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## ASIAN AMERICANS, RACIAL STEREOTYPES, AND ELITE UNIVERSITY ADMISSIONS<sup>†</sup>

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### ABSTRACT

*Asian Americans have long occupied a precarious position in America's racial landscape, exemplified by controversies over elite university admissions. Recently, this has culminated with the Students for Fair Admissions, Inc. v. President & Fellows of Harvard College case. In January 2022, the Supreme Court granted certiorari in this case, and it will hear arguments and make a ruling in the next year or so. Students for Fair Admissions ("SFFA") has attempted to link "negative action," or discrimination against Asian Americans in admissions in favor of White Americans, with "affirmative action," or race-conscious admissions policies intended to increase the enrollment of underrepresented applicants. This Article examines SFFA v. Harvard and the social and historical context for the case, focusing on the role of racial stereotypes of Asian Americans. The Article is novel in three respects. First, it goes beyond the "model minority" stereotype of Asian Americans as high*

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*academic achievers. The model minority stereotype is important, but there are other stereotypes of Asian Americans that are also significant in admissions controversies. Second, this Article examines negative action not only from a legal and empirical lens, but also from a contextual and perceptual standpoint. It argues that Asian Americans' perceptions of negative action are as important as the realities and that these perceptions should be addressed. The division created by allegations of negative action could have implications beyond the affirmative action debate. Third, the Article integrates legal scholarship and analysis with the work of scholars in Asian American Studies. This integration provides valuable insights on the positioning of Asian Americans in America's racial hierarchy. The Article ultimately argues that Asian Americans should support affirmative action and that racial justice advocates should address negative action even if its tangible impact is small. Although the SFFA v. Harvard litigation attempts to create political divides between people of color, it also brings opportunities for mutual understanding and coalition-building. By engaging these opportunities, Asian Americans can become more prominent contributors to the discourse on American racism.*

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## INTRODUCTION

Admission to elite universities is a highly contested issue—not only because it creates competition between excellent students but also because it implicates charged social and political issues such as race. Affirmative action in higher education is a paradigmatic example of how American racial ideology pits different racial groups against each other.<sup>1</sup> This involves not only conflicts between White Americans and particular minority groups, but also among different minority groups—especially conflicts involving Asian Americans<sup>2</sup> and other people of color.

Such conflicts have long permeated the affirmative action debate.<sup>3</sup> But these conflicts have recently become more prominent, due in large part to the work of the anti-affirmative action organization, Students for Fair Admissions (“SFFA”). SFFA has filed lawsuits challenging race-conscious admissions policies at several universities, including Harvard University, the University of North Carolina at Chapel Hill (“UNC Chapel Hill”), Yale University, and the University of Texas at Austin (“UT Austin”).<sup>4</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*<sup>5</sup> (“the Harvard case”) has gained the most attention thus far. While past challenges to race-conscious university admissions have typically involved White applicants, the Harvard case is different because it includes Asian American plaintiffs. SFFA’s arguments have

<sup>1</sup> See Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105, 122 (1999) (noting that, in context of affirmative action, “conservatives have . . . manufactured conflicts between Blacks and Asian Americans”); DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN PACIFIC AMERICANS AND RACIAL POLITICS* 137 (1998) (explaining that, in late 1980s, neoconservatives endorsed idea that “less qualified blacks and Hispanics were admitted [to universities] at the expense of better-qualified Asians”).

<sup>2</sup> People have preferences for various terms besides “Asian American”: Asian Pacific American, Asian Pacific Islander, Asian American Pacific Islander, and others. See Vinay Harpalani, *Can “Asians” Truly Be Americans?*, 27 WASH. & LEE J. C.R. & SOC. JUST. 559, 560 n.1 (2021) (noting that variety of terms for “Asian American” may be appropriate). This Article generally uses the term “Asian American” except when referencing specific groups or organizations that have chosen another term. Additionally, the Article does not use “Asian” as shorthand for “Asian American.” Although it is often used for brevity, the simple label “Asian” obscures a vast amount of diversity—it lumps together 4.5 billion people, conflating the different experiences of people who live in Asian countries, recent immigrants to the United States, and Asian Americans who were born in the United States. Omitting the “American” part of “Asian American” is also problematic for a group that has long been viewed as foreign.

<sup>3</sup> See sources cited *supra* note 1. See generally Claire Jean Kim, *Are Asians the New Blacks?: Affirmative Action, Anti-Blackness, and the ‘Sociometry’ of Race*, 15 DU BOIS REV. 217 (2018) (outlining historical relationship between Asian Americans and Black Americans in context of affirmative action in university admissions).

<sup>4</sup> *Our Cases*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/our-cases/> [<https://perma.cc/V38D-U2NG>] (last visited Jan. 18, 2022) (listing and providing links to lawsuits filed by SFFA against colleges and universities).

<sup>5</sup> 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

focused mostly on the treatment of Asian Americans in the admissions process and in other university activities.<sup>6</sup>

SFFA lost its case against Harvard at the U.S. District Court of Massachusetts<sup>7</sup> and at the U.S. Court of Appeals for the First Circuit<sup>8</sup> and appealed to the U.S. Supreme Court.<sup>9</sup> The Court granted SFFA's petition for a writ of certiorari on January 24, 2022.<sup>10</sup> In the next year or so, the Supreme Court could rule that race-conscious admissions policies are unconstitutional. And given the conservative make-up of the Court, this would be the likely outcome.<sup>11</sup> Moreover, SFFA's litigation strategy of using Asian American plaintiffs has broad implications—not only for affirmative action, but also for racial equity in education and racial justice in America.

While the Supreme Court could end affirmative action with the Harvard case, the legal questions implicated in the case are not novel. The case rehashes frameworks for the constitutionality of race-conscious policies that have already been established and refined.<sup>12</sup> However, the social and political dynamics of the case have immense consequences for relations between different racial groups. At elite universities, admitted Asian Americans have indisputably attained higher standardized test scores and grades than all other groups, including White Americans.<sup>13</sup> Although Asian Americans are well represented

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<sup>6</sup> Complaint paras. 15-17, *SFFA*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), 2014 WL 6241935. For more detail on the plaintiffs in the Harvard case, see *infra* notes 168-71 and accompanying text.

<sup>7</sup> *SFFA*, 397 F. Supp. 3d at 205 (holding that “Harvard’s admission program passes constitutional muster in that it satisfies the dictates of strict scrutiny”).

<sup>8</sup> *SFFA*, 980 F.3d at 204 (“Harvard’s limited use of race in its admissions process in order to achieve diversity . . . is consistent with the requirements of Supreme Court precedent.”); see also Audrey Anderson, *Harvard’s Affirmative Action Plan Upheld by First Circuit: Victory Now But What Will Come Next?*, JD SUPRA (Nov. 17, 2020), <https://www.jdsupra.com/legalnews/harvard-s-affirmative-action-plan-68389/> [<https://perma.cc/3AN6-QK9P>] (“The First Circuit held that Harvard had demonstrated that it has a compelling interest in using race in its admissions program and that its use of race is narrowly tailored as required by the Supreme Court’s precedent.”); *Courts Rule Harvard Admissions Process Legal on All Counts*, HARV. UNIV.: HARV. ADMISSIONS LAWSUIT, <https://admissionscase.harvard.edu/> [<https://perma.cc/LMK8-GBGK>] (last visited Jan. 18, 2022).

<sup>9</sup> See Anderson, *supra* note 8 (“SFFA has announced that it will seek a review of the First Circuit’s opinion from the United States Supreme Court . . .”).

<sup>10</sup> *SFFA*, 2022 WL 199375.

<sup>11</sup> See Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 239 (2021) (“The Supreme Court has signaled the end of affirmative action. . . . [W]ith a new composition of Justices on the Court and relevant cases winding their way through the lower courts, the end of affirmative action could come [soon].”).

<sup>12</sup> See *infra* notes 140-55 and accompanying text.

<sup>13</sup> See THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSIONS AND CAMPUS LIFE 92

at these institutions,<sup>14</sup> the possibility or perception that they face discrimination in admissions is of great concern to many in the Asian American community. And while many Asian American organizations have historically taken a stance in support of affirmative action, a growing number of such organizations have come out in opposition to race-conscious university admissions in recent years.<sup>15</sup>

Consequently, the Harvard case has sparked various racial and ethnic divisions. It has created internal conflict among Asian Americans—who are not a monolithic group themselves—and it has also pitted Asian Americans against other minority groups. Divisions between these groups—all of whom should have an interest in dismantling White privilege and supremacy—would undermine racial justice. In that vein, it is important to distinguish challenges to affirmative action to benefit underrepresented groups, such as Black and Latina/o Americans, from claims of discrimination against Asian Americans in favor of White Americans. Antiracist initiatives can then both defend affirmative action and address Asian Americans’ concerns.

This Article aims to make those two goals—defending affirmative action and addressing Asian Americans’ concerns—compatible in theory and in practice. It counters SFFA’s project<sup>16</sup> by addressing the legitimate concerns about discrimination in university admissions against Asian Americans. It also argues

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(2009) (exhibiting table of SAT and ACT scores by race); *see also* Report of David Card, Ph.D., para. 73, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) (“Asian-American applicants tend to have higher academic ratings . . . than White applicants . . .”).

<sup>14</sup> *See, e.g.*, Prabhudev Konana, Opinion, *Harvard Shouldn’t Punish Asian-American Students for Working Too Hard, Achieving Too Much*, USA TODAY (Nov. 2, 2108, 10:56 AM), <https://www.usatoday.com/story/opinion/2018/11/02/universities-harvard-yale-reward-asian-americans-successful-diversity-bias-column/1739012002/> (“In most elite universities, Asian-Americans make up a far higher percentage of students than is reflected in the overall population.”); Steve H. Hanke & Stephen J. K. Walters, Commentary, *Asian-American Ivy League Applicants Can Trust Markets More than Courts*, CATO INST. (Feb. 22, 2021), <https://www.cato.org/commentary/asian-american-ivy-league-applicants-can-trust-markets-more-courts> [<https://perma.cc/27PA-ZAWQ>] (indicating that Asian American enrollment in elite universities has increased in the last few years; for example, now comprising 25% of Princeton’s Class of 2024 and 43% of Caltech’s student body); *The Demographics of the Ivy League*, COLL. MONK (Oct. 13, 2020), <https://www.thecollegemonk.com/blog/ivy-league-demographics> [<https://perma.cc/5V44-UT49>] (showing racial demographics of Ivy League enrollment and indicating that Asian Americans comprise at least 20% of student body at Harvard, University of Pennsylvania, and Columbia).

<sup>15</sup> *See infra* notes 242, 267, 268 and accompanying text (outlining historical role of Asian American organizations in Supreme Court’s affirmative action cases).

<sup>16</sup> *See* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 56 (2d ed. 1994) (describing “racial projects” as “interpretation[s] . . . or explanation[s] of racial dynamics” which “redistribute resources along particular racial lines” (emphasis omitted)); *see also* EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* 30 (2001) (describing “racial project” as “the active process of reorganization of racial dynamics by a fraction of the dominant race”).

that Asian Americans should emphatically support affirmative action. The Article pursues these dual goals by showing how various racial stereotypes of Asian Americans permeate the allegations of discrimination against them and how those stereotypes are part of a broader racial ideology that pits minority groups against each other.<sup>17</sup> It argues that breaking down this ideology requires vigorous support for affirmative action and active opposition to negative action.

This Article adds to analyses of the Harvard case and the broader discourse on Asian Americans and university admissions in three major ways. First, it goes beyond the “model minority” stereotype of Asian Americans—the idea that Asian Americans are high academic achievers because of their work ethic and that other groups should follow in their footsteps.<sup>18</sup> The model minority stereotype is important, but it is only one of the stereotypes that should be part of the conversation. The “perpetual foreigner” stereotype—the idea that Asian Americans do not belong in the United States and remain tied to their ancestral homelands no matter how long or for how many generations they have lived in the United States<sup>19</sup>—is also necessary for understanding the positioning of Asian Americans in controversies surrounding university admissions. Moreover, the model minority and perpetual foreigner stereotypes intersect through further tropes which influence how Asian Americans view elite university admissions. All of these factors complicate the role of racial stereotypes in the affirmative action debate.

Second, this Article expands on the concept and implications of “negative action”<sup>20</sup>—discrimination against Asian Americans in admissions specifically in favor of White Americans. The Harvard case has attempted to link negative action with “affirmative action”—race-conscious admissions policies intended to increase the enrollment of Black, Latina/o, Native American, and other underrepresented applicants. Several scholars have argued convincingly that negative action—in the form of a “White bonus”—accounts for any discrimination that occurs against Asian Americans.<sup>21</sup> Nevertheless, the

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<sup>17</sup> See Kim, *supra* note 1, at 122-24 (explaining that minority groups may be pitted against each other in context of affirmative action).

<sup>18</sup> See *infra* Section I.A.

<sup>19</sup> See *infra* Section I.B; see also Frank H. Wu, *Where Are You Really From?: Asian Americans and the Perpetual Foreigner Syndrome*, 6 C.R. J. 14, 14-17 (2002) (introducing common manifestations of “perpetual foreigner syndrome”); see also Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) (noting that “foreignness is a crucial dimension of the American racialization of persons of Asian ancestry”).

<sup>20</sup> Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (defining negative action as “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison”).

<sup>21</sup> See, e.g., Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590, 628 n.151 (2017) (“Scholars have used the term

historical and political context for allegations of negative action is also important and merits a more in-depth analysis. This context is particularly informative for assessing how Asian Americans view elite university admissions and approach the application process for these institutions.<sup>22</sup> Allegations of negative action also have implications beyond the affirmative action debate. The divisions they create could pit Asian Americans against other people of color in other education and admissions debates, such as those concerning standardized testing—which is a pipeline to elite high school and university admissions.<sup>23</sup>

Third, building from its analysis of racial stereotypes and broader view of affirmative action, this Article focuses specifically on the racial positioning and experiences of Asian Americans. It brings the rich and pioneering work of Asian American Studies into the legal academic conversation on affirmative action and negative action. Historians, political scientists, and theorists such as Claire Jean

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‘negative action’ to describe what I describe as ‘white advantage.’”); Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 709-10 (2019) (arguing that conflation of affirmative action and discrimination against Asian Americans “obscures the actual beneficiaries of Harvard’s Asian penalty: Harvard’s White students”); LILIANA M. GARCES & OIYAN POON, C.R. PROJECT/PROYECTO DERECHOS CIVILES, ASIAN AMERICANS AND RACE CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION’S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION 9 (Nov. 1, 2018), [https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/asian-americans-and-race-conscious-admissions-understanding-the-conservative-opposition2019s-strategy-of-misinformation-intimidation-racial-division/RaceCon\\_GarcesPoon\\_AsianAmericansRaceConsciousAdmi.pdf](https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/asian-americans-and-race-conscious-admissions-understanding-the-conservative-opposition2019s-strategy-of-misinformation-intimidation-racial-division/RaceCon_GarcesPoon_AsianAmericansRaceConsciousAdmi.pdf) [<https://perma.cc/2CFV-E6M8>] (“[N]egative action takes place when an Asian American applicant would have been admitted had the individual been a white applicant.”); Jeena Shah, *Affirming Affirmative Action by Affirming White Privilege: SFFA v. Harvard*, 108 GEO. L.J. ONLINE 134, 134 (2020) (arguing that real issue in Harvard case is “discrimination against Asian-American applicants vis-à-vis white applicants resulting from race-neutral components of the [Harvard] admissions program”); see also Nancy Leong, *Preliminary Thoughts on the Summary Judgment Motions in the Harvard Affirmative Action Lawsuit*, TAKE CARE BLOG (June 18, 2018), <https://takecareblog.com/blog/preliminary-thoughts-on-the-summary-judgment-motions-in-the-harvard-affirmative-action-lawsuit> [<https://perma.cc/87BY-DGQY>] (suggesting that Harvard should admit more Asian American students by admitting fewer White students); Philip Lee, *Rejecting Honorary Whiteness: Asian Americans and the Attack on Race-Conscious Admissions*, 70 EMORY L.J. 1475, 1488 (2021) (arguing that Asian Americans are being used in attacks on affirmative action which merely “seek to preserve whiteness as an access card to education”).

<sup>22</sup> See *infra* Section III.B.3.

<sup>23</sup> See *infra* Section III.D.

Kim,<sup>24</sup> Michael Omi,<sup>25</sup> Gary Okihiro,<sup>26</sup> Vijay Prashad,<sup>27</sup> Ronald Takaki,<sup>28</sup> and Ellen Wu<sup>29</sup> contribute valuable perspectives that illustrate how Asian Americans fit into American racial ideology and contemporary debates on charged issues such as affirmative action. Additionally, sociologists such as Grace Kao,<sup>30</sup> Jennifer Lee,<sup>31</sup> Min Zhou,<sup>32</sup> Julie Park,<sup>33</sup> and Sapna Cheryan<sup>34</sup> have contributed empirical studies that focus on the tangible experiences of Asian American students. These perspectives bring new insights to the analysis of the Harvard case. They supplement legal analyses by illuminating the historical and social forces around the case. This Article also builds on the work of the limited but important legal scholarship that has engaged Asian American Studies,<sup>35</sup> and thus it expands the burgeoning field of Asian American jurisprudence and Critical Race Theory.<sup>36</sup>

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<sup>24</sup> Kim, *supra* note 1; Kim, *supra* note 3.

<sup>25</sup> OMI & WINANT, *supra* note 16.

<sup>26</sup> GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* (2014 ed. 2014).

