher than the SAT score of all African American admitted students.”¹⁹³ This is because SAT scores are not the only basis for admission to universities, and even though the group average SAT score of all admitted Asian American students to a university may be higher than all other groups, their group average non-academic scores may be collectively lower. While this explains why average test scores of Asian Americans may be higher at no fault of affirmative action, it also raises the question of whether Asian Americans’ non-academic qualities are being undervalued as a result of negative action and harmful stereotypes. However, it would be a mistake to want an admissions process that solely relies on academic criteria because scholastic

189. Liu, *supra* note 186, at 1078.

190. *Id.* at 1064–68 (“[B]lack and white applicants with similar SAT scores might not be similarly situated with respect to nonacademic admissions criteria.”).

191. *Id.* at 1046.

192. Affirmative action sits within the broader idea of race-conscious admissions, but they are not the same thing. Not all admissions policies that consider race are affirmative action policies. An example of this would be a policy that enables bias against Asian American applicants in comparison to *white* applicants, thus giving white applicants a type of plus factor over those Asian American applicants. I think Asian Americans could potentially fare better if race-conscious admissions were banned but would not if just affirmative action was due to the causation fallacy. The difference would be that race-conscious admissions have the ability to contain negative action against Asian Americans while affirmative action inherently does not. There is space in this discussion to both remedy the grievances Asian Americans feel through the devaluation of their personal attributes and maintain the affirmative action policies necessary to fulfill the compelling interest of educational diversity.

193. West-Faulcon, *supra* note 83, at 603.

ability, on its own, does not determine beneficial contribution to an elite university, and it has been shown that standardized tests are not racially neutral determinants of merit.¹⁹⁴ Both of these logical fallacies are employed in SFFA's complaint and are used to appeal to the Asian American community as a way to manipulate blame for discriminatory ceilings against Asian Americans to create support for eliminating affirmative action.

IV. ASIAN AMERICANS AND AFFIRMATIVE ACTION IN THE FUTURE

A. DIVERSITY RE-EVALUATED

The use of an unnamed Asian American plaintiff and any possible evidence of an upper limit quota against Asian Americans should not bring into question whether diversity is a compelling interest. However, the conception of what this diversity should look like does need to change. There is a fear in the affirmative action discussion that any criticism of current race-conscious policies could be seen as an attack on affirmative action. That should not be the case; while affirmative action creates necessary benefits, it can also be improved.

The conception of diversity needs to evolve past even the idea of intra-racial diversity that was introduced in *Fisher II*. Diversity needs to be more than just having diversity within racial groups; the discussion needs to shift toward why diverse characteristics become more valuable when attributed to one race over another. When holistic admissions policies allow negative stereotypes about a group to bias their conception of diversity, the true educational benefits of a diverse student body cannot be achieved.

There is a concern that an admissions process that uses racial preferences as a means of enhancing educational diversity may stereotype applicants by race, expressing illegitimate assumptions about applicants' viewpoints and experiences.¹⁹⁵ For Asian Americans, these stereotypes are

194. *Id.* at 604–05 (“[U]niversities do not select students solely based on SAT scores and . . . SAT scores are racially skewed as a general matter.”) (“[F]or reasons that range from the theoretical and measurement limitations of *g*-based standardized tests like the SAT to the fact that African Americans belong to the racial group that has been most severely harmed by American Jim Crow racism, housing segregation, public educational opportunity gaps, and disparities in economic opportunities.” (footnotes omitted)).

195. *See Liu, supra* note 186, at 1096. At the very least, we would be better off urging top colleges to commit to genuine educational diversity that places a greater emphasis on different types of diversity like first-generation status, diversity in faculty, and diversity in the types of cultural histories taught at these schools, rather than attacking affirmative action. How often are general education classes taught from the point of view of an African American student or from the perspective of a woman? So often the

harmful and can help explain any potential ceilings. Even when the stereotypes are deemed “positive,” such as the model minority myth, there can be a negative effect.¹⁹⁶ While these “positive” stereotypes may help Asian Americans break into the workforce, these same stereotypes may also prevent them from advancing upward through management.¹⁹⁷ This leads to data that may show “many Asian Americans are ‘underemployed’ relative to their educational background,”¹⁹⁸ creating an assumption within the Asian American community “that a fact of American life is that their efforts and accomplishments are discounted.”¹⁹⁹

When the stereotypes are negative, there is an even greater impact. Negative stereotypes can lead to “admissions committees [concluding] unfairly that [Asian American] applicants were not well-balanced individuals.”²⁰⁰ This stereotype that Asian Americans are one-dimensional

education system focuses on the accomplishments of white males and fails to recognize the value of a diverse core curriculum, and this affects the way our future leaders exist and shape our society.