<sup>27</sup> VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* (2000) [hereinafter PRASHAD, KARMA]; VIJAY PRASHAD, *EVERYBODY WAS KUNG FU FIGHTING: AFRO-ASIAN CONNECTIONS AND THE MYTH OF CULTURAL PURITY* (2001); VIJAY PRASHAD, *UNCLE SWAMI: SOUTH ASIANS IN AMERICA TODAY* (2012) [hereinafter PRASHAD, UNCLE SWAMI].

<sup>28</sup> RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989).

<sup>29</sup> ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* (2014).

<sup>30</sup> Grace Kao, *Asian Americans As Model Minorities? A Look at Their Academic Performance*, 103 AM. J. EDUC. 121 (1995).

<sup>31</sup> JENNIFER LEE & MIN ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* (2015).

<sup>32</sup> *Id.*

<sup>33</sup> Julie J. Park & Sooji Kim, *Harvard's Personal Rating: The Impact of Private High School Attendance*, 30 ASIAN AM. POL'Y REV. 2 (2020).

<sup>34</sup> Caitlin Handron, Teri A. Kirby, Jennifer Wang, Helena E. Matskewich & Sapna Cheryan, *Unexpected Gains: Being Overweight Buffers Asian Americans from Prejudice Against Foreigners*, 28 PSYCH. SCI. 1214 (2017) (finding that overweight Asian Americans are seen as more "American" and less foreign); Mika Semrow, Linda X. Zou, Shuyang Liu, & Sapna Cheryan, *Gay Asian Americans Are Seen as More American Than Asian Americans Who Are Presumed Straight*, 11 SOC. PSYCH. & PERSONALITY SCI. (2020) (finding that gay Asian Americans are seen as more "American" and less foreign).

<sup>35</sup> See, e.g., sources cited *supra* note 19-20; see also Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947 (2013); Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1993) [hereinafter Chang, *Asian American Legal Scholarship*]; Mari Matsuda, *Voices of the Community: We Will Not Be Used*, 1 ASIAN AM. & PAC. ISLANDS L.J. 79 (1993).

<sup>36</sup> This Article also draws to an extent from sociological theories of race and racism. See, e.g., sources cited *supra* note 16.

Part I discusses stereotypes of Asian Americans, focusing on how they play into debates about elite admissions. It gives a historical overview of the model minority and perpetual foreigner stereotypes, and it relates these to the more specific stereotypes of Asian Americans that permeate admissions debates: “peril of the mind” and “passive nerd.” Part II examines the history of Asian Americans in debates about elite admissions. It distinguishes between affirmative action and negative action, and then it delves into allegations of negative action in the 1980s, as Asian Americans became more visible on elite college campuses. This Part also traces how negative action became tied to affirmative action. Part III analyzes the Harvard case, focusing on allegations of negative action and the weaponization of Asian Americans to attack affirmative action. This Part delves into the arguments that SFFA has made, the evidence that came out in the case, the courts’ analysis of this evidence, and the broader discourse around the case. It also considers how Asian Americans and other people of color might be similarly pitted against each other in debates over standardized testing. Part IV proposes ways to combat this divide. This Part considers how American racial ideology has pitted Asian Americans against other minority groups, through a process of “racial triangulation”<sup>37</sup> and the weaponization of the model minority stereotype. It discusses challenges faced by Asian Americans that are often masked by the model minority stereotype and the importance of recognizing and addressing those challenges. This Part also discusses ways to address overt and implicit bias against Asian Americans, increase Asian Americans’ race-consciousness, and incorporate Asian Americans’ perspectives more into discourse on American racism. This involves recognition of the weaponization of Asian Americans against other groups of people of color and understanding of the experiences that Asian Americans have with racial stereotyping and xenophobia.

#### I. STEREOTYPES OF ASIAN AMERICANS

Discourse on American racism often focuses on its most overt expressions, such as racist hate crimes and explicitly racist groups such as the Ku Klux Klan. But racial stereotypes, which are “common, highly simplified beliefs about racial/ethnic groups” that are often held subconsciously,<sup>38</sup> can have an even larger everyday impact on how race is lived and experienced.<sup>39</sup> These stereotypes are “subtle but omnipresent . . . [and] constantly affect attitudes and

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<sup>37</sup> See Kim, *supra* note 1, at 106 (arguing that Asian Americans have historically been “racially triangulated” vis-à-vis Whites and Blacks”).

<sup>38</sup> Vinay Harpalani, *Racial Stereotypes and Achievement-Linked Identity Formation During Adolescence: An Investigation of Athletic Investment and Academic Resilience*, at 1 (2005) (Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania).

<sup>39</sup> See *id.* (“[Racial s]tereotypes are readily apparent in numerous realms of American life, [yet] they are particularly hard to reconcile and remedy because [people] are usually unaware of them.”).

behaviors towards members of other groups (and often even one's own group)."<sup>40</sup> And they are especially insidious when they cast different groups in opposition to each other, as with stereotypes about academic prowess and educational achievement.<sup>41</sup>

Stereotypes of Asian Americans have played a key role in debates about affirmative action, elite university admissions, and racial disparities in academic achievement more generally. In these and other realms, Asian Americans have often been dubbed the model minority—a group that is viewed as more educationally and economically successful than other minority groups because of its work ethic and perseverance.<sup>42</sup> The model minority stereotype is often at the center of comparisons of academic and educational success between racial groups. It is used as a tool to position Asian Americans against other people of color, as exemplified by the Harvard case. But while the model minority stereotype itself has a significant impact on discourse on elite university admissions, it also intersects with another powerful stereotype of Asian

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<sup>40</sup> *Id.*

<sup>41</sup> Underlying this Article is the position that racial stereotyping is an affront to the dignity of all groups—particularly those that have faced a long history of discrimination in the United States. The experience of being stereotyped is itself an “expressive harm” or a “stigmatic harm”—a harm that is manifested by mere expression, independent of tangible consequences. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993) (“An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. . . . [T]he meaning . . . is just as important as what that action does . . . because the very meaning . . . convey[ed] demonstrates inappropriate respect for relevant public values.”); see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004) (“[S]tigmatic harm occurs when a given act or policy sends the message that racial difference renders a person or a group inferior to Whites, the category constructed as the racial norm.”). In *City of Richmond v. J.A. Croson Co.*, Justice Sandra Day O’Connor articulated the concept of stigmatic harm: “Classifications based on race carry a danger of stigmatic harm. . . . [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility . . . [and] ‘reinforce common stereotypes’ . . .” 488 U.S. 469, 493-94 (1989) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

<sup>42</sup> Monisha Murjani, *Breaking Apart the Model Minority and Perpetual Foreigner Stereotypes: Asian Americans and Cultural Capital*, 35 VT. CONNECTION 83 (2014) (“The model minority myth suggests that there is a distinct quality in Asian Americans that promotes their success which other populations of color must not possess. Not only does the myth ignore the histories of Asian Americans and the role of American immigration policies, but it also does not account for the variances within the Asian American community.”). The model minority stereotype has deep roots in U.S. history and has long been used to juxtapose Asian Americans and Black Americans. See Kim, *supra* note 1, at 110-11 (noting that nineteenth-century Chinese laborers were thought to be “hardworking and intelligent” and to possess “a great deal more brain power” and to be “far superior . . . physiologically and mentally” than Black Americans (citation omitted)). As applied to Asian Americans and elite admissions, the model minority stereotype started to become prominent after World War II and particularly in the 1960s. See *infra* Section I.A.

Americans: the perpetual foreigner stereotype—which is the notion that Asian Americans can never truly be American, because they are more loyal and connected to their ancestral homelands than to the United States.<sup>43</sup>

The duality of the model minority and perpetual foreigner stereotypes has been a consistent theme in the history of Asian Americans.<sup>44</sup> And these two stereotypes can intersect in specific ways. The confluence of these stereotypes illuminates the racial positioning of Asian Americans within the affirmative action debate and within American racial ideology more generally. One such confluence is the peril of the mind trope: the notion that Asian Americans are a foreign threat precisely because of their high achievement.<sup>45</sup> Another is the passive nerd image: the idea that Asian Americans excel academically but are one-dimensional “geeks” and “nerds” who lack social and leadership skills.<sup>46</sup> These different images of Asian Americans come into play in debates about elite admissions; understanding all of these stereotypes and their impact is important to fully grasp the racial positioning of Asian Americans.

#### A. *Model Minority*

The story of the model minority stereotype and its impact on elite university admissions begins with reopening of Asian immigration after World War II. Prior to the War, immigration from most Asian countries had been banned broadly since 1917.<sup>47</sup> But World War II changed the global landscape dramatically. The United States and the Soviet Union became the world’s dominant powers,<sup>48</sup> and the two nations competed for military and technological superiority during the Cold War.<sup>49</sup> Both nations sought to increase their global spheres of influence. Overtly racist policies in America threatened to hinder its

<sup>43</sup> See generally Wu, *supra* note 19 (examining the perpetual foreigner stereotype in detail).

<sup>44</sup> See Kim, *supra* note 1, at 110 (noting that Asian Americans have been simultaneously valorized and ostracized).

<sup>45</sup> See OKIHIRO, *supra* note 26, at 141 (“The very indices of Asian American ‘success’ can imperil the good order of race relations when the [Asian American] margins lay claim to the privileges of the [White] mainstream.”).

<sup>46</sup> See TAKAGI, *supra* note 1, at 79 (discussing “popular ‘nerd’ image of Asian American students”).

<sup>47</sup> See Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952) (directing that all persons from “Continent of Asia” be “excluded from admission into the United States”). The 1917 Act was the broadest in a series of laws and policies, gradually enacted from the 1880s to the 1920s to ban immigration from Asia. See generally Chang, *Asian American Legal Scholarship*, *supra* note 35, at 1296-99.

<sup>48</sup> See *Great Responsibilities and New Global Power*, NAT’L WWII MUSEUM (Oct. 23, 2020), <https://www.nationalww2museum.org/war/articles/new-global-power-after-world-war-ii-1945> [<https://perma.cc/7XUR-8G86>].

<sup>49</sup> See *Cold Conflict*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/cold-conflict> [<https://perma.cc/G6Y3-Q7MP>] (last visited Jan. 18, 2022).

influence—particularly when contrasted to communism’s emphasis on equality.<sup>50</sup> It was in this historical context that the U.S. government began supporting civil rights and also reopening immigration.<sup>51</sup>

First, in 1946, the Luce-Celler Act allowed immigration from Asian countries in small numbers.<sup>52</sup> Subsequently, the Immigration and Nationality Act of 1952 removed all racial restrictions on immigration.<sup>53</sup> As the Cold War proceeded, the impetus for promoting immigration from Asian countries grew stronger. The Soviet Union launched Sputnik I in 1957, becoming the first nation to send a satellite into outer space.<sup>54</sup> In 1961, Soviet cosmonaut Yuri Gagarin became the first human to reach outer space.<sup>55</sup> U.S. governmental officials feared that, as the Soviet Union advanced technologically, the United States was losing the Cold War.<sup>56</sup> They determined that the United States needed more educated professionals in scientific and technical fields to reverse this trend.<sup>57</sup>

During the same time period, countries such as China and India had large numbers of scientists, engineers, and other skilled professionals without many opportunities in their homelands.<sup>58</sup> The Immigration Act of 1965<sup>59</sup> thus served the interests of both the U.S. government and educated professionals in Asian countries. The 1965 Immigration Act significantly raised annual immigration

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<sup>50</sup> See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 6-15 (2000).

<sup>51</sup> See generally DUDZIAK, *supra* note 50 (describing how Cold War led to conditions that allowed for greater civil rights and immigration to United States).

<sup>52</sup> Act of July 2, 1946, ch. 534, 60 Stat. 416 (repealed 1952) (“To authorize the admission into the United States of persons of races indigenous to India, and persons of races indigenous to the Philippine Islands, to make them racially eligible for naturalization, and for other purposes.”).

<sup>53</sup> Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (enacting statutory language “[t]o revise the laws relating to immigration, naturalization, and nationality”).

<sup>54</sup> See *Sputnik and the Dawn of the Space Age*, NASA HIST. DIV., <https://history.nasa.gov/sputnik.html> [<https://perma.cc/D4QX-W4XE>] (last visited Jan. 18, 2022).

<sup>55</sup> *April 12, 1961: Soviet Cosmonaut Yuri Gagarin Becomes the First Man in Space*, HISTORY.COM: THIS DAY IN HIST. (Apr. 8, 2020), <https://www.history.com/this-day-in-history/first-man-in-space> [<https://perma.cc/C2UU-DFRG>].

<sup>56</sup> See Vinay Harpalani, *Simple Justice or Complex Injustice?: American Racial Dynamics and the Ironies of Brown and Grutter*, PENN. GSE PERSPS. URB. EDUC., Fall 2004, at 2, <https://urbanedjournal.gse.upenn.edu/archive/volume-3-issue-1-fall-2004/simple-justice-or-complex-injustice-american-racial-dynamics-and-> [[perma.cc/GUG3-3BLX](https://perma.cc/GUG3-3BLX)] (“As the Cold War pressed on, the 1957 launch of Sputnik I by the Soviet Union intensified fears that the U.S. was losing ground to communism.”).

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89-23, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

quotas from these countries, and it created a system of immigration preferences that favored educated, skilled workers.<sup>60</sup>

This development changed the demographics of Asian America<sup>61</sup> and set the course for the positioning of Asian Americans in admissions controversies. Post-1965, educated Asian American immigrants were structurally situated for upward mobility and achievement. Although they faced various forms of discrimination, they also had the educational background to advance quickly in the United States. Many were able to forego the transient enclave status of other immigrant groups, much less the long-term residential segregation and caste-like status of many Black and Latina/o Americans.<sup>62</sup> Before long, these Asian American immigrants were able to integrate socially and economically into predominantly White communities,<sup>63</sup> even if they chose to maintain distinct cultural identities. They capitalized on the opportunities that America provided for them.

Voluntary immigrants, such as many Asian Americans, generally have advantages over multigenerationally oppressed minorities such as Black Americans and Native Americans.<sup>64</sup> Many post-1965 Asian American immigrants and their children had the additional advantage of growing up in educated home environments with the social, cultural, and economic capital that accompanies such environments.<sup>65</sup> Even after occupational immigration preferences were curbed back,<sup>66</sup> many Asian immigrants came to the United States through family-related immigration preferences and thus had some access to social and economic capital through their family networks.<sup>67</sup> Consequently, many first- and second-generation Asian Americans became high-achieving students and successful professionals.

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<sup>60</sup> See *id.* § 201(a), at 911 (increasing yearly quota to 170,000).

<sup>61</sup> PRASHAD, KARMA, *supra* note 27, at 4 (arguing that attainments of Asian Americans are result of “state selection whereby the U.S. state, through the special-skills provisions in the 1965 Immigration Act, fundamentally reconfigured the demography of South Asian America” (emphasis omitted)).

<sup>62</sup> Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 141-42 (2013) (discussing symbolic status of post-1965 South Asian Americans as “honorary whites,” which was augmented by model minority myth).

<sup>63</sup> *Id.* at 142.

<sup>64</sup> See JOHN U. OGBU, *MINORITY EDUCATION AND CASTE: THE AMERICAN SYSTEM IN CROSS-CULTURAL PERSPECTIVE* 21 (1978) (discussing how racial stratification in America contributes to school performance and access to education, but that educational problems faced by recent immigrants are different than those faced by “nonimmigrant minorities” and may be temporary).

<sup>65</sup> Harpalani, *supra* note 62, at 141.

<sup>66</sup> *Id.* at 96-97 (discussing how divergences in education and occupation is partly due to various immigration waves shifting from occupational immigration to family-based immigration in the 1980s).

<sup>67</sup> *Id.* at 143 (noting that more recent immigrants have “capitalize[d] . . . on the larger [immigrant] community’s success[es] and . . . networks”).

This phenomenon was more common among some Asian American groups than others, and it continues to mask the barriers that many Asian Americans face.<sup>68</sup> Nevertheless, it was in this context that the model minority stereotype took hold. Rather than acknowledging structural factors, the model minority attributes the success of Asian Americans to cultural upbringing and work ethic.<sup>69</sup> In 1966, sociologist William Petersen wrote an article for the *New York Times Magazine* which has been cited widely as promoting the idea of the model minority.<sup>70</sup> Petersen described the success of Japanese Americans,<sup>71</sup> and, according to Professor Roger Daniels, Petersen conceived of the model minority in two senses: (1) praising the success of Japanese Americans; and (2) suggesting that other groups should emulate Japanese Americans.<sup>72</sup> Professor Daniels argues that the “unstated major premise of Petersen’s argument was that Horatio-Alger-bootstrap-raising was needed for success by such ‘non-achieving’ minorities as blacks and Chicanos, rather than the social programs of Lyndon Johnson’s Great Society.”<sup>73</sup> This view juxtaposes the success of first- and second-generation Asian Americans with the underachievement of Black and Latina/o Americans. Today, conservatives and even some liberals still hold Asian Americans as a model minority that other minority groups should follow.<sup>74</sup>

The model minority stereotype effectively pits different groups of people of color against each other.<sup>75</sup> While it may appear complimentary on the surface and may have positive ramifications in certain situations, the model minority

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<sup>68</sup> See *infra* Section IV.B.1.

<sup>69</sup> See, e.g., Ellie McGrath, *Education: Confucian Work Ethic*, TIME, Mar. 28, 1983, <http://content.time.com/time/subscriber/printout/0,8816,923424,00.html#> (observing that many educators attribute Asian American students’ success to “cultural conditioning” and emphasis on education as the pathway to success).

<sup>70</sup> William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 6, 1966, at 21; see also ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 318 (2d prtg. 1992) (observing that Petersen used model minority myth as a method of attacking perceived erosion of “standards of American life”).

<sup>71</sup> Petersen, *supra* note 70, at 21 (“By any criterion of good citizenship that we choose, the Japanese Americans are better than any group in our society, including native-born whites.”). Although the model minority stereotype is often attributed to Petersen’s article, the term itself does not appear in the text of the article. See Tamara K. Nopper, *Safe Asian Americans: On the Carceral Logic of the Model Minority Myth*, ASIAN AM. WRITERS’ WORKSHOP: MARGINS (May 7, 2021), <https://aaww.org/the-carceral-logic-of-the-model-minority-myth/> [<https://perma.cc/77AC-98FM>] (“[T]he term [model minority] never appears in . . . [Petersen’s] 1966 *New York Times Sunday Magazine* story ‘Success: Japanese-American Style.’”).

<sup>72</sup> DANIELS, *supra* note 70, at 318 (noting that novelty of Petersen’s approach was “blanket denigration of other groups”).

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* (describing Thomas Sowell as one such conservative theorist).

<sup>75</sup> See *infra* Section IV.A.2 (discussing use of model minority myth to perpetuate racial inequality).

stereotype also has negative effects: it obscures the vast diversity among Asian Americans and masks the discrimination and inequalities that they face.<sup>76</sup>

### B. *Perpetual Foreigner*

The perpetual foreigner stereotype has existed since Asian Americans first came to this country. Late nineteenth and early twentieth century immigrants from Asian countries were often targets of violence. They were viewed as menacing foreigners who were an economic threat.<sup>77</sup> Immigrant laborers from China, Japan, and Korea were dubbed the “Yellow Peril,”<sup>78</sup> and those from the Indian subcontinent were dubbed the “Dusky Peril.”<sup>79</sup> The Chinese Exclusion Act of 1882 banned immigration from China.<sup>80</sup> The Japanese and Korean Exclusion League formed in San Francisco in 1905, and two years later, it changed its name to the Asiatic Exclusion League in response to the “anticipated flood of immigration from India.”<sup>81</sup> Also in 1907, President Theodore Roosevelt entered into the “Gentlemen’s Agreement” with Japan, ending the influx of Japanese immigrants.<sup>82</sup> Asian Indian immigrants were excluded ad hoc for

<sup>76</sup> See *infra* Section IV.B (discussing economic differences, “glass ceiling,” and harmful pressure to succeed).

<sup>77</sup> See Chang, *Asian American Legal Scholarship*, *supra* note 35, at 1254-55 (noting that in 1885, a mob of White miners attacked Chinese American laborers, killing twenty-eight, wounding fifteen, and driving hundreds away).

<sup>78</sup> See OKIHIRO, *supra* note 26, at 118-47 (discussing the interplay between the model minority myth and the “yellow peril” phenomenon); TAKAKI, *supra* note 28, at 192 (reporting that in 1912, when successful and wealthy Japanese farmer Kinji Ushijima bought a house in Berkeley, local newspapers ran headline “Yellow Peril in College Town”); Chang, *Asian American Legal Scholarship*, *supra* note 35, at 1291 (“Ironically, despite . . . efforts by Japanese, Korean, Asian Indian, and Filipino immigrants to ‘westernize’ and to be accepted, they were treated by white Americans as merely different strains of the same ‘Yellow Peril’ . . .”).

<sup>79</sup> See *Have We a Dusky Peril?: Hindu Hordes Invading the State*, PUGET SOUND AM., Sept. 16, 1906, at 16, in S. ASIAN AM. DIGIT. ARCHIVE, <https://www.saada.org/item/20111215-549> [<https://perma.cc/6H2A-ET7T>]. For more on xenophobic sentiments against early twentieth century immigrants from the Indian subcontinent, see *Workingmen Drive Out the Hated Hindoo*, S.F. CHRON., Sept. 6, 1907, at 1, which reports a vicious attack against a group of Asian Indian immigrants; and Harpalani, *supra* note 62, at 157. These immigrants from British India were called “Hindoos” even though many of them were Sikh. *Id.*

<sup>80</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58, 61 (1882) (repealed 1943) (prohibiting “Chinese laborers,” defined as “both skilled and unskilled laborers and Chinese employed in mining,” from entering or remaining in the United States).

<sup>81</sup> See Harold S. Jacoby, *U.S. Strategies of Asian Indian Immigration Restriction 1882-1917*, in FROM INDIA TO AMERICA: A BRIEF HISTORY OF IMMIGRATION; PROBLEMS OF DISCRIMINATION; ADMISSION AND ASSIMILATION 35, 36 (Sripati Chandrasekhar ed., 1982).

<sup>82</sup> See S. Chandrasekhar, *A History of United States Legislation with Respect to Immigration from India*, in FROM INDIA TO AMERICA: A BRIEF HISTORY OF IMMIGRATION; PROBLEMS OF DISCRIMINATION; ADMISSION AND ASSIMILATION 11, 17-18 (Sripati

physical and health reasons; those who were Muslim also faced exclusion because of charges of polygamy.<sup>83</sup> The Immigration Act of 1917 created the “Pacific Barred Zone,” which excluded immigrants from much of the rest of Asia.<sup>84</sup> Those Asian Americans who were already in the United States could not become naturalized citizens—a privilege that was limited to free, White persons.<sup>85</sup> They were also oppressed in other ways, such as the internment of Japanese Americans during World War II.<sup>86</sup>

Even after immigration from Asian countries reopened, xenophobia against Asian Americans was readily apparent in other realms of American society. “Japan bashing” emerged as Americans perceived that U.S. businesses were losing a “competitive edge” to Japanese corporations in the automotive and technology industries, among other areas.<sup>87</sup> Asian Americans were perceived as more loyal to their ancestral nations than to the United States, a central theme in the well-known spying case of Chinese American scientist Wen Ho Lee.<sup>88</sup> Anti-Asian American sentiment has also escalated to violence. Two incidents that received significant attention were the 1982 murder of Chinese American Vincent Chin in Detroit, Michigan,<sup>89</sup> and the 1987 murder of Asian Indian American Navroze Mody in Jersey City, New Jersey.<sup>90</sup>

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Chandrasekhar ed., 1982) (recounting informal diplomatic agreement in “which the Japanese government undertook to prevent laborers from leaving for the United States in return for the assurance that American law would not stigmatize the Mikado’s subjects as inferiors”); Jacoby, *supra* note 81, at 35-36 (noting that exclusion of Japanese immigrants “was accomplished by executive action, rather than by legislation”).

<sup>83</sup> Jacoby, *supra* note 81, at 37 (noting that after pre-embarkation physical examinations were initiated in Asian ports, rejections for health reasons dropped significantly, and people who followed Islam were vulnerable to charge of “believing in the practice of polygamy,” but most frequent reason for exclusion was “likely to become a public charge”).

<sup>84</sup> See Harpalani, *supra* note 62, at 125.

<sup>85</sup> Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795) (providing citizenship opportunities for any “free white person” residing in United States for two years). For an analysis of litigation over the meaning of “white” under this Act, see generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

<sup>86</sup> See *Korematsu v. United States*, 323 U.S. 214, 247 (1944) (upholding internment of Japanese Americans during World War II).

<sup>87</sup> TAKAGI, *supra* note 1, at 61 (“The emergence of a phenomenon known as ‘Japan bashing’ in the late 1980s only reinforced popular anxiety that American corporations and schools were losing their competitive edge against Japan.”).

<sup>88</sup> See Gotanda, *supra* note 19, at 1689-94 (asserting that charges against Lee were based on racial profiling because FBI had no actual evidence of espionage).

<sup>89</sup> See Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, HISTORY.COM (May 5, 2020), <https://www.history.com/news/vincent-chin-murder-asian-american-rights> [<https://perma.cc/6CMX-Y3XC>] (describing murder of Chin after two White men mistook him to be Japanese).

<sup>90</sup> See Deborah N. Misir, *The Murder of Navroze Mody: Race, Violence, and the Search for Order*, 22 AMERASIA J. 55, 55 (1996) (describing murder of Navroze Mody). “Dotbuster” references the bindi, a red dot worn on the forehead by many South Asian women (and some men) as a sign of marital fidelity. *Id.* at 56.

Hate and bias crimes against Asian Americans increased dramatically in 2020, as the COVID-19 pandemic took hold. Perpetrators of these crimes blamed China for the pandemic and targeted anyone who looked Chinese to them.<sup>91</sup> Stop AAPI Hate, an organization that combats anti-Asian American hate incidents, reported 9,081 such incidents in the United States from March 19, 2020, to June 30, 2021.<sup>92</sup> In particular, the March 2021 killing of six Asian American women at Atlanta massage parlors brought national attention to violence against Asian Americans.<sup>93</sup>

The perpetual foreigner stereotype also extends to normal, everyday experiences. Many Asian Americans find that others are often surprised when they speak English well.<sup>94</sup> Recent Asian immigrants and second-generation Asian Americans who are born and raised in the United States are often lumped together, not only with each other, but also with people living in Asian countries. People tend to assume that all of these groups have the same experiences and perspectives. While there can be similarities, the failure to distinguish between these groups obscures the important differences between people who have always lived in Asian countries, recent immigrants to the United States, and Asian Americans who were born in the United States. Second-generation Asian Americans come of age in different cultural environments than natives of Asian countries or immigrants from those nations who come to the United States as adults.<sup>95</sup> Generational conflicts over career choice, dating, and other issues are defining aspects of Asian American families which include both adult immigrants and second generation children.<sup>96</sup> These conflicts reflect different

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<sup>91</sup> AGGIE J. YELLOW HORSE, RUSSELL JEONG, RICHARD LIM, BOAZ TANG, MEGAN IM, LAURYN HIGASHIYAMA, LAYLA SCHWENG & MIKAYLA CHEN, STOP AAPI HATE NATIONAL REPORT 3/19/20 - 6/30/21, at 8 (2021), <https://stopaapihate.org/wp-content/uploads/2021/08/Stop-AAPI-Hate-National-Report-Final.pdf> [<https://perma.cc/C3LH-G6MD>] (noting 1,967 incidents of reported “[s]capegoating of China” for COVID-19 pandemic).

<sup>92</sup> *Id.* at 1.

<sup>93</sup> See Jiayang Fan, *The Atlanta Shooting and the Dehumanizing of Asian Women*, NEW YORKER (Mar. 19, 2021), <https://www.newyorker.com/news/daily-comment/the-atlanta-shooting-and-the-dehumanizing-of-asian-women> (“A senseless massacre can be painfully clarifying about the state of a country. . . . To live through this period as an Asian-American is to feel defenseless against a virus as well as a virulent strain of scapegoating.”).

<sup>94</sup> See, e.g., Vanessa Hua, *‘Your English Is So Good!’ — Pop Culture Stereotypes Asians*, S.F. CHRON. (June 21, 2018, 1:17 PM), <https://www.sfchronicle.com/entertainment/article/Your-English-is-so-good-pop-culture-13014590.php> (observing that “an Asian face must mean an Asian accent,” according to portrayals of Asian Americans in pop culture).

<sup>95</sup> See *Immigrant vs. Second-Generation: Difference in Asian-American Experience*, DYSKE (Dec. 12, 2017), <https://dyske.com/paper/1258> [<https://perma.cc/LWR9-5BP4>] (highlighting differences in experiences and attitudes of Asian immigrants and first-generation Asian Americans).

<sup>96</sup> See BANDANA PURKAYASTHA, NEGOTIATING ETHNICITY: SECOND-GENERATION SOUTH ASIAN AMERICANS TRAVERSE A TRANSNATIONAL WORLD 95-110 (2005) (discussing construction of ethno-religious communities and gender regimes in selection of life partners).

outlooks and experiences. And all of these differences are neglected when Asian Americans are viewed as perpetual foreigners.

Physical attributes are also associated with the perpetual foreigner stereotype. Epicanthic folds, or single eyelids,<sup>97</sup> mark many Asian Americans as foreign, similar to the way that dark skin has come to stereotypically signal criminality. Research on implicit biases<sup>98</sup> shows that Americans are more likely to perceive people with single eyelids as foreigners.<sup>99</sup> But not all subgroups of Asian

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<sup>97</sup> See Daniel Nelson, *What Are Monolid Eyes: Epicanthic Fold*, SCI. TRENDS (Dec. 5, 2018), <https://sciencetrends.com/what-are-monolid-eyes-epicanthic-fold/> [<https://perma.cc/2NBT-UCN3>]. There is no consensus on how to describe this eyelid shape. The term “almond-shape” is used by some, but others consider it to be offensive. See generally Kat Chow, *Why Do We Describe Asian Eyes as ‘Almond-Shaped’?*, NPR (Sept. 16, 2013, 11:52 AM), <https://www.npr.org/sections/codeswitch/2013/09/16/219402847/-almond-shaped-eyes-remarkably-exotic-yet-too-foreign/> [<https://perma.cc/4XHV-3Y3Y>] (discussing origins of term “almond-shape” and calling for better way to describe “Asian eyes”). Besides eyes, other facial features such as nose shape may evoke the stereotype of foreignness. Nevertheless, eyes are more closely linked to foreignness because of derogatory terms such as “slanted eyes,” along with the prominence of eye contact as a facet of human interaction. See *id.*; see also Hironori Akechi, Atsushi Senju, Helen Uibo, Yukiko Kikuchi, Toshikazu Hasegawa & Jari K. Hietanen, *Attention to Eye Contact in the West and East: Autonomic Responses and Evaluative Ratings*, PLOS ONE, Mar. 2013, at 1 (describing importance of eye contact and effect of cultural norms, and more specifically East Asian norms, on perception of eye contact).

<sup>98</sup> “[I]mplicit bias refers to . . . attitudes or stereotypes that affect . . . understanding, actions, and decisions in an unconscious manner.” *Understanding Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> [<https://perma.cc/M9WN-CVXL>] (last visited Jan. 18, 2022). See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (revealing hidden biases and promoting awareness so that people may better align their behaviors with their beliefs). For a critique of implicit bias research, see Frederick L. Oswald, Gregory Mitchell, Hart Blanton & James Jaccard, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCH. 171, 171 (2013), which criticizes the Implicit Association Tests as “poor predictors of every criterion category other than brain activity.”

<sup>99</sup> See BANAJI & GREENWALD, *supra* note 98, at 109 (“[A]n [Implicit Association Test] measure of an *Asian* = *foreign* stereotype . . . used images of students’ faces to represent the groups *Asian* and *White*, making it clear that both the Asians and Whites were born and raised in the United States, and measured associations to symbols that represented *American* and *foreign*, using pictures of monuments, currencies, and maps. The results . . . showed that both White and Asian American respondents were more adept at associating White Americans than Asian Americans with American symbols such as a dollar bill or a map of the United States.”). Ironically, if Asian Americans are perceived as overweight or gay—traits that are often stigmatized in the United States—they are perceived as more American. See Handron et al., *supra* note 34, at 1224 (noting that “[d]espite the stigma commonly associated with being overweight,” being overweight has a profound effect on Asian individuals being viewed as more American (citation omitted)); Semrow et al., *supra* note 34, at 341 (“Although being gay is associated with negative stereotypes and discrimination . . . it may also offer a modicum of protection against race-based foreignness stereotypes for Asian Americans.”)

Americans commonly possess single eyelids: these are most common among East Asian Americans (descended from China, Japan, Korea, Mongolia, or Taiwan) and Southeast Asian Americans (descended from Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Timor-Leste, Thailand, or Vietnam).<sup>100</sup> And single eyelids are not the only stereotypical markers of foreignness. While South Asian Americans (descended from the Indian subcontinent)<sup>101</sup> and Arab and Middle Eastern Americans are less likely to have single eyelids, they are nevertheless also marked as foreigners via other signals. Both of these groups have been targets of anti-Muslim hate and bias crimes, which grew in prominence and frequency after the attacks of September 11, 2001.<sup>102</sup> Beards and turbans stereotypically associated with Islam have become signals of foreign terrorists, even for those who are not Muslim.<sup>103</sup> Sikh Americans, particularly males, are often mistaken for Muslim because they grow long beards and wear turbans.<sup>104</sup> Even South Asian Americans without beards

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(citation omitted)). Although those traits are not held in high esteem, they are stereotypically associated with the United States more than with Asian countries. *Id.*

<sup>100</sup> See Chung-Sheng Lai, Ching-Hung Lai, Yi-Chia Wu, Kao-Ping Chang, Su-Shin Lee & Sin-Daw Lin, *Medial Epicanthoplasty Based on Anatomic Variations*, 65 J. PLASTIC RECONSTRUCTIVE & AESTHETIC SURGERY 1182, 1182 (2012) (reporting that medial epicanthus occurs in an estimated 50% of “general Asian population”). For a discussion of the differentiation between East Asian and Southeast Asian countries, see, for example, Isabelle Khoo, *The Difference Between East Asians and South Asians Is Pretty Simple*, HUFFPOST CAN. (May 30, 2017, 3:22 AM), [https://www.huffingtonpost.ca/2017/05/30/difference-between-east-asians-and-southasians\\_n\\_16872338.html](https://www.huffingtonpost.ca/2017/05/30/difference-between-east-asians-and-southasians_n_16872338.html) [<https://perma.cc/79NH-ZYEJ>].

<sup>101</sup> See Harpalani, *supra* note 62, at 90-91 (discussing countries that are part of South Asia and demographics of South Asian diaspora).