196. For example, the “positive” stereotype that Asian Americans are successful works to diminish the success achieved by Asian Americans as expected or ordinary. This requires Asian Americans to be held to a higher standard in comparison to each other in order to stand out. There is a feeling among the Asian American community that one must be extraordinary to just seem average. In addition, a positive stereotype of Asian Americans as hard workers easily becomes translated into Asian Americans being unfair competitors.

197. Chew, *supra* note 49, at 40–41.

Employers might tend to see Asian Americans as homogeneous and suited for certain defined roles that are consistent with society’s image. . . . While society may consider Asian Americans hard working and intelligent, especially in math, Asian American faculty may be considered “too nice” to be intellectually demanding and rigorous professors and scholars.

Id.

198. *Id.* at 53.

A comparison of the number of Asian Americans in managerial and professional positions versus the number of Asian Americans with bachelor and graduate degrees evidences this disparity. One would generally expect individuals with bachelor or graduate degrees to hold managerial or professional positions. For example, 23.6 million whites hold bachelor or graduate degrees and, comparably, 26.5 million whites hold managerial or professional positions—a ratio of 1.12. Accordingly, one would expect the number of Asian Americans with this education level to correspond to the number of Asian Americans in these positions. Instead, the number of Asian Americans with these degrees (1.3 million) is significantly higher than the number in managerial or professional positions (1 million)—a ratio of 0.77.

Id. (footnotes omitted).

This should lead us to question whether the traditional beliefs about what constitutes an exemplary manager or professional are correct. If what we value as an ideal manager has race and gender stereotypes built in, a re-conception of what good leadership qualities are may be necessary. For example, if Asian Americans tend to value humility but our society rewards those who are assertive, are Asian Americans under-promoted because they are less qualified or because our society is not open to the concept that a better manager may be soft-spoken instead of self-promoting? In the educational context, what do we expect from the ideal candidate? Is it possible that the qualities we revere are subject to bias based on racial stereotypes?

199. *Id.* at 55. There is a stigma that Asian Americans have inherent advantages compared to other minorities that enable them to succeed without deserving it, perpetuating the model minority myth.

200. *Id.* at 63.

fails to value the diversity associated with Asian Americans. This creates two main issues. First, while there is value in providing a characteristic that is unusual for your race because you have a unique experience, this does not account for why those same characteristics are valued differently across races, even where they create intraracial diversity²⁰¹ equally. For white or other minority applicants, the value of being a concert pianist or a chess player is seen as positive, while for an Asian American, it may be seen as negative because it does not distinguish the Asian American applicant from his or her perceived societal stereotype. While there is a large value to be placed on intraracial diversity and interracial diversity,²⁰² it is important to question whether there are any equivalent stereotypes that hold back white applicants.²⁰³ Second, there is an additional failure to even recognize the

201. *Intraracial*, YOUR DICTIONARY, <https://www.yourdictionary.com/intraracial> (last visited Jan. 21, 2019).

202. Intraracial diversity is diversity within a race, while interracial diversity is diversity of races. *Intraracial*, *supra* note 201; *Interracial*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/interracial> (last visited Jan. 21, 2019). Intraracial diversity works to break down racial stereotypes by demonstrating a wide array of experiences within races, while interracial diversity works to take down segregation and inequality of opportunity in the education system. The argument urging for equality in the conception of diversity is separate from wanting intraracial diversity.