<sup>102</sup> See *id.* at 83 (“Such racial ambiguity—the changing racial characterization of a person or group, depending on the local and historical context—is an important part of the experience of South Asians in the United States.”). See generally Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL’Y & L. 411 (2010) (analyzing post-9/11 responses to Arabs, Muslims, and South Asians and formation of new racial identity). Professor Chen frames the joint targeting of Arab and South Asian Americans as “alienation”—emphasizing the perpetual foreigner as manifested in the law of citizenship. See *id.* at 420-22.

<sup>103</sup> See PRASHAD, UNCLE SWAMI, *supra* note 27, at 8 (noting that Muslim terrorist stereotypes include characteristics such as “olive skin, turbans, head scarves, [and] facial hair”).

<sup>104</sup> See, e.g., Shaun Tandon, *Year After Massacre, Threat Persists for US Sikhs*, YAHOO! NEWS SING. (Aug. 2, 2013), <https://sg.news.yahoo.com/massacre-threat-persists-us-sikhs-142547547.html> [<https://perma.cc/Z2Q9-Y978>] (“Sikh men are easily visible as their faith, founded five centuries ago in South Asia, requires them to wear turbans and keep beards. Anti-Sikh violence spiked following the September 11, 2001 attacks as some assailants appeared to incorrectly link Sikhs with radical Islam.”).

or turbans are sometimes confused with people from the Middle East, based on similar hair color, eye color, and skin tones.<sup>105</sup>

All of these occurrences are manifestations of the perpetual foreigner stereotype, as Asian Americans descended from various regions remain associated with those regions via superficial but identifiable markers. In the discourse on university admissions, East Asian Americans—and especially Chinese Americans—have usually been at the forefront, but South Asian Americans and Southeast Asian Americans are also marked by the model minority and perpetual foreigner stereotypes. These stereotypes also come together and create a more specific trope that permeates discourse on elite admissions: peril of the mind.<sup>106</sup>

### C. *Peril of the Mind*

Although Asian Americans can be exalted by the model minority stereotype, they are also viewed as a foreign, invading threat because of it. Peril of the mind is the notion that Asian Americans threaten White dominance precisely because of their high academic achievement. It derives from “Yellow Peril” and “Dusky Peril”—the aforementioned xenophobic epithets levied at early twentieth century Asian American and South Asian American immigrant laborers.<sup>107</sup> Due to their educational and occupational success, Asian Americans have often been “seen as too competent, too ambitious, [and] too hardworking.”<sup>108</sup>

Professor Vijay Prashad coined the term “peril of the mind,” citing Professor Gary Okihiro for articulating the concept: “In Gary Okihiro’s useful account, the Asian presence in the United States is treated as . . . a peril of the mind . . . [, which] refers to the fact of Asian success . . . . That is . . . something unacceptable . . . to nativism.”<sup>109</sup> Professor Okihiro further notes that:

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<sup>105</sup> See Harpalani, *supra* note 62, at 82-83 (relaying author’s experience of being mislabeled as “Arab or Middle Eastern”). For more discussion of Islamophobia in this context, see KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 92-95 (2019), which recounts the murder of Sikh American Balbir Singh Sodhi, who was assumed to be Muslim and killed in an Islamophobic attack on September 15, 2001.

<sup>106</sup> See text accompanying *supra* note 43.

<sup>107</sup> See *supra* notes 78-79 and accompanying text.

<sup>108</sup> Susan T. Fiske, Amy J.C. Cuddy, Peter Glick & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow From Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCH. 878, 880 (2002) (citing various studies which have found that Asian Americans are viewed as too competent and competitive and “not sociable”); Monica H. Lin, Virginia S. Y. Kwan, Anna Cheung & Susan T. Fiske, *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCH. BULL. 34, 44 (2005) (“[Asian Americans are] targets of resentful, envious prejudice: grudgingly respected for their presumed competence but disliked for their alleged lack of sociability.”).

<sup>109</sup> See PRASHAD, KARMA, *supra* note 27, at 107 (citing OKIHIRO, *supra* note 26, at 141-47).

[T]he model minority fortifies white dominance, or the status quo, but it also poses a challenge to the relationship of majority over minority. The very indices of Asian American “success” can imperil the good order of race relations . . . Asians can work too hard, study overmuch, . . . and thereby . . . “flood” our schools and displace students . . . .<sup>110</sup>

Over the past three decades, the view of Asian Americans as a peril of the mind has been inscreasingly visible in elementary and secondary schooling, where White Americans often move away from school districts once the percentage of Asian American students reaches a certain point. In 2005, the *Wall Street Journal* reported this “New White Flight” in the Silicon Valley suburbs of California.<sup>111</sup> The percentage of White students dropped significantly at both Lynbrook High School and Monte Vista High School.<sup>112</sup> But this White flight was not happening because of any perception that the schools were failing—they were both considered among the top public schools. Rather, White parents were leaving because they thought the schools were *too Asian*—too academically competitive due to the influx of Asian American students.<sup>113</sup> Similarly, in Johns Creek, Georgia, an affluent suburb of Atlanta, the population of White students in local public schools dropped by more than half since the mid-2000s.<sup>114</sup> White parents have given the following explanations for leaving: “Asian parents take their kids for extra tutoring. It’s not fair for the ‘regular’ kids,” and, “The high school is too competitive. My kids won’t get into a good

<sup>110</sup> OKIHIRO, *supra* note 26, at 141.

<sup>111</sup> Suein Hwang, *The New White Flight*, WALL ST. J., Nov. 19, 2005, at A1 (reporting on decline of White students in schools with larger populations of Asian American students due to stereotypes about Asian American students’ academic success).

<sup>112</sup> *Id.* (noting that few students in top classes were White).

<sup>113</sup> *Id.* (reporting that parent left Monte Vista parents’ night with concerns that school focused too heavily on test scores and prestige of colleges that graduates attended).

<sup>114</sup> Anjali Enjeti, *Ghosts of White People Past: Witnessing White Flight from an Asian Ethnoburb*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/ghosts-of-white-people-past-witnessing-white-flight-from-an-asian-ethnoburb> [https://perma.cc/E5JU-BMTM] (“In a decade, the white population at our local elementary school plummets from 397 to 195 white students, or from 55 percent to 23 percent of the total student body.”).

college because of all of the Asians.”<sup>115</sup> Others have also studied and documented the new White flight in various settings.<sup>116</sup>

The view that Asian American students are a peril of the mind has also come into play as their numbers increased at elite universities. Some White students have reacted negatively, complaining that Asian Americans were too competitive and were becoming “damned curve raisers,” an epithet originally used against successful Jewish students in the 1920s and 1930s.<sup>117</sup> This notion has long been in the backdrop of alleged negative action against Asian Americans, including the negative action alleged in the Harvard case.<sup>118</sup>

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<sup>115</sup> *Id.* Accompanying the peril of the mind trope is the stereotype of Asian American “tiger” parents who place enormous pressure on their children to achieve academic success. See generally AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* (2011) (coining term “tiger mother” and describing how Chua’s Chinese heritage influenced her parenting style); Annie Murphy Paul, *Tiger Moms: Is Tough Parenting Really the Answer?*, TIME (Jan. 20, 2011), <http://content.time.com/time/magazine/article/0,9171,2043477,00.html> (describing Chua’s parenting methods and noting American education suffers in comparison to China’s primary and secondary education because “Chinese students work harder, with more focus, for longer hours than American students do”). For a critique of tiger parenting, see Su Yeong Kim, *What Is “Tiger” Parenting? How Does It Affect Children?*, DEVELOPMENTAL PSYCH. (Am. Psych. Ass’n Div. 7, D.C.), Summer 2013, at 26, 28, <https://www.apadivisions.org/division-7/publications/newsletters/developmental/2013/07/issue.pdf> [https://perma.cc/ZS8L-UVUD], which presents evidence that children with tiger parents had lower GPAs than children with supportive parents.

<sup>116</sup> See Deirdre Oakley, *Trespassers? Asian Americans and the Battle for Suburbia*, by Willow S. Lung-Amam, Berkeley, University of California Press, 2017, 41 J. URB. AFFS. 409, 410 (2018) (book review) (“In her interviews, Lung-Amam found that though White flight from the highly demanding [STEM]-focused schools was dominant, some Asian households had grown weary of the cutthroat academic environment as well, opting to send their children to other good but less competitive and stressful schools.”); Ind. Univ., *Research Ties Persistence of ‘White Flight’ to Race, Not Socioeconomic Factors*, EUREKALERT! (Apr. 9, 2018), <https://www.eurekaalert.org/news-releases/711579> [https://perma.cc/5BK8-KD2M] (discussing report that showed White flight occurs once diversity reaches certain point); Jenny Tsai, “Too Many Asians at This School”: Racialized Perceptions and Identity Formation 45 (Mar. 2007) (Bachelor’s thesis, Harvard College), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1082148](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082148) [https://perma.cc/2AQZ-3A7S] (observing that magnet schools were not effective at desegregating school districts and that voluntary desegregation plans with higher percentages of magnet schools increased White flight); Richard Keiser, *Subverting the American Dream*, LE MONDE DIPLOMATIQUE (Sept. 2020), <https://mondediplo.com/2020/09/14usa> (recognizing patterns of White flight in Maryland, New Jersey, and New York). But see Robert W. Fairlie & Alexandra M. Resch, *Is There “White Flight” into Private Schools? Evidence from the National Educational Longitudinal Survey*, 84 REV. ECON. & STAT. 21, 31-32 (2002) (concluding that data suggest White flight from indigent minority groups).

<sup>117</sup> Linda Mathews, *When Being Best Isn’t Good Enough: Why Yat-pang Au Won’t Be Going to Berkeley*, L.A. TIMES, July 19, 1987, at L22 (drawing parallels to quotas imposed on Jewish students in 1920s and 1930s).

<sup>118</sup> See *infra* Section III.B.3 (discussing Princeton Review’s anecdotal advice to Asian American university applicants to avoid mentioning their background); *infra* Section III.B.5 (reviewing SFFA’s argument based on how Harvard pits people of color against each other).

D. *Passive Nerd*

The model minority stereotype has largely depicted Asian Americans as excellent in math, science, and technical subjects. But the flip side of this stereotype is the notion that Asian Americans are passive and lacking in interpersonal skills.<sup>119</sup> They are viewed as high-achieving, hard-working students but also as socially inept “nerds” and “geeks” who are not equipped for leadership positions and other forms of professional advancement. In attempts to counter allegations of discriminatory admissions practices, universities have claimed that Asian American applicants were “flat” and “not well rounded.”<sup>120</sup> In essence, they have contended that the stereotypical model minority—the high-achieving Asian American applicant—is a one-dimensional nerd without social skills or other talents.<sup>121</sup> Many of the studies that have indicated that Asian Americans are viewed as too competitive have also found that they are perceived as “not sociable.”<sup>122</sup>

Sometimes Asian Americans themselves make jocular references that play on the passive nerd stereotype. For example, during the 2020 Democratic presidential primary, Andrew Yang referred to his own campaign “the nerdiest . . . in history!”<sup>123</sup> He also joked, “I am Asian, so I know a lot of doctors,”<sup>124</sup> and he quipped that “[t]he opposite of Donald Trump is an Asian man who likes math.”<sup>125</sup> But voters themselves also saw Yang through a stereotypic lens: some thought that Yang was “too nice” to beat Trump.<sup>126</sup>

<sup>119</sup> Annabel Li, *Perfect but Passive: The Problem with the ‘Model Minority,’* DAILY NEXUS (Mar. 17, 2019), <https://dailynexus.com/2019-03-07/perfect-but-passive-the-problem-with-the-model-minority/> [<https://perma.cc/4HGZ-7N5W>] (decrying notion that Asian Americans are not “engaged, active, or powerful”).

<sup>120</sup> TAKAGI, *supra* note 1, at 57 (noting university officials’ responses to charges of “discriminatory quotas and ceilings against Asian American applicants”).

<sup>121</sup> *Id.* at 58 (“The flip-flop in image from ‘model minority’ to academic nerd was a direct result of broader public arguments about discrimination, diversity, and meritocracy in higher education.”); *see also infra* Sections II.C, III.B.

<sup>122</sup> *See* Fiske et al., *supra* note 108, at 880.

<sup>123</sup> Todd Bishop & Taylor Soper, *In Seattle Visit, Presidential Hopeful Andrew Yang Calls on Amazon to Admit Job Loss from Automation*, GEEKWIRE (May 4, 2019, 10:43 AM), <https://www.geekwire.com/2019/seattle-visit-presidential-candidate-andrew-yang-calls-amazon-admit-job-loss-automation/> [<https://perma.cc/949K-V4FB>].

<sup>124</sup> Li Zhou, *Andrew Yang’s Use of Asian Stereotypes Is Reinforcing Toxic Tropes*, VOX (Sept. 17, 2019, 2:50 PM), <https://www.vox.com/policy-and-politics/2019/9/17/20864861/andrew-yang-debate-asian-stereotype-model-minority-myth>.

<sup>125</sup> *Id.*

<sup>126</sup> *See* Matt Stevens, *Is Andrew Yang ‘Too Nice’ to Beat President Trump?*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/andrew-yang-2020-president.html> (examining connection between perception of Yang as too nice and stereotype of Asian Americans as “reserved and submissive”).

Race and gender also intersect in the manifestation of such stereotypes and discrimination.<sup>127</sup> Professor Grace Kao and actor Peter Shinkoda note that media reinforces stereotypes of Asian Americans generally as “quiet and submissive,” which for Asian American men means that they “are seen as passive, geeky and unattractive.”<sup>128</sup> Consequently, in the public eye, Asian American men become unmasculine and desexualized.<sup>129</sup> Asian American women are also viewed as passive, but rather than being desexualized, they are “ultra-feminine . . . objects of desire,” mainly for White men.<sup>130</sup> These stereotypes received more national attention after the March 2021 killing of six Asian American women in Atlanta massage parlors, where the White male shooter was driven by a racist sexual fetish.<sup>131</sup>

Additionally, foreignness is related to the common stereotypes and portrayals of Asian Americans as awkward, socially inept nerds. The presumption that someone cannot speak English well itself creates expectations of awkward social interactions, unfamiliarity with American social norms, and inability to fit in. Many college undergraduates find social interactions with Asian international student teaching assistants to be awkward and difficult, complaining that these teaching assistants do not speak English very well.<sup>132</sup> This link between

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<sup>127</sup> See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (“[T]he intersectional experience is greater than the sum of racism and sexism . . .”).

<sup>128</sup> Grace Kao & Peter Shinkoda, *Media Bears Responsibility for Reinforcing Asian American Stereotypes*, VARIETY (Apr. 12, 2021, 1:20 PM), <https://variety.com/2021/film/news/media-asian-american-stereotypes-1234949658/> [<https://perma.cc/C8HP-522L>].

<sup>129</sup> See Andrew Kung, *The Desexualization of the Asian American Male*, CNN STYLE (Mar. 3, 2020), <https://www.cnn.com/style/article/andrew-kung-asian-american-men/index.html> [<https://perma.cc/8P8R-4CBQ>] (“Because we have been historically desexualized, there is often an underlying pressure to portray traditional visual cues of masculinity: chiseled jaw lines, elevated cheek bones, [and] sculpted bodies.”); see also DAVID L. ENG, RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA 1 (2001) (discussing how being Asian American and being “masculine” are perceived as antithetical to each other).

<sup>130</sup> Kao & Shinkoda, *supra* note 128; see also Rachel Kuo, *5 Ways ‘Asian Woman Fetishes’ Put Asian Women in Serious Danger*, EVERYDAY FEMINISM (Dec. 25, 2015), <https://everydayfeminism.com/2015/12/asian-woman-fetishes-hurtful/> [<https://perma.cc/XFF6-6SF5>] (“Racial fetishes are about objectification, fetishizing an entire group of people – in this case Asian women, means reducing them down to stereotypes instead of recognizing their full personhood.”).

<sup>131</sup> See Harmeet Kaur, *Fetishized, Sexualized and Marginalized, Asian Women Are Uniquely Vulnerable to Violence*, CNN (Mar. 17, 2021, 8:22 PM), <https://www.cnn.com/2021/03/17/us/asian-women-misogyny-spa-shootings-trnd/index.html> [<https://perma.cc/B9UW-9259>] (“The way their race intersects with their gender makes Asian and Asian American women uniquely vulnerable to violence . . .”).

<sup>132</sup> See Kat Chow, *Study: At ‘Rate My Professors,’ A Foreign Accent Can Hurt A*

foreignness and awkwardness is compounded because current citizens of Asian countries, recent adult Asian immigrants, second-generation, and multi-generational Asian Americans are often lumped together, allowing stereotypes of the former two to transfer to the latter two.

Over the years, numerous media depictions have also linked foreignness and awkwardness. For example, the character Apu Nahasapeemapetilon on *The Simpsons* was, for three decades, the most widely viewed South Asian image in the United States.<sup>133</sup> He had a stereotypical Indian accent and a Ph.D. in computer science—although he worked at a convenience store—and he came across as socially awkward.<sup>134</sup> In 2017, comedian Hari Kondabolu critiqued the stereotyped depiction in his documentary film, *The Problem with Apu*.<sup>135</sup> More recently, in 2021, actor Hank Azaria apologized for being the voice of Apu.<sup>136</sup>

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*Teacher's Score*, NPR (Mar. 5, 2015, 2:24 PM), <https://www.npr.org/sections/codeswitch/2015/03/05/390686619/study-at-rate-my-professor-a-foreign-accent-can-hurt-a-teachers-score> [<https://perma.cc/7X7L-C6TU>] (discussing study that showed teachers with common Chinese or Korean last names got lower ratings on clarity and helpfulness than those with common non-Asian last names on Rate My Professors); see also Nicholas Close Subtirelu, “*She Does Have an Accent But . . .*”: Race and Language Ideology in Students’ Evaluations of Mathematics Instructors on RateMyProfessors.com, 44 LANGUAGE SOC’Y 35, 35 (2015) (“Findings confirm the presence of disadvantages related to ‘Asian’ instructors’ race and language.”).

<sup>133</sup> See Arwa Mahdawi, *From Apu to Master of None: How US Pop Culture Tuned into the South Asian Experience*, GUARDIAN (May 9, 2017, 1:37 PM), <https://www.theguardian.com/tv-and-radio/2017/may/09/from-apu-to-master-of-none-how-us-pop-culture-tuned-into-the-south-asian-experience> (“It is not an exaggeration to say that, for decades, the most famous south Asian in the US was Apu Nahasapeemapetilon, proprietor of the Kwik-E-Mart in *The Simpsons*.”).

<sup>134</sup> See Christian Blauvelt, *The Simpsons’ Apu: ‘A Stereotype Hiding in Plain Sight,’* BBC (Nov. 6, 2017), <https://www.bbc.com/culture/article/20171027-the-simpsons-apu-a-stereotype-hiding-in-plain-sight> [<https://perma.cc/4CEU-QCE9>] (“Apu manages Springfield’s Kwik-E-Mart - an occupation that in itself is a send-up of the perception that many Indian immigrants to the US worked as shop managers - he journeys at one point to the original Kwik-E-Mart in the Himalayas. This despite the fact he has a PhD in computer science . . .”).

<sup>135</sup> *The Problem with Apu* (truTV broadcast Nov. 19, 2017) (detailing harm Apu has done to South Asian actors and comedians); see also Sukhmani Khorana, *The Problem with Apu: Why We Need Better Portrayals of People of Colour on Television*, CONVERSATION, <https://theconversation.com/the-problem-with-apu-why-we-need-better-portrayals-of-people-of-colour-on-television-106707> [<https://perma.cc/Y36E-SLBU>] (last visited Jan. 18, 2022) (“In his 2017 documentary *The Problem with Apu*, Indian-American comedian Hari Kondabolu explored how this prime-time stereotyping has been a source of racial micro-aggressions and slurs, even for *Simpsons’* fans who appreciate the bent rules of comedy.”).

<sup>136</sup> See Bethonie Butler, *Hank Azaria Apologizes for Playing Apu on ‘The Simpsons’ for Three Decades*, WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/arts-entertainment/2021/04/13/hank-azaria-apology-apu-simpsons/> (“Azaria said he continues to make amends for voicing the character. The actor said he has teamed with the anti-racist Soul Focused Group, which offered one of the seminars he took, to help educate others.”).

The idea that Asian Americans are socially awkward, passive, and lacking in leadership skills has played heavily into the discourse on discrimination in elite admissions. And while it has gotten the most attention in the Harvard case, the passive nerd stereotype has pervaded admissions controversies for forty years.<sup>137</sup>

## II. NEGATIVE ACTION AND THE HISTORICAL CONTEXT FOR *SFFA V. HARVARD*

Allegations of negative action have existed ever since Asian Americans became a significant, visible presence on elite campuses. This Part briefly elaborates on the distinction between affirmative action and negative action. It then gives the historical context of the Harvard case, focusing on the major controversies involving negative action during the past four decades, and highlighting stereotypes of Asian American applicants when relevant.

### A. *Disentangling Affirmative Action and Negative Action*

The distinction between affirmative action and negative action is key for understanding the role of Asian Americans in elite admissions controversies.<sup>138</sup> Throughout the Harvard case, SFFA has conflated the two in order to link them together, pitting Asian Americans against other groups of people of color. But affirmative action and negative action are different concepts and should be treated as separate phenomena, even if they occur at the same time and place.

#### 1. Affirmative Action

Broadly speaking, the term “affirmative action” refers to a range of policies that involve “an active effort to improve the employment or educational opportunities of members of minority groups and women[.]”<sup>139</sup> In common

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<sup>137</sup> See *infra* Sections II.B, III.B.2-4.

<sup>138</sup> See William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 606 (2006) (“[I]nattention to the distinction between negative action and affirmative action effectively marginalizes [Asian Americans] and contributes to a skewed and divisive public discourse about affirmative action . . .”).

<sup>139</sup> *Affirmative Action*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/affirmative%20action> [<https://perma.cc/UH57-V9MY>] (last visited Jan. 18, 2022). In addition to promoting diversity, affirmative action can aim to “eliminate existing and continuing discrimination, to redress lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.” *Affirmative Action*, BLACK’S LAW DICTIONARY (11th ed. 2019). The origins of the term “affirmative action” predate race-conscious university admissions and even race-conscious policies. The National Labor Relations Act of 1935 states that employers found engaging in unfair labor practices would be required “to take such affirmative action including reinstatement of employees with or without backpay.” 29 U.S.C. § 160(c). In 1961, President John F. Kennedy issued Executive Order 10925, which required government contractors to “take affirmative action, to ensure that . . . employees are treated during employment, without regard to their race,

parlance, however, “affirmative action” is often used in a narrower sense to refer specifically to race-conscious university admissions policies. This Article uses the term in that narrower sense. Most elite universities use affirmative action and acknowledge that they consider race as a factor in admissions for the purpose of having racially diverse student bodies. The use of race-conscious admissions primarily works to boost the enrollment of underrepresented minority groups—particularly Black, Latina/o, and Native American students.

The U.S. Supreme Court established the legal framework for affirmative action through its decisions in *Regents of the University of California v. Bakke*,<sup>140</sup> *Gratz v. Bollinger*,<sup>141</sup> *Grutter v. Bollinger*,<sup>142</sup> and *Fisher v. University of Texas at Austin (Fisher I)*<sup>143</sup> and *Fisher v. University of Texas at Austin (Fisher II)*.<sup>144</sup> Under this framework, universities have a compelling interest in attaining the educational benefits of diversity and can consider race as an admissions factor to do so.<sup>145</sup> In *Bakke*, the U.S. Supreme Court outlawed racial quotas in admissions, but Justice Lewis Powell’s opinion intimated that universities had a compelling interest in pursuing educational benefits of

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creed, color, or national origin.” Exec. Order No. 10925, 3 C.F.R. § 86 (1961). President Lyndon Johnson’s 1965 commencement address is frequently cited for laying out the concept of affirmative action. See Pamela Kirkland, *For Howard Grads, LBJ’s ‘To Fulfill These Rights’ Remarks Are Still Relevant Half a Century Later*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/04/for-howard-grads-lbjs-to-fulfill-these-rights-remarks-are-still-relevant-half-a-century-later/> (“The ‘To Fulfill These Rights’ speech is widely known as the intellectual framework for affirmative action.”). In this speech, President Johnson stated that “[w]e seek . . . not just equality as a right and a theory but equality as a fact and equality as a result.” President Lyndon Johnson, Commencement Address at Howard University (June 4, 1965), in JOHN R. BURCH, JR., *THE GREAT SOCIETY AND THE WAR ON POVERTY: AN ECONOMIC LEGACY IN ESSAYS AND DOCUMENTS* 328, 330 (2017).

<sup>140</sup> 438 U.S. 265 (1978).

<sup>141</sup> 539 U.S. 244 (2003).

<sup>142</sup> 539 U.S. 306 (2003).

<sup>143</sup> 570 U.S. 297 (2013).

<sup>144</sup> 136 S. Ct. 2198 (2016).

<sup>145</sup> *Grutter*, 539 U.S. at 325 (“[The Court] endorse[s] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). For critiques of diversity as a compelling interest, see generally Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003), which argues that affirmative action harms minorities by allowing policy makers to ignore the root causes of inequality; and Osamudia James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 426 (2014), which contends, “the diversity rationale does not promote progressive thinking about race and identity. Rather, it perpetuates an old story—a story about using black and brown bodies for white purposes on white terms . . . .”

diversity<sup>146</sup> and could use race as a “plus” factor to do so.<sup>147</sup> Twenty-five years later, in *Grutter*, Justice Sandra Day O’Connor’s majority opinion brought five votes to Justice Powell’s view that the educational benefits of diversity are a compelling interest. *Grutter* upheld the University of Michigan Law School’s holistic admissions policy, which assessed race flexibly, as one factor of many in each individual’s application.<sup>148</sup> As part of narrow tailoring, *Grutter* also included other limitations on race-conscious admissions policies: they could not use race to “unduly harm” any racial group,<sup>149</sup> they had to be time-limited,<sup>150</sup> and, when possible, universities should use race-neutral alternatives to achieve a diverse class.<sup>151</sup> In *Gratz*, which the Court decided at the same time as *Grutter*, the Court ruled that the University of Michigan undergraduate admissions policy was unconstitutional because it awarded a fixed number of points to all underrepresented minority applicants without flexibility or individualized review.<sup>152</sup>

*Grutter* and *Gratz* laid out the basic framework for narrow tailoring of race-conscious admissions policies.<sup>153</sup> In 2013, *Fisher I* reiterated those narrow tailoring standards and held that while universities receive judicial deference in defining diversity as part of their educational missions, they receive no deference when courts review narrow tailoring.<sup>154</sup> *Fisher II* upheld UT Austin’s race-

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<sup>146</sup> *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.) (“[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”).

<sup>147</sup> *Id.* at 317 (“[R]ace or ethnic background may be deemed a ‘plus’ in a particular applicant’s file . . .”).

<sup>148</sup> *See Grutter*, 539 U.S. at 337 (“[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. . . . Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.” (citing 539 U.S. 244 (2003))).

<sup>149</sup> *Id.* at 341 (“Narrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group.”).

<sup>150</sup> *Id.* at 342 (“[R]ace-conscious admissions programs . . . must have a logical end point.”).

<sup>151</sup> *Id.* at 339 (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

<sup>152</sup> *See Gratz*, 539 at 270 (“We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”).

<sup>153</sup> For a broad critique of this framework, see generally Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272 (2015).

<sup>154</sup> *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 311 (2013) (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”).

conscious admissions policies but admonished universities to provide ample evidence that such policies are necessary to attain the educational benefits of diversity and that no workable race-neutral alternatives can achieve those benefits.<sup>155</sup> The Harvard case and other cases brought by SFFA are being reviewed under the framework established by *Bakke*, *Grutter*, *Gratz*, and *Fisher I* and *II*.<sup>156</sup>

## 2. Negative Action

In contrast to affirmative action, negative action—a term coined by Professor Jerry Kang—refers to policies or practices which disadvantage Asian Americans in elite school admissions in comparison specifically to White Americans.<sup>157</sup> Professor Kang underscores that the preference for White applicants must be based on race:

In analyzing whether negative action is in force, it is critical to keep every characteristic of the applicant constant except for race. Therefore, if a socioeconomically disadvantaged White were admitted in favor of a wealthy, privileged Asian American, this does not necessarily indicate that negative action is in effect. It may well be that the poor White was preferred not because of race but because of class.<sup>158</sup>

The idea of negative action derives from the insidious practice of many elite American universities in the early- and mid-twentieth century to limit their enrollment of Jewish students.<sup>159</sup> Although universities generally have denied that they engage in negative action against Asian Americans, there have been many allegations of its occurrence, dating back well before the Harvard case.<sup>160</sup>

This Article examines not only negative action in elite admissions itself, but also the social, historical, and political context for allegations of negative action. These are key for understanding how Asian Americans view elite admissions.

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<sup>155</sup> *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (“[Narrow tailoring] does impose ‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’” (citing *Fisher I*, 570 U.S. at 311)).

<sup>156</sup> SFFA argues that Harvard’s admissions policy violates the Court’s framework for race-conscious admissions policies and, in the alternative, that this framework should be overturned. See Complaint, *supra* note 6, para. 494 (“The Supreme Court’s decisions holding that there is a compelling government interest in using race as a factor in admissions decisions in pursuit of ‘diversity’ should be overruled.”).

<sup>157</sup> Kang, *supra* note 20, at 3 (“In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had that person been White. To be clear, Whites, not any other race, are used as the baseline.” (footnotes omitted)).

<sup>158</sup> *Id.* at 3 n.8.

<sup>159</sup> *Id.* at 40 (noting that “[n]egative action, which forces Asian Americans out to let Whites in” parallels “the precedent of negative action programs instituted against Jewish students in the 1920s and 1930s in elite institutions such as Harvard College”).

<sup>160</sup> See *infra* Section II.B.

Generally, negative action has referred to intentional discrimination against Asian Americans in admissions. There is also the possibility that implicit biases work to disadvantage Asian Americans in the admissions process.<sup>161</sup> Although implicit bias is not legally actionable under the Equal Protection Clause,<sup>162</sup> it directly reflects racial ideologies and stereotypes that are key to understanding Asian Americans' position in the U.S. racial landscape and in understanding Asian Americans' views of elite college admissions. Asian Americans are numerically well represented at elite institutions, but the history and politics surrounding negative action can still be invoked in various ways. SFFA has employed such invocations in the Harvard case to augment Asian Americans' perceptions that elite universities are engaging in negative action.<sup>163</sup> In this light, universities should take concerns about discrimination against Asian Americans seriously, and they should also take care to separate allegations of negative action from affirmative action.

This Article contends that even if the effect of negative action on enrollment of Asian Americans is small, the perception that it occurs threatens to divide people of color. It argues not only that universities and advocates for racial equity should defend affirmative action, but that they should proactively combat stereotypes of Asian Americans—including those that may influence elite university admissions. Many Asian Americans support affirmative action,<sup>164</sup> at least nominally, if not strongly, but they also believe that favoring White applicants over them is unfair and unjustified.<sup>165</sup> Failure to address negative action or even the perception of negative action will have negative consequences for relations between Asian Americans and other people of color.

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<sup>161</sup> See *infra* Section III.C.1 (describing district court proceedings); *supra* note 98 (defining implicit bias).

<sup>162</sup> See *Washington v. Davis*, 426 U.S. 229, 240-42 (1976) (holding that equal protection applies only to intentional discrimination). Some scholars and activists have argued that implicit bias should be recognized in equal protection doctrine and antidiscrimination law more generally. See, e.g., Alyson Grine & Emily Coward, *Recognizing Implicit Bias Within the Equal Protection Framework*, TRIAL BRIEFS, Apr. 2017, at 26, 27 (“As one advocate observed, ‘equal protection jurisprudence has failed to keep pace with the way discrimination is now practiced and experienced in contemporary society.’” (quoting Reggie Shuford, *Reclaiming the 14th Amendment*, DAILY J., Feb. 3, 2011)). For example, one proposal has called for presumptions of motive based on statistical evidence. *Id.* at 27-28. Employment discrimination claims under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, use such frameworks. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (describing disparate impact liability based on statistical disparity); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977) (describing pattern-or-practice liability).

<sup>163</sup> See *infra* Section III.B.

<sup>164</sup> See *infra* note 513 and accompanying text.

<sup>165</sup> See, e.g., *2018 Asian American Voter Survey (AAVS)*, AAPI DATA (Oct. 9, 2018), <https://aapidata.com/2018-survey/> [<https://perma.cc/5W7Q-A2PN>].

### 3. Students for Fair Admissions

Opponents of affirmative action have long tried to link affirmative action and negative action.<sup>166</sup> But the Harvard case is the first major litigation that has made this link the centerpiece of its attack on race-conscious university admissions.<sup>167</sup> The plaintiffs in the Harvard case are represented by SFFA, an anti-affirmative action organization whose members include “more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”<sup>168</sup> These plaintiffs are anonymous; however, at least one of them is an Asian American applicant who was rejected from Harvard in 2014, despite being valedictorian of his high school and having a perfect score on the ACT, among many other academic and extracurricular accomplishments.<sup>169</sup> SFFA’s membership also includes Asian American high school students who intend to apply to Harvard,<sup>170</sup> along with parents of such students.<sup>171</sup>

SFFA’s president is Edward Blum,<sup>172</sup> an activist who organized the *Fisher* litigation and is well-known for his long standing opposition to race-conscious policies.<sup>173</sup> The organization has brought several lawsuits challenging race-

<sup>166</sup> See *infra* Section II.C. This Article treats conservatives as opponents of affirmative action, which is the conventional view. Nevertheless, there are conservative arguments in favor of affirmative action. See generally, e.g., Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683 (2004).

<sup>167</sup> In the 1990s, there was a challenge by Asian American plaintiffs to the admissions process at Lowell High School and other selective high schools in San Francisco. See *Ho v. S.F. Unified Sch. Dist.*, 965 F. Supp. 1316, 1318-19 (N.D. Cal. 1997). For more details on this challenge, see *infra* notes 236-43 and accompanying text.

<sup>168</sup> See STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/> [https://perma.cc/EUA4-UNYV] (last visited Jan. 18, 2022).

<sup>169</sup> Complaint, *supra* note 6, paras. 15-21.

<sup>170</sup> *Id.* para. 25.

<sup>171</sup> *Id.* para. 27.

<sup>172</sup> *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> [https://perma.cc/9YYN-T7B3] (last visited Jan. 18, 2022).