203. For example, an Asian American cannot play an instrument, be good at math or science, or want to be a doctor or engineer without being considered “a typical Asian candidate.” Are white applicants allowed to excel in any area without it being considered a byproduct of their racial background? Do we view a white applicant who is a concert pianist, a varsity basketball player, an exceptional painter, or a national merit scholar as creating intra-racial diversity? In addition, when Asian Americans go against racial stereotypes, such as by participating in sports, it is often greeted with skepticism or under-valued. See Ling Woo Liu, Opinion, *Why Jeremy Lin’s Race Matters*, CNN (Feb. 14, 2012), <https://www.cnn.com/2012/02/13/opinion/jeremy-lin-race/index.html> (describing how Asian American basketball player Jeremy Lin was met with skepticism based on stereotypes that Asian Americans do not play basketball).

Lin himself has been candid about the racism he’s encountered along the way. “It’s a sport for white and black people,” he told the San Francisco Chronicle in 2008. “You don’t get respect for being an Asian-American basketball player in the U.S. . . . I hear everything. ‘Go back to China. Orchestra is on the other side of campus. Open up your eyes.’”

Id. If the stereotype associated with Asian Americans is one of “overachievement,” is the only way to break down the stereotype to underachieve? See Jeff Yang, Opinion, *Harvard Lawsuit Is not what It Seems*, CNN (Nov. 4, 2014), <http://www.cnn.com/2014/11/24/opinion/yang-harvard-lawsuit/index.html> (describing how he would have been denied admission based on his grades but an interviewer made the case that he had intangibles that would be an asset to the student body, though the assets that distinguished him were to be an “underachiever” academically and in stereotypically “Asian” activities) (“What saved my application was the optional interview I’d done on campus, in which I’d ended up talking about everything that wasn’t in my application: My aspirations to be a writer. . . . The fact that I actually really, really suck at piano.”). Although this Note focuses on stereotypes attached to Asian Americans, they are not the only minority group to be adversely affected by negative and positive stereotypes, and they should be questioned for all racial groups. See generally Geoffrey L. Cohen & Julio Garcia, “*I Am Us*”: *Negative Stereotypes as Collective Threats*, 89 J. PERSONALITY & SOC. PSYCHOL. 566 (2005) (discussing how negative stereotypes of a group impact individuals within that group); *Exploring the Negative Consequences of Stereotyping*, UNIV. OF ARIZ. NEWS (Nov. 20, 2003), <https://uanews.arizona.edu/story>

intra-racial diversity that already exists among Asian Americans. Asian Americans have diverse cultural backgrounds and experiences that are undervalued when they are viewed as a monolithic group.²⁰⁴ There would be great intra-racial diversity between two Asian American applicants, even if both have the same SAT scores and extracurricular activities, if one was the child of Vietnamese immigrants who came as refugees after the Vietnam War, and the other was the child of second-generation Punjabi Americans. To place less value on these distinct cultural experiences than would be placed on the diversity of “a farm boy from Idaho”²⁰⁵ is illogical. When admissions officers reward candidates who “appear less Asian” or when professional admissions consultants recommend Asian Americans not talk about their immigrant backgrounds to avoid discrimination, it should raise the question of whether there is a devaluation of the Asian American identity in admissions policies.²⁰⁶

The diversity of Asian Americans is also devalued through the perception of Asian Americans as over-represented in education. The idea of over-representation itself creates the presumption that Asian Americans are not subjected to discrimination in admissions policies, which is not the case.²⁰⁷ When schools are identified as being “too Asian,” the diversity of Asian Americans is reduced to an assumption that all Asian Americans are the same and are not valued as individuals who provide a unique benefit to a university. The comments crying “yellow peril” are not said in hushed tones

/exploring-negative-consequences-stereotyping (same); Laura Green, *Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, FERRIS ST. U., <https://www.ferris.edu/htmls/news/jimcrow/links/essays/vcu.htm> (last visited Jan. 21, 2019) (discussing racial stereotypes of African Americans).

204. Complaint, *supra* note 7, at 58–59 (describing recommendations that Asian American applicants not write application essays related to their ethnic background). Asian American encompasses many different groups of people and to dismiss the value this diversity could bring to elite universities should be questioned. The immigrant story of an Asian American should not be viewed any less favorably toward a “personal rating” than the story from another applicant.