<sup>173</sup> See Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU BLOG (Oct. 18, 2018, 3:00 PM), <https://www.aclu.org/blog/racial-justice/affirmative-action/meet-edward-blum-man-who-wants-kill-affirmative-action-higher> [https://perma.cc/Z653-AS3J] (describing Blum’s history of anti-affirmative action legal actions).

conscious admissions policies at various universities, including Harvard, UNC Chapel Hill,<sup>174</sup> Yale,<sup>175</sup> and UT Austin.<sup>176</sup>

The lawsuits against Harvard<sup>177</sup> and Yale<sup>178</sup> both focus on linking negative action and affirmative action. The Harvard case is much further along and has gotten the most attention, and the U.S. Supreme Court granted certiorari for it and the UNC Chapel Hill case on January 24, 2022.<sup>179</sup> But while allegations of negative action against Asian Americans are now gaining much public attention, they did not begin with SFFA. Negative action has a long history that is intertwined with affirmative action—dating back forty years.

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<sup>174</sup> UNC Chapel Hill prevailed at the district court in its case; Judge Loretta Biggs wrote a detailed 155-page slip opinion. *See* *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954, at 153 (M.D.N.C. Oct. 18, 2021) (holding that UNC Chapel Hill's race-conscious admissions policy does not violate Equal Protection Clause or Title VI of Civil Rights Act of 1964), *cert. granted and consolidated*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.). SFFA has petitioned the U.S. Supreme Court to bypass the U.S. Court of Appeals for the Fourth Circuit, and the Supreme Court will hear the Harvard and UNC Chapel Hill cases together. *Id.*; *see also* Vivi E. Lu & Dekyi T. Tsotsong, *SFFA Petitions Supreme Court to Hear Harvard and UNC Cases Together*, HARV. CRIMSON (Nov. 16, 2021), <https://www.thecrimson.com/article/2021/11/16/sffa-petition-combine-cases/> [<https://perma.cc/3GCH-2JR6>].

<sup>175</sup> Complaint at 1, *Students for Fair Admissions, Inc. v. Yale Univ.*, No. 3:21-cv-00241 (D. Conn. Feb. 25, 2021), ECF No. 1. SFFA also filed a challenge against Yale University after the Biden Administration's Justice Department dropped its investigation of Yale and SFFA's motion to intervene was denied. Amelia Davidson, *Students for Fair Admissions Sues Yale, Petitions to Escalate Harvard Case to Supreme Court*, YALE DAILY NEWS (Feb. 25, 2021, 11:58 PM), <https://yaledailynews.com/blog/2021/02/25/students-for-fair-admissions-sues-yale-petitions-to-escalate-harvard-case-to-supreme-court/> [<https://perma.cc/964J-B57C>].

<sup>176</sup> The University of Texas lawsuit was recently dismissed on res judicata grounds. *See* Audrey Anderson, *Case Challenging Race-Conscious Admissions at the University of Texas Is Dismissed*, JD SUPRA (July 28, 2021), <https://www.jdsupra.com/legalnews/case-challenging-race-conscious-2029521/> [<https://perma.cc/QXV9-WVG7>] (“The court invoked the doctrine of *res judicata* in holding that the case was barred by the previous case of *Fisher v. University of Texas*, in which the U.S. Supreme Court upheld the university's use of race as furthering the university's compelling interest in the benefits of diverse student enrollments carried out in a narrowly tailored way.”).

<sup>177</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 198-206 (D. Mass. 2019) (holding that statistical evidence was inadequate to show Harvard intentionally discriminated against Asian American applicants), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

<sup>178</sup> Complaint, *supra* note 175, at 1 (“Plaintiff . . . brings this action to obtain . . . declaratory and injunctive relief to remedy Yale University's racial discrimination in its administration of its undergraduate admissions program.”).

<sup>179</sup> *SFFA*, 2022 WL 199375.

B. *Allegations of Negative Action in the 1980s*

By the late 1970s and early 1980s, large numbers of Asian Americans began enrolling at elite universities,<sup>180</sup> just as these universities started to emphasize diversity in the wake of the *Bakke* decision. Asian Americans were seen as foreigners on campuses, and there was a backlash to their growing presence. Professor Dana Takagi discusses how resentful White students labeled various campuses having significant Asian American student populations with xenophobic epithets.<sup>181</sup> Massachusetts Institute of Technology (“MIT”) was dubbed “Made in Taiwan” and the University of California, Los Angeles (“UCLA”), was called “University of Caucasians Living Among Asians.”<sup>182</sup> Elevators in buildings with large numbers of Asian American students were called “[t]he Orient Express.”<sup>183</sup> The peril of the mind trope was also readily apparent: White students viewed Asian Americans as “‘hordes’ of ‘unfair competition’”<sup>184</sup> and advised each other not to take classes that had large numbers of Asian American students.<sup>185</sup>

Additionally, *Bakke* signaled to universities that the educational benefits of diversity were a compelling interest that could justify race-conscious admissions policies.<sup>186</sup> Universities began emphasizing diversity and subjective factors more in admissions and placing reduced weight on academic criteria such as grades and test scores. Some perceived that this was also driven, at least in part, by the desire to limit the numbers of high-achieving Asian American students.<sup>187</sup>

In this context, Asian Americans also began to suspect that elite universities were also discriminating against them in admissions. Although the percentage

<sup>180</sup> See Sharon S. Lee, *The De-Minorization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 134 (2008) (“[B]etween 1976 and 1986, the proportion of Asian Americans in freshman classes grew from 3.6% to 12.8% at Harvard, from 5.3% to 20.6% at Massachusetts Institute of Technology, from 5.7% to 14.7% at Stanford, and from 16.9% to 27.8% at Berkeley.” (citations omitted)).

<sup>181</sup> See TAKAGI, *supra* note 1, at 60 (“[T]he educational achievement of Asian American students was, and continues to be, followed by a wave of reaction.”).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *id.* (“On many college campuses, college seniors only half-jokingly advised freshmen to avoid classes with high Asian enrollments.”).

<sup>186</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.) (“[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”).

<sup>187</sup> See TAKAGI, *supra* note 1, at 79 (“[T]he rhetoric used by well-intentioned university representatives to preserve diversity and define merit provided the institutional voice for white students and their parents to express trepidation about Asian American achievement.”); *id.* at 101 (noting how chairs of task force investigating Asian American admissions at University of California stated that admissions policies “failed to define ‘the precise relations between the principles of selectivity and diversity for each campus and falls short of making a strong commitment to have fair and open admissions policies and practices’”).

of Asian Americans at these universities was higher than their proportion of the general population, some believed that universities wanted to limit the number of Asian American students so that their campuses did not appear too “foreign.” There was a historical analog to this allegation: in the early and mid-twentieth century, many elite universities, including Harvard, made efforts to exclude or limit the number of Jewish students.<sup>188</sup>

Admissions statistics also aroused suspicions among Asian Americans. At several universities, Asian American applicants had lower admissions rates than comparable White applicants.<sup>189</sup> In 1983, the East Coast Asian Student Union (“ECASU”), which consisted of students from Harvard, Yale, Brown, Princeton, and other East Coast colleges and universities, conducted a study of admissions for twenty-five East Coast institutions.<sup>190</sup> From this survey, undergraduate students David Ho and Margaret Chin published an article entitled “Admissions: Impossible,” which garnered attention at elite colleges.<sup>191</sup> Ho and Chin reported that while the number of Asian American applicants at elite institutions had risen steeply in the late 1970s and early 1980s, enrollment of Asian Americans at these schools had increased only slightly.<sup>192</sup> The authors discussed academic and personal ratings used to evaluate applicants, and they were keenly aware of the passive nerd stereotype. They argued that personal ratings, which were based on “personality assessment, recommendations[,] personal essays, interviews, extracurricular activities, community involvement, etc.,”<sup>193</sup> were “the downfall of many Asian American applicants.”<sup>194</sup> Ho and Chin noted that Asian Americans are stereotyped as having “[p]assive [p]ersonalities” and “[n]arrow

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<sup>188</sup> See *id.* at 60 (“Sometimes called ‘damned curve raisers,’ a term applied first to Jewish students at elite East Coast colleges during the 1920s and 1930s, Asian American students have increasingly found themselves taking the brunt of campus racial jokes.”); Kang, *supra* note 20, at 40; see also *supra* note 117 and accompanying text.

<sup>189</sup> TAKAGI, *supra* note 1, at 64-70 (discussing decrease in admissions rates for Asian American university applicants).

<sup>190</sup> *Id.* at 26 (stating that “the Joint Admissions Task Force of ECASU [examined] twenty-five universities about their admissions rates [broken down] by race”).

<sup>191</sup> David Ho & Margaret Chin, *Admissions: Impossible*, BRIDGE MAG., Summer 1983, at 7, <https://osf.io/preprints/socarxiv/gwu6e/> [<https://perma.cc/7JNV-5LUL>] (reviewing admissions data collected among the ECASU membership colleges and contending that Asian Americans should be included in undergraduate affirmative action programs); see also TAKAGI, *supra* note 1, at 26-27 (“The results of the survey, published in an article entitled ‘Admissions Impossible,’ found that the number of Asian American applicants had soared between 1978 and 1983, but that Asian enrollment had barely increased.” (citing Ho & Chin, *supra*)).

<sup>192</sup> Ho & Chin, *supra* note 191, at 7 (noting that “the average college-bound Asian American high school student has an extremely low chance of being admitted to the colleges . . . surveyed”).

<sup>193</sup> *Id.* at 8.

<sup>194</sup> *Id.*

[c]areer [i]nterests” and are viewed as a “[m]odel [m]inority” who is overrepresented at universities—all notions they disputed.<sup>195</sup>

Formal allegations of discrimination were first raised at Brown University in 1983. Brown’s admissions office contended that Asian American applicants tended to be premedical students who did not excel in extracurricular activities.<sup>196</sup> However, Asian American students and staff at Brown claimed that admissions discussions often involved racial stereotyping and negative sentiments towards Asian American applicants. The Brown Asian American Students Association (“AASA”) brought this to the attention of Brown’s Board of Trustees, which delegated the issue to Brown’s Committee on Minority Affairs (“COMA”).<sup>197</sup> COMA created an investigative committee which interviewed admissions officers and others and reported several problematic findings.<sup>198</sup> As one example, Admissions Director Jim Rogers allegedly remarked that Brown could shrink its admitted class size “by cutting the first ten Kims off the top of the list.”<sup>199</sup> COMA made several recommendations, such as regular evaluations and provisions for Asian Americans to participate in the process.<sup>200</sup> Although AASA wanted Rogers to be fired, COMA did not recommend his termination, and he remained.<sup>201</sup> Several years later, after Rogers left the position, his replacement Eric Widmer was quoted in a *New York Times* article as saying that Asian Americans’ allegations about negative action in the admissions were “founded on a justifiable sense of concern.”<sup>202</sup>

<sup>195</sup> *Id.* at 8, 51 (contending that admissions officers believe in stereotypes that work against Asian American applicants). Interestingly, Ho and Chin thought that Asian Americans who defied these stereotypes were also penalized. They gave one example: “an admissions officer once told us he thought a candidate was too slick, that he was a ‘smooth talker’ from the inner city who did not evince a more desirable, non-threatening image.” *Id.* at 51. Ho and Chin also critiqued the social inequities in elite admissions. They lamented the fact that those Asian Americans who were admitted came “from homogeneous backgrounds—from middle and upper middle class suburbia[.]” while “[t]hose from inner cities and from economically disadvantaged backgrounds [were] being left outside the entrance gates.” *Id.* at 7. Additionally, they contended that “the system used to assess academic ability is culturally biased.” *Id.* at 8.

<sup>196</sup> TAKAGI, *supra* note 1, at 64–65 (note that, according to a former member of Minority Review Committee in Brown’s admissions office, “admissions officers described Asian applicants ‘as having bad profiles, they don’t have enough extracurriculars to be admitted at a high rate, and they’re all pre-meds”).

<sup>197</sup> *Id.* at 65.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* (stating that admissions officers interviewed by faculty investigators confirmed allegations of racial discrimination raised by Brown’s AASA).

<sup>200</sup> *Id.* at 66 (“Although the recommendations did not prompt any major shifts in the organization of Brown admissions, there were some important developments.”).

<sup>201</sup> *Id.*

<sup>202</sup> Julie Johnson, *Wider Door at Top Colleges Sought by Asian-Americans*, N.Y. TIMES, Sept. 9, 1989, at 1, 8 (discussing charges by Asian Americans that nation’s top universities are unfairly limiting their enrollment).

Similarly, there was evidence of discrimination at Princeton University. A study of admissions indicated that Asian Americans were rated “below average on the ‘nonacademic’ portion of the admissions process.”<sup>203</sup> One Princeton faculty member suspected that there “may be subconscious [discrimination].”<sup>204</sup> Another faculty member noted that during the discussion of “a clearly qualified Asian-American student” one fellow admissions committee member stated flatly, “We have enough of them,” and another said, “You have to admit, there are a lot.”<sup>205</sup> Such comments could only augment suspicions of intentional discrimination and Asian American quotas. However, Princeton’s self-study found that the lower admissions rate of Asian Americans was not due to bias but rather to other types of preferences in the admissions process: those for athletes, children of alumni, and underrepresented minorities.<sup>206</sup> The latter, of course, refers to affirmative action and illustrates how affirmative action and negative action began to be connected.

Students also raised claims of discrimination at Stanford University. In 1983, Jeffrey Au, a junior political science major, began raising questions about Asian Americans and admissions.<sup>207</sup> Eventually, the Faculty Senate directed a subcommittee of the Committee on Undergraduate Admissions and Financial Aid (“C-UAFA”) to investigate further.<sup>208</sup> C-UAFA’s investigation subcommittee found some evidence of bias and concluded “that ‘unconscious bias’ by admissions officers in rating personality traits might have disadvantaged Asian American applicants.”<sup>209</sup> There was no evidence of intentional discrimination, and C-UAFA’s chair promised to take measures to remove this bias.<sup>210</sup>

Additionally, Harvard has had to answer claims of discrimination against Asian Americans in the 1980s, after a study found that Asian American applicants were admitted at 74% the rate of White applicants, with admittees scoring on average 112 points higher on the SAT.<sup>211</sup> Harvard’s Dean of

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<sup>203</sup> Michael Winerip, *Asian-Americans Question Ivy League’s Entry Policies*, N.Y. TIMES, May 30, 1985, at B1 (highlighting Asian Americans’ questioning of Ivy League’s admissions policies).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (“One of the things that works against Asian-American’ applicants, according to Anthony Cummings, dean of admissions at Princeton, is that they are underrepresented among groups given preference for general undergraduate admissions — such as athletes, blacks and the children of alumni.”).

<sup>207</sup> See TAKAGI, *supra* note 1, at 38-39.

<sup>208</sup> *Id.* at 39.

<sup>209</sup> *Id.* at 40.

<sup>210</sup> *Id.* at 66 (“Addressing the academic senate, the chair of the C-UAFA referred to the problem as one of ‘latent’ bias against Asian Americans and promised that such bias would be removed from the Stanford admissions process.”).

<sup>211</sup> John H. Bunzel & Jeffrey K.D. Au, *Diversity or Discrimination? Asian Americans in*

Admissions and Director of Minority Recruitment contended that this difference was due, not to biases, but to other factors: Asian Americans' relative weakness in extracurricular activities and their underrepresentation among athletes and children of alumni.<sup>212</sup> However, they also made it a point to say that Asian Americans contribute to diversity and there should not be a limit on their representation.

Perhaps the most charged controversies involving negative action came at the University of California, Berkeley ("UC Berkeley"). In 1984, a group of Asian American community leaders, who included not only academics but also lawyers, judges, and others, set up the Asian American Task Force on University Admissions to investigate a drop in Asian American enrollment at UC Berkeley the previous year.<sup>213</sup> The Task Force also considered how recent changes in admissions policies might affect the admission of Asian American applicants.<sup>214</sup>

In response to allegations of discrimination, UC Berkeley framed admissions as a zero-sum game. It contended that admission of underrepresented minority groups was responsible for the lower admissions rate of Asian Americans. Some university officials invoked the passive nerd stereotype, opining that Asian Americans were "flat" and "not well-rounded because of their proclivity for math and science majors."<sup>215</sup> In December 1986, David P. Gardner, the President of the University of California ("UC") system, exacerbated the controversy when he contended that Asian American "overrepresentation" on the UC campuses was a barrier to enrollment of Black and Latina/o students and that it might lead to protest—not only by these groups, but also by White students.<sup>216</sup>

Gardner later backtracked from those comments. Nevertheless, UC Berkeley ethnic studies professor Ling-Chi Wang retorted by noting how Asian Americans students are viewed as a threat because of their academic ability and achievement:

As soon as the percentages of Asian students began reaching double digits at some universities, suddenly a red light went on . . . . Since then, Asian-American admissions rates have either stabilized or declined. . . . I don't

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*College*, PUB. INT., Spring 1987, at 49, 54-55; see also TAKAGI, *supra* note 1, at 69 (discussing Bunzel and Au's findings on discrimination in Harvard's admissions process).

<sup>212</sup> See TAKAGI, *supra* note 1, at 70 (highlighting that differences between white and Asian admissions rates vanished after controlling for alumni status and extracurricular activities).

<sup>213</sup> *Id.* at 33.

<sup>214</sup> *Id.* (noting that in addition to investigating the 1984 decline in UC Berkeley's Asian American enrollment, "the task force planned to review the impact on Asian American applicants of recently announced changes in admissions policies").

<sup>215</sup> *Id.* at 81 ("Because of the differences in how they conceptualized diversity and affirmative action, university officials offered counterclaims that were sometimes inconsistent with one another.").

<sup>216</sup> See Mathews, *supra* note 117 ("UC President David P. Gardner stirred up a storm last December when, in an interview with the San Diego Union, he expressed concern that 'the overrepresentation' of Asian-Americans in the UC system made it difficult to increase black and Latino enrollment and might cause unrest among other racial groups, including whites.").

want to say there's a conspiracy, but university officials see the prevalence of Asians as a problem, and they have begun to look for ways to slow down Asian-American admissions. Are they scared of Berkeley's becoming an Asian university? They're shaking in their socks.<sup>217</sup>

Professor Wang compared this discrimination to the quotas on Jewish students in the early twentieth century.<sup>218</sup> His quote reflects Asian Americans' awareness of the peril of the mind trope. He was one of several critics to contend that to limit the number of Asian American universities, elite universities have decreased "the relative importance of high school grades and test scores and add[ed] consideration of subjective factors such as . . . essay[s] and extracurricular activities."<sup>219</sup> But Professor Wang also illustrated that those concerned about discrimination against Asian Americans in admissions included supporters of diversity and race-conscious admissions policies. He was a founding figure of Ethnic Studies at UC Berkeley and of the group Chinese for Affirmative Action.<sup>220</sup>

Similarly, the late Professor Don Nakanishi, founder of Asian American Studies at UCLA, also feared that Asian Americans had become a peril of the mind on campuses, stating that Asian Americans "have become victims of their own academic success," are "viewed as a threat," and that university administrators are "worrying about Caucasians becoming 'underrepresented' and about how to curb the decline of white students in the UC system."<sup>221</sup> UCLA did not conduct its own investigation of negative action, but the university's administration made statements denying that it occurred there.<sup>222</sup>

However, the U.S. Department of Education, Office for Civil Rights ("OCR") conducted investigations of several universities and found inconsistent admissions practices that discriminated against Asian Americans at UCLA. In 1990, OCR ordered UCLA "to admit several mathematics graduate students who had previously been denied admission."<sup>223</sup> OCR cleared Harvard of wrongdoing, accepting its explanation that other factors such as alumni preferences accounted

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<sup>217</sup> *Id.* (second alteration in original).

<sup>218</sup> Professor Wang said, "I don't want to say it was a conspiracy, but I think all of the elite universities in America suddenly realized they had what used to be called a 'Jewish problem' before World War II, and they began to look for ways of slowing down the admissions of Asians." See Robert Lindsey, *Colleges Accused of Bias to Stem Asians' Gains*, N.Y. TIMES, Jan. 19, 1987, at A10.

<sup>219</sup> *Id.*

<sup>220</sup> See *Ling-chi Wang*, ASIAN AM. & ASIAN DIASPORA STUD., DEP'T OF ETHNIC STUD., U.C. BERKELEY, <https://aaads.berkeley.edu/faculty/ling-chi-wang/> [<https://perma.cc/8Y2N-X98A>] (last visited Jan. 18, 2022).

<sup>221</sup> See Mathews, *supra* note 117.

<sup>222</sup> See TAKAGI, *supra* note 1, at 102 ("Officials from UCLA and Harvard denied the use of quotas.").

<sup>223</sup> GARCES & POON, *supra* note 21, at 9.

for differences in admissions rates.<sup>224</sup> California conducted its own state investigations and did not find any conclusive evidence of discrimination by Berkeley.<sup>225</sup> But several of the Regents of the University of California criticized the “careless recordkeeping” and vagueness of the admissions process.<sup>226</sup> UC Berkeley’s Chancellor apologized and noted that “Berkeley could have acted more openly and less defensively.”<sup>227</sup> He promised various reforms which would bring more transparency and more Asian Americans’ involvement in reviewing admissions policies.<sup>228</sup>

These investigations set the stage for Asian Americans’ positioning in controversies involving affirmative action. They reveal how stereotypes of Asian Americans permeated the discourse on elite university admissions discussions.<sup>229</sup> In this milieu, opponents of affirmative action began to link it with negative action.<sup>230</sup>

### C. *From Negative Action to the Attack on Affirmative Action*

Professor Takagi traces the linkage of negative action and affirmative action to a 1988 memo written by Assistant Attorney General William Reynolds, director of the U.S. Department of Justice, Civil Rights Division during the Reagan Administration.<sup>231</sup> Reynolds stated that “the phenomenon of a ‘ceiling’ on Asian American admissions is the inevitable result of the ‘floor’ that has been built for a variety of other favored racial groups.”<sup>232</sup> Conservatives seized on this to attack race-conscious university admissions policies designed to increase the

<sup>224</sup> *Id.* (noting that Harvard was “exonerated because discrepancies in admission rates could be attributed to differences in legacy and other special admissions considerations”).

<sup>225</sup> *See* TAKAGI, *supra* note 1, at 91 (stating that findings of state auditor general were “largely descriptive and did not take a clear stand on the issue of discrimination”).

<sup>226</sup> *Id.* at 95 (stating that Regent Yori Wada “defended the university against charges of discrimination in front of Asian American groups but that the findings of the auditor general ‘caught him off guard’”).

<sup>227</sup> *Id.* at 96.

<sup>228</sup> *Id.* (noting that UC Berkeley Chancellor announced that special committee on Asian American concerns at UC Berkeley would play critical role in assessing admissions policies and “that he would establish an Admissions Coordination Board that would give interest groups an opportunity to respond and comment on . . . admissions policy”).

<sup>229</sup> *Id.* at 58 (“Asian Americans, so frequently praised as diligent, hard-working super-students, increasingly found themselves cast as a homogenous pool of narrow-minded, overly technical science majors. This flip flop in image from ‘model minority’ to academic nerd was a direct result of broader public arguments about discrimination, diversity, and meritocracy in higher education.”); *see also id.* at 79 (“In the context of the debate over Asian admissions, university administrators, through their rebuttals to claims of discrimination, gave official ‘voice’ to the popular ‘nerd’ image of Asian American students.”).

<sup>230</sup> *See id.* at 109-39 (observing that neoconservative arguments about Asian admissions, against affirmative action and for “free market admissions policy,” started to appear in editorials and articles in late 1980s and early 1990s).

<sup>231</sup> *See id.* at 103.

<sup>232</sup> *Id.* at 104.

enrollment of Black, Latina/o, and Native American students. In this narrative, Asian Americans were simultaneously exalted as model minorities and cast as victims of affirmative action.<sup>233</sup>

California was the initial focal point for these battles. It had been the locus of the *Bakke* decision—the U.S. Supreme Court’s first major ruling in a case involving race-conscious university admissions.<sup>234</sup> It was also one of the most racially diverse states, with rapidly growing Asian American and Latina/o populations,<sup>235</sup> thus becoming ripe ground for legal and political battles over racial issues.

The first lawsuit involving Asian Americans and admissions—*Ho v. San Francisco Unified School District*<sup>236</sup>—came in 1994, with a challenge to the admissions plan for the San Francisco Unified School District (“SFUSD”).<sup>237</sup> SFUSD used a “diversity index” to guarantee places at Lowell High School and other magnet schools to underrepresented students.<sup>238</sup> The three plaintiffs were Chinese American children. Two of the plaintiffs, Brian Ho (five years old) and Hillary Chen (eight years old), were refused admission to elementary schools near their homes because those schools had reached their quota of Chinese Americans.<sup>239</sup> The third plaintiff, Patrick Wong (fourteen years old), was denied admission to Lowell High School, a prestigious public magnet school, because his academic index was deemed too low for admission, although SFUSD conceded that he would have gained admission if he had belonged to any other

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<sup>233</sup> See Kim, *supra* note 3, at 225 (arguing that model minority myth, or “the blanket presumption of group success[,] exaggerates Asians’ socioeconomic status”).

<sup>234</sup> Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978) (opinion of Powell, J.) (affirming decision of California courts requiring UC Davis Medical School to admit petitioner). The *Bakke* litigation did not directly involve Asian Americans. However, Professor Claire Jean Kim argues that Justice Powell, who wrote the controlling opinion in *Bakke*, “invokes Asian Americans repeatedly in his effort to discredit the ‘societal discrimination’ rationale.” Kim, *supra* note 3, at 223. Professor Kim also contends that Justice Powell’s opinion suggests in various footnotes that Asian Americans have been able to overcome discrimination. *Id.* at 223-24 (referencing *Bakke*, 438 U.S. at 296 n.36, 297 n.37, 309 n.45 (opinion of Powell, J.)). For a more detailed discussion of the role of Asian Americans in discourse on *Bakke*, see Lee, *supra* note 180, at 136-42.

<sup>235</sup> See Hans Johnson, Eric McGhee & Marison Cuellar Mejia, *California’s Population*, PUB. POL’Y INST. CAL. (Mar. 2021), <https://www.ppic.org/publication/californias-population/> (graphing the increasing diversity in California from 13% Latina/o and 3% AAPI in 1970 to 39% Latina/o and 15% AAPI in 2019).

<sup>236</sup> 965 F. Supp. 1316 (N.D. Cal. 1997).

<sup>237</sup> *Id.* at 1319.

<sup>238</sup> *Id.* at 1318-19 (finding that schools in question had “capped out” on number of Chinese students).

<sup>239</sup> *Id.*

racial group.<sup>240</sup> He was also rejected from two other high schools because they had “capped out” their Chinese quota.<sup>241</sup>

*Ho* was a class action lawsuit litigated by the Asian American Legal Foundation—an Asian American organization that has consistently opposed affirmative action.<sup>242</sup> The case eventually resulted in a settlement, and SFUSD adopted a race-neutral admissions system that considered other factors that could lead to racially diverse schools.<sup>243</sup>

Political developments also set the context for racial conflict in California. Throughout the early and mid-1990s, Republican Governor Pete Wilson campaigned successfully as an opponent of undocumented immigration and affirmative action.<sup>244</sup> In 1994, California voters passed Proposition 187 (also known as the “Save Our State Initiative”), denying government services to undocumented immigrants and requiring local law enforcement to report them to the Immigration and Naturalization Service.<sup>245</sup> A majority of Asian Americans opposed Proposition 187 and organized against it.<sup>246</sup>

In 1995, race-conscious university admissions came to the forefront in California. The Regents of the University of California, led by anti-affirmative

<sup>240</sup> *Id.* at 1319 (stating that Wong’s entry score of fifty-eight “was lower than the minimum score of 62 required for Chinese applicants,” but was sufficient for members of other racial groups).

<sup>241</sup> *Id.*

<sup>242</sup> See ASIAN AM. LEGAL FOUND., <https://www.asianamericanlegal.com/> [<https://perma.cc/L4YK-LSJ4>] (last visited Jan. 18, 2022).

<sup>243</sup> The “diversity index” had been part of an NAACP consent decree. See Henry O’Connell, *Facing Our Past, Changing Our Future, Part II: Five Decades of Desegregation in SFUSD (1971-Today)*, SFUSD (Sept. 16, 2020), <https://www.sfusd.edu/facing-our-past-changing-our-future-part-ii-five-decades-desegregation-sfusd-1971-today> [<https://perma.cc/JK7E-52QP>] (“In 1983, the NAACP and SFUSD entered into a court-approved desegregation consent decree . . .”).

<sup>244</sup> See Mario Koran, ‘A Failed Experiment’: The Racist Legacy of California Governor Pete Wilson, *GUARDIAN* (July 31, 2020), <https://www.theguardian.com/us-news/2020/jul/31/california-pete-wilson-governor-affirmative-action> [<https://perma.cc/NW49-RZ6B>] (chronicling Pete Wilson’s efforts to undermine diversity policies while serving as California’s governor).

<sup>245</sup> See CAL. HEALTH & SAFETY CODE, § 130(c)(3) (West 1997) (repealed 2014); CAL. WELF. & INST. CODE, § 10001.5(c)(3) (West 1997) (repealed 2014).

<sup>246</sup> See John SW Park, *Race Discourse and Proposition 187*, 2 MICH. J RACE & L. 175, 184 n.56 (1996) (“The Asian American community has . . . responded to Proposition 187 with concern and organized opposition to the measure.”). Parts of Proposition 187 were later deemed unconstitutional. See *California: Proposition 187 Unconstitutional*, MIGRATION NEWS (Dec. 1997), [https://migration.ucdavis.edu/mn/more.php?id=1391\\_0\\_2\\_0](https://migration.ucdavis.edu/mn/more.php?id=1391_0_2_0) [<https://perma.cc/V7PS-L4C6>] (“In Los Angeles on November 14, 1997, US District Court Judge Mariana R. Pfaelzer . . . ruled that Proposition 187 violates both the US Constitution and the 1996 welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”). Unenforceable parts of Proposition 187 were also repealed. See Patrick McGreevy, *Gov. Bill Repealing Parts of Prop. 187 Is Signed*, L.A. TIMES, Sept. 16, 2014, at AA.

action activist Ward Connerly, passed two resolutions to eliminate race-conscious admissions policies: Special Policy 1 (“SP1”) and Special Policy 2 (“SP2”).<sup>247</sup> The following year, California voters approved Proposition 209 (also known as the “California Civil Rights Initiative”), a state constitutional amendment which banned race-conscious policies not only at California public universities, but in all state government institutions.<sup>248</sup> This led to a large drop in the enrollment of Black, Latina/o, and Native American students at UC Berkeley and UCLA—the two flagship campuses in the UC system.<sup>249</sup> As with Proposition 187, a majority of Asian Americans opposed Proposition 209.<sup>250</sup> But other states also passed similar constitutional amendments,<sup>251</sup> and the U.S. Supreme Court eventually upheld these in *Schuette v. Coalition to Defend Affirmative Action*.<sup>252</sup> In 2020, a ballot initiative to repeal Proposition 209 and reinstate affirmative action in California failed at the polls.<sup>253</sup> States have also

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<sup>247</sup> See JOHN A. DOUGLASS, A BRIEF ON THE EVENTS LEADING TO SP1 1, 8-9 (1997), [https://senate.universityofcalifornia.edu/\\_files/reports/sp1rev.pdf](https://senate.universityofcalifornia.edu/_files/reports/sp1rev.pdf) [<https://perma.cc/PL2D-GSW4>].

<sup>248</sup> See *Regents Policy 4401: Policy on Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 and SP-2)*, U.C. BD. OF REGENTS (May 16, 2001), <https://regents.universityofcalifornia.edu/governance/policies/4401.html> [<https://perma.cc/3KMS-RAFS>].

<sup>249</sup> Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California’s Public Universities: Proposition 16 Would Allow Race and Ethnicity to Become Factors in Admissions, Hiring and Contracts*, EDSOURCE (Oct. 29, 2020), <https://edsources.org/2020/dropping-affirmative-action-had-huge-impact-on-californias-public-universities/642437> [<https://perma.cc/NS4X-TDDD>] (finding that Asian American students were overrepresented compared to Black, Latina/o, and Native American students).

<sup>250</sup> *State Propositions: A Snapshot of Voters*, L.A. TIMES (Nov. 9, 1996), <https://www.latimes.com/archives/la-xpm-1996-11-07-mn-62330-story.html> (finding that 61% of Asian respondents opposed Proposition 209).

<sup>251</sup> California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012) have all passed state constitutional amendments proscribing race-conscious policies. See *Affirmative Action: State Action*, NAT’L CONF. ST. LEGISLATURES (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>. Colorado voters rejected a similar ban in 2008. Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, ASPEN TIMES (Nov. 7, 2008), <https://www.aspentimes.com/news/colorado-voters-reject-affirmative-action-ban/> [<https://perma.cc/R2T6-AMQ2>].

<sup>252</sup> 572 U.S. 291, 314 (2014) (“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”).

<sup>253</sup> See Vinay Harpalani, *What the California Vote to Keep the Ban on Affirmative Action Means for Higher Education*, CONVERSATION (Nov. 10, 2020, 8:22 AM), <https://theconversation.com/what-the-california-vote-to-keep-the-ban-on-affirmative-action-means-for-higher-education-149508> [<https://perma.cc/D4EJ-BY6G>] (“On Nov. 3, California voters rejected Proposition 16, a proposed amendment to the California Constitution which would have reinstated affirmative action in the state’s public institutions.”).

eliminated affirmative action through legislative action,<sup>254</sup> executive action,<sup>255</sup> and voluntary decisions by universities.<sup>256</sup>

As the political battles over affirmative action in California and other states pressed on, race-conscious university admissions policies also faced legal challenges nationwide.<sup>257</sup> *Gratz*, *Grutter*, and *Fisher I* and *II* resulted from these challenges.<sup>258</sup> The distinction between the holistic admissions plan upheld in *Grutter* and the point system rejected in *Gratz* proved to be significant. Holistic admissions policies are less transparent than fixed point systems.<sup>259</sup> They allow

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<sup>254</sup> New Hampshire's state legislature passed a law curbing race-conscious policies, effective in 2012. H.B. 623, 2011 Leg., 581st Sess. (N.H. 2011). Idaho passed a similar law in 2020. See *Idaho Governor Signs Affirmative Action Ban into Law*, ASSOCIATED PRESS (Mar. 31, 2020), <https://apnews.com/article/bbe0f81d2b4ef63102d749879c045a10>.

<sup>255</sup> The former governor of Florida, Jeb Bush, eliminated race-conscious policies by executive order in 1999. Florida Exec. Order No. 99-281 (Nov. 9, 1999).

<sup>256</sup> The University of Georgia and Texas A&M University choose not to use race-conscious admissions policies, even after *Grutter* deemed such policies legal and abrogated lower court rulings. See RICHARD D. KAHLBERG, CENTURY FOUND., A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 4 (2012), <http://tcf.org/assets/downloads/tcf-abaa.pdf> [<https://perma.cc/QV2T-TK4G>].