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

A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

Id.

206. Bella English, *To Get Into Elite Colleges, Some Advised to “Appear Less Asian.”* BOSTON GLOBE (June 1, 2015), <https://www.bostonglobe.com/lifestyle/2015/06/01/college-counselors-advise-some-asian-students-appear-less-asian/Ew7g4JiQMiqYNQIiwqEluO/story.html>.

207. Kang, *supra* note 83, at 15 (“The glib assertion that Asian Americans are ‘overrepresented’ at certain universities is less a description of empirical fact than a value judgment. It presumes that the percentage of Asian Americans at each university should reflect their percentage of the national population.”).

or with backlash of racism, but are viewed as commonplace.²⁰⁸ The claim of “too Asian” stems out of a fear of universities losing their “white image” due to competition with Asians.²⁰⁹ With the combination of feeling over-represented while also being asked to “appear less Asian,” the effect has resulted in Asian Americans internalizing these beliefs and a lack of self-identity.²¹⁰ For elite universities looking to gain the educational benefits of diversity, creating admissions policies that value the broad range of Asian American experiences is necessary.

B. UNITY WITH OTHER MINORITIES

Asian Americans are traditionally viewed as a “reticent minority” because in comparison to other ethnic groups, they tend to be less politically active and vocal.²¹¹ There has been a recent increase in Asian American political activity, particularly in affirmative action,²¹² which is necessary and

208. Stephan Thernstorm, *Farewell to Preferences?*, 130 PUB. INT., Winter 1998, at 34, 42–43 (quoting Bob Beckel, *CNN Crossfire* co-host) (“Would you like to see the UCLA Law School 80 percent Asian? Because at the rate it is going . . . by the year 2007 UCLA will be 80 percent Asian. Will that make you happy?”); *Student Quits at U.C.L.A. over Rant*, N.Y. TIMES (March 19, 2011), <https://nyti.ms/2q8wlak> (describing Alexandra Wallace, a UCLA student, who posted a video complaining about Asians in the library where she stated, “the problem is these hordes of Asian people that U.C.L.A. accepts into our school every single year”); Emma Whitford, *When Asians Are Targets of Racism*, INSIDE HIGHER EDUC. (Oct. 11, 2018), <https://www.insidehighered.com/news/2018/10/11/anti-asian-messages-spread-washington-university-st-louis> (explaining a series of messages between Washington University in St. Louis students with one stating, “[w]hy are Asians invading our study room”).

209. See MATSUDA, *supra* note 5, at 153.

210. For Asian Americans, the model minority myth has created pressure for performance to require “super-achievement.” This norm of “super-achievement” and needing to distinguish oneself from the rest of the Asian American community can be debilitating. To add to this, when Asian Americans are told it is better to not check anything than to check the “Asian box” on a college application, this outward demonstration of society’s lack of acceptance can lead to negative self-image in young Asian Americans. See Jean S. Phinney, *The Multigroup Ethnic Identity Measure: A New Scale for Use with Diverse Groups*, 7 J. ADOLESCENT RES. 156, 156–57 (1992) (describing that ethnic identity is central to the self-identity of minority individuals); Chew, *supra* note 49, at 84 (“Many Asian Americans believe that they are more likely to be successfully assimilated into American society if they do not publicly identify their minority status.”). See generally Joan E. Rigdon, *Exploding Myth—Asian American Youth Suffer Rising Toll from Heavy Pressures: Suicides and Distress Increase as They Face Stereotypes and Parents’ Expectations*, WALL ST. J., July 10, 1991, at A1.

211. Chew, *supra* note 49, at 73 (“They have pinned their hopes for economic survival on individual efforts rather than on collective political activities . . .”). See generally Michelle Diggles, *The Untapped Political Power of Asian Americans*, THIRD WAY (Jan. 15, 2015), <https://www.thirdway.org/report/the-untapped-political-power-of-asian-americans> (describing how and why Asian American political participation has lagged behind other racial and ethnic groups).

212. See Agnes Constante, *In California, Asian Americans Find Growing Political Power*, NBC NEWS (April 19, 2018, 5:42 AM), <https://www.nbcnews.com/news/asian-america/california-asian-americans-find-growing-political-power-n866611> (illustrating the rise in Asian American political participation); Ross Douthat, Opinion, *The Asian-American Age: At the Movies and in Court, a Rising*

important. However, it is crucial that Asian Americans not fall victim to a “race to the bottom” mentality by attacking other minority groups in a competition of who is worse off.²¹³ In considering affirmative action, Asian Americans should work with other minorities in discussing with universities “what the institutional and minority needs and priorities are.”²¹⁴ When Asian Americans criticize affirmative action, they must first ask themselves (1) even if you are “individually innocent of any racial discrimination” and face it yourself, do you not benefit from it? and (2) would you trade your Asian American experience to participate in the “piecemeal remedy of affirmative action programs?”²¹⁵ While the unsuccessful candidate may feel that there are painful costs to affirmative action, Asian Americans should be protesting negative action based on the perpetuation of harmful stereotypes, rather than affirmative action, which continues to benefit Asian Americans. As a racial bourgeoisie, Asian Americans have not been included in affirmative action discussions, and they are caught between societal beliefs that they are receiving preferential treatment and personal feelings of experiencing discrimination.²¹⁶

Minority Claims the Spotlight, N.Y. TIMES (Sept. 1, 2018), <https://nyti.ms/2MLuEyA> (describing Asian American political participation with special focus on affirmative action).

213. Chin et al., *supra* note 80, at 51.

Pitting racial minority groups against one another represents the worst form of divide-and-conquer political strategy. [Asian Americans] must refuse to believe that they are superior to Whites, non-Whites, or anyone else. . . . History teaches us that not long ago, the exact same criticisms were leveled at us: that *we* were the stupid, the unassimilable, the deprived, the criminal.

Id. (emphasis in original).

214. Chew, *supra* note 49, at 88.

215. Chin et al., *supra* note 80, at 133–34 (posing these same questions to white people). For the first question, Asian Americans can benefit from racial discrimination because while the model minority myth is damaging to Asian Americans, it is also damaging to other minorities by categorizing them as something less than “model.” In addition, Asian Americans benefit from affirmative action, both historically in the education context and continuously, in areas where there is “under-parity” of Asian Americans, such as in many professional contexts. Kidder, *supra* note 75, at 623–24. For the second question, the systematic and rampant racism against African Americans that stems from several historical factors including slavery, Reconstruction, Jim Crow laws, unequal prison sentencing, and de facto segregation means that the opportunity for the American Dream is not equally available for all minority groups. See Angela Hanks et al., *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality>. This does not invalidate discrimination felt by Asian Americans but should be clearly understood when considering this question.

216. Chew, *supra* note 49, at 75; MATSUDA, *supra* note 5, at 153–54.

CONCLUSION

After *Fisher II*, diversity is the only justification accepted by the Supreme Court as a compelling interest for universities' admissions policies to satisfy strict scrutiny, and although the Court claimed to require the university to show no race-neutral alternatives, it ultimately gave deference to the university's good faith in determining whether the race-neutral alternatives would be plausible in achieving the educational benefits of diversity. The historical discrimination of Asian Americans and their existence as a group too different to be white and not different enough to be a "true minority" give context to why there is frustration and misunderstanding over affirmative action in the Asian American community. Although the negative repercussions of these circumstances and the stereotypes they come with are harmful to Asian Americans, they are not the result of affirmative action and would not be remedied by an elimination of affirmative action. SFFA's complaint and the arguments it made at trial against Harvard rest on misconceptions of the Asian American experience in the admissions processes. In its effort to get rid of race-conscious admissions programs, SFFA falls victim to logical fallacies and fails to address the true problem facing Asian Americans in admissions. While diversity continues to be a compelling interest, the conception of what types of diversity are valued needs to be re-evaluated to consider the stereotypes attributed to Asian Americans. For the Asian American community, their position as a racial bourgeoisie can have a significant impact in the affirmative action discussion if Asian Americans can target their efforts at attacking negative action while simultaneously supporting affirmative action.