<sup>257</sup> Two anti-affirmative action organizations spearheaded this effort. One was the Center for Individual Rights, which litigated *Gratz* and *Grutter* on behalf of the plaintiffs. See CTR. FOR INDIVIDUAL RTS., <https://www.cir-usa.org/> [<https://perma.cc/4RJL-LVU9>] (last visited Jan. 18, 2022). The other was the Pacific Legal Foundation, which has continued its efforts to eliminate race-conscious admissions policies. See PAC. LEGAL FOUND., <https://pacificlegal.org/> [<https://perma.cc/Q7YS-P6JT>] (last visited Jan. 18, 2022).

<sup>258</sup> See *supra* Section II.A.1.

<sup>259</sup> See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) (characterizing Justices Powell and O'Connor's views as "something akin to a 'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it" (citation omitted)). Many commentators have been critical of *Grutter*'s lack of transparency and the Supreme Court's preference for the *Grutter* plan over the *Gratz* plan. See *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) ("Equal protection cannot become an exercise in which the winners are the ones who hide the ball."); *id.* at 305 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."); David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 528-29 (2004) ("One can argue that the undergraduate Michigan program at issue in *Gratz*, involving a fixed-point system, should have been regarded as constitutionally superior to the unlimited discretion model in *Grutter*. . . . At least in such a system the invidious exercise of discretion has been structured, confined, and checked. . . . The point system used in the undergraduate program struck down in *Gratz* should instead have been preferred because it makes the racial remedy visible. . . ." (citations omitted)); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902 (2006) ("It is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment. . . ."). Other commentators, however, have defended the

for flexible consideration of racial diversity, which could also be used to mask overt discrimination or implicit bias against Asian Americans. Holistic admissions policies rely on the subjective assessments of admissions reviewers to evaluate “soft” admissions factors—which include not only essays and extracurricular activities but also reviewers’ perceptions of leadership, grit, humor, and social skills.<sup>260</sup> Asian Americans have been stereotyped as inferior in many of these traits,<sup>261</sup> and a holistic admissions policy more readily allows stereotypes to infuse the admissions process.<sup>262</sup> Moreover, *Grutter*’s explicit guidance is that all of these factors should not be accorded the same weight for every applicant.<sup>263</sup> It actually requires that reviewers use their own subjective judgments—and biases—to make distinctions between applicants. In the Harvard case, SFFA exploits this subjectivity to bolster its claims of negative action and link them to affirmative action. This is easier to do with holistic admissions policies, where the explicit and implicit biases of admissions reviewers already come into play, than it would be with fixed point systems based on numerical formulas.

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*Grutter* plan’s obfuscation of the use of race. See Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply ‘another factor’ among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.”); Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 412 (2003) (“[T]he very nature of what may be conceived as the ultimate goal of affirmative action . . . would make it counterproductive to fully disclose . . . the extent to which some of these programs take race into account. . . . [I]n several Supreme Court decisions[,] . . . judges have made a significant, yet underappreciated, contribution to that rational process of minimizing the visibility and distinctiveness of race-based affirmative action.”).

<sup>260</sup> See *infra* Section III.B.1 (providing Margaret Chin’s account of Harvard’s admissions officers’ displaying biases against Asian students for lacking extracurricular activities and personal qualities).

<sup>261</sup> See *supra* Sections I.C, II.B (examining stereotypes of Asian American students as overly studious and not congenial).

<sup>262</sup> See Cristina Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406 (2008) (“[I]ndividualized consideration is ultimately more likely to thwart the long-term objectives of reducing the salience of race in our society and eliminating race-based stereotyping. Individualized consideration demands that officials prioritize among members of a racial group according to race-related criteria, whereas mechanical decision making simply demands recognition of the existence of broad categories and the membership of certain individuals in those categories, based on individual self-identification.”).

<sup>263</sup> The *Grutter* plan has also been critiqued for giving more weight to race overall than the *Gratz* plan. See Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 534 (2007).

*Grutter* thus facilitated future litigation, as it created more legal possibilities to challenge the unknowns,<sup>264</sup> resulting in the *Fisher* litigation. Like *Grutter* and *Gratz*, the main plaintiff in the *Fisher* litigation was a White woman. But Asian Americans were in the backdrop.<sup>265</sup> Their enrollment and involvement in classroom discussions was a component of UT Austin's argument. When contending that racial diversity was lacking in its small classes—those with less than twenty-four students—UT Austin cited data showing that 46% of these classes had zero or one Asian American students.<sup>266</sup> Additionally, the *Fisher* litigation further illustrated the division over affirmative action among Asian Americans. Many Asian American organizations filed amicus briefs on both sides in the case. In support of *Fisher* were the Asian American Legal Foundation (which represented 117 Asian American organizations) and the 80-20 National Asian-American Educational Foundation.<sup>267</sup> Both of these groups held the view that race-conscious admissions policies unfairly disadvantaged Asian Americans. Conversely, several organizations filed amicus briefs in support of UT Austin: the Asian American Legal Defense and Education Fund, Asian/Asian American Faculty and Staff Association of the University of Texas at Austin, and Asian Desi Pacific Islander American Collective of the University of Texas at Austin, and Asian Americans Advancing Justice.<sup>268</sup> All of these

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<sup>264</sup> Ironically, two very ideologically different legal luminaries predicted that *Grutter* would prompt more litigation: the late U.S. Supreme Court Justice Antonin Scalia and Derrick Bell, the late law professor, activist, and founding figure in Critical Race Theory. See *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part) (contending that “*Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation”); Bell, *supra* note 145, at 1631 (referring to *Grutter* as “litigation-prompting compensation for admissions criteria that benefit the already privileged and greatly burden the already disadvantaged”).

<sup>265</sup> For thorough discussions of the role of Asian Americans in the *Fisher* cases, see Kim, *supra* note 3, at 232-34 (examining efforts of both conservative and liberal Asian American advocacy groups in *Fisher* litigation); West-Faulcon, *supra* note 21, 607-11 (cautioning that facial discrimination against Asian American students did not rise to level that Justice Alito suggested in his *Fisher II* dissent).

<sup>266</sup> See *Fisher v. Univ. of Texas at Austin (Fisher II)*, 758 F.3d 633, 658 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016) (“When the holistic review program was modified to be race-conscious, 90% of classes had one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.”).

<sup>267</sup> See Brief of Asian American Legal Foundation et al. as Amici Curiae Supporting Petitioner, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 5345842; *Supreme Court Fight Against Discrimination: 80-20 Files Amicus Brief in Support of the Petitioner in “Fisher v. Univ. of Texas”*, CISION (May 29, 2012, 9:03 AM), <https://www.prnewswire.com/news-releases/supreme-court-fight-against-discrimination-80-20-files-amicus-brief-in-support-of-the-petitioner-in-fisher-v-univ-of-texas-155322575.html> [<https://perma.cc/VT4Q-V4LF>].

<sup>268</sup> See Brief of the Asian American Legal Defense and Education Fund et al. as Amici Curiae Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6754988; Brief of Members of Asian Americans Advancing Justice et al. as Amici Curiae Supporting Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 7770251.

groups felt that Asian Americans should stand in solidarity with other minority groups and support policies that aim to promote diversity and reduce racial inequities.

In his *Fisher II* dissent, Justice Alito accused UT Austin of treating Asian Americans unfairly in various ways. He contended that UT Austin ignored the long history of discrimination against Asian Americans.<sup>269</sup> Citing the amicus brief of the Asian American Legal Foundation, which supported *Fisher*, Alito also argued that UT Austin did not value the diverse perspectives brought by Asian Americans as much as it valued diverse perspectives brought by other minority students.<sup>270</sup> He pointed to UT Austin's own data which showed that Asian Americans are not as well represented as Latina/os in small classes,<sup>271</sup> and he argued that UT Austin undervalues their contributions to diversity, "act[ing] almost as if Asian-American students do not exist."<sup>272</sup> Further, Alito questioned why UT Austin "lumped . . . together" a diverse array of Asian Americans who are "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population" and treated this group as "overrepresented" and as all having "similar backgrounds and similar ideas and experiences to share."<sup>273</sup> Regardless of whether these critiques were applicable to UT Austin's admissions policies, they reflect issues that resonate with the experiences of Asian Americans,<sup>274</sup> and they foreshadowed public discourse on the Harvard case. The *Fisher* case also invited more litigation; it requires universities to provide ample evidence to show that race-conscious admissions policies are necessary to attain the educational benefits of diversity<sup>275</sup> and to demonstrate that no workable race-neutral alternatives can achieve those benefits.<sup>276</sup>

In addition to the lawsuits by anti-affirmative action organizations, federal investigations have set the context for the Harvard case. The 1980s Department of Education complaints foreshadowed later federal investigations of elite university admissions. In 2006, the Bush Administration's OCR started investigating Princeton University's admissions policies for allegedly

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<sup>269</sup> *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2227 (2016) (Alito, J., dissenting).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 2226 ("[In] a study of select classes containing five or more students . . . 16% had no Asian-Americans, . . . 12% had no Hispanics[,] . . . 67% had two or more Asian-Americans, and 70% had two or more Hispanics.").

<sup>272</sup> *Id.* at 2227.

<sup>273</sup> *Id.* at 2229.

<sup>274</sup> See *supra* Section I.B and *infra* Section IV.C.3.

<sup>275</sup> See Shakira D. Pleasant, *Fisher's Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 824 (2019).

<sup>276</sup> *Fisher II*, 136 S. Ct. at 2208 ("[Narrow tailoring] does impose 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'" (citing *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 312 (2013))).

discriminating against Asian American applicants.<sup>277</sup> Nine years later, the Obama Administration, which by then had taken over the investigation, found no wrongdoing by the university.<sup>278</sup> However, following the 2016 election, the Civil Rights Division President Donald Trump's Department of Justice ("DOJ") worked vigorously to attack affirmative action.<sup>279</sup> The DOJ investigated race-conscious admissions policies at Harvard and Yale and accused both universities of discriminating against Asian Americans.<sup>280</sup> In this way, the Trump Administration augmented SFFA's efforts to dismantle affirmative action.<sup>281</sup> The DOJ formally declared that Yale's race-conscious admissions policy was unconstitutional, and after Yale refused to end the policy, it filed suit against the

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<sup>277</sup> Scott Jaschik, *Anti-Asian Bias Claim Rejected*, INSIDE HIGHER ED (Sept. 24, 2015), <https://www.insidehighered.com/news/2015/09/24/ocr-clears-princeton-anti-asian-discrimination-admissions> [<https://perma.cc/6B5P-LGJ2>] (detailing OCR's 2006 investigation of Princeton's admissions process).

<sup>278</sup> *Id.* ("The [OCR] investigation found that Princeton considered race only in ways consistent with U.S. Supreme Court rulings, and without creating a quota system that limited Asian-American admissions. The reason Asian-American applicants have such a tough time getting into Princeton, OCR concluded, was that everyone has a tough time getting into Princeton.").

<sup>279</sup> See Vinay Harpalani, "*Trumping*" *Affirmative Action*, 66 VILL. L. REV. ONLINE 1, 3-7 (2021) (discussing Trump Administration's attacks on affirmative action through DOJ investigations of universities' admissions processes).

<sup>280</sup> *Id.* at 4-6 ("[Under the Trump Administration, t]he Civil Rights Division of the Department of Justice . . . worked vigorously to eliminate affirmative action. The DOJ began investigating race-conscious admissions policies at two of the most elite universities in the U.S.: Harvard and Yale.").

<sup>281</sup> *Id.* at 5-6 ("SFFA contends that affirmative action, legacy preferences for children of alumni, and other evaluations used by admissions reviewers all discriminate against Asian-American applicants. Former President Trump's DOJ largely echoed this position." (internal citation omitted)). In April 2019, President Trump's Department of Education, Office of Civil Rights, also settled a complaint against Texas Tech University School of Medicine which dated back to the George W. Bush Administration. See Benjamin Wermund, *Texas Tech Medical School Will End Use of Race in Admissions*, POLITICO (Apr. 9, 2019, 3:09 PM), <https://www.politico.com/story/2019/04/09/texas-tech-medical-school-race-admissions-3048529> [<https://perma.cc/D3BW-UKQR>] (discussing results of probe into Texas Tech's use of race in medical school admissions). As part of the settlement, the medical school agreed to end its use of race-conscious admissions policies. *Id.* ("The agreement leaves the door open for the medical school to again use race in admissions, but says that it must 'ensure . . . that it provides a reasoned, well principled explanation for its decision and identifies concrete and precise goals,' among other things." (alteration in original)).

university.<sup>282</sup> SFFA tried unsuccessfully to intervene in the Yale lawsuit,<sup>283</sup> and the Biden Administration later dropped it.<sup>284</sup> But SFFA itself then sued Yale.<sup>285</sup>

All of these events have influenced the legal strategy and public discourse on the Harvard case—a case that represents the culmination of the conservative strategy to divide the interests of people of color. By conflating negative action and affirmative action, SFFA has attempted to pit Asian Americans against other minority groups—a division that could have implications beyond affirmative action.<sup>286</sup>

### III. *SFFA v. HARVARD* AND THE WEAPONIZATION OF ASIAN AMERICANS

SFFA devised a comprehensive strategy to link allegations of negative action to challenges of affirmative action.<sup>287</sup> It contends that Harvard's race-conscious admissions policies, and other evaluations used by admissions reviewers, all discriminate against Asian American applicants.<sup>288</sup> To bolster its case, SFFA presented various forms of evidence—much of which was aimed at the public discourse more than the legal issues.<sup>289</sup> Nevertheless, the U.S. District Court for

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<sup>282</sup> Harpalani, *supra* note 279, at 4 (“In August 2020, the DOJ declared Yale’s race-conscious admissions policy illegal and suggested that it might file a lawsuit. And after Yale refused to stop considering race in its 2020-21 admissions cycle, the DOJ did file suit.” (footnote omitted)). See Press Release, DOJ Off. of Pub. Affs., Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions: Race Discrimination Against Applicants to Yale College Violates Federal Civil Rights Law (Oct. 8, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate> [<https://perma.cc/VN89-ERQH>] (“The Justice Department today filed suit against Yale University for race and national origin discrimination. The complaint alleges that Yale discriminated against applicants to Yale College on the grounds of race and national origin, and that Yale’s discrimination imposes undue and unlawful penalties on racially-disfavored applicants, including in particular most Asian and White applicants.”).

<sup>283</sup> See *United States v. Yale Univ.*, 337 F.R.D. 35, 41 (D. Conn. 2021) (denying motion to intervene after finding United States capable of adequately representing SFFA’s interest in case).

<sup>284</sup> Pete Williams, *In Biden Administration Reversal, Justice Dept. Drops Discrimination Suit Against Yale*, NBC NEWS (Feb. 3, 2021, 11:15 AM), <https://www.nbcnews.com/news/us-news/biden-administration-reversal-justice-dept-drops-discrimination-suit-against-yale-n1256597> [<https://perma.cc/A6D2-F6Y6>] (reporting Biden Administration’s “voluntary dismissal” of lawsuit against Yale).

<sup>285</sup> Complaint, *supra* note 175, at 1 (requesting declaratory and injunctive relief for “racial discrimination in [Yale’s] administration of its undergraduate admissions program”).

<sup>286</sup> See *infra* Section III.D (discussing standardized testing).

<sup>287</sup> See *supra* Section II.A.3.

<sup>288</sup> See *supra* Section II.A.3.

<sup>289</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 205 (D. Mass. 2019) (“[E]nsuring diversity at Harvard relies, in part, on race conscious admissions. Harvard’s admission program passes constitutional muster in that it

the District of Massachusetts ruled in favor of Harvard, finding that it did not intentionally discriminate against Asian Americans and that its race-conscious admissions policy was constitutional.<sup>290</sup> This ruling was affirmed by the U.S. Court of Appeals for the First Circuit.<sup>291</sup> SFFA then filed a petition for certiorari with the U.S. Supreme Court, which the Court granted on January 24, 2022.<sup>292</sup>

#### A. Case Overview

SFFA filed its lawsuits against Harvard and UNC Chapel Hill in November 2014,<sup>293</sup> even before the Supreme Court's decision in *Fisher II*. The Harvard case is different than prior cases in that it also involves Title VI of the Civil Rights Act of 1964<sup>294</sup> rather than solely the Fourteenth Amendment's Equal Protection Clause.<sup>295</sup> Title VI prohibits race discrimination by all educational institutions, including public and private universities, that receive federal funding.<sup>296</sup> Although the Supreme Court has not ruled directly in a Title VI case involving race-conscious university admissions, it has strongly suggested that the criteria for evaluating racial classifications under Title VI are the same as those for the Equal Protection Clause.<sup>297</sup> Consequently, the legal framework from *Grutter* and *Fisher I* and *II* applies under Title VI litigation.

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satisfies the dictates of strict scrutiny.”), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted* No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.). However, Judge Burroughs did note the possibility of implicit bias against Asian Americans in Harvard's admissions process. *Id.* at 171; *see also infra* notes 387-91 and accompanying text.

<sup>290</sup> *SFFA*, 397 F. Supp. 3d at 204-05.

<sup>291</sup> *SFFA*, 980 F.3d at 204 (affirming lower court's finding that Harvard's use of race in admissions process is constitutional).

<sup>292</sup> *SFFA*, 2022 WL 199375.

<sup>293</sup> *See* Complaint, *supra* note 6, at 120 (filing suit on November 17, 2014); Press Release, Students for Fair Admissions, Students for Fair Admissions Files Petition for *Certiorari* to U.S. Supreme Court to End Race-Based Admissions at Harvard and All Colleges and Universities (Feb. 25, 2021), <https://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/SFFA-Harvard-Press-Release-SFFA-files-cert-petition-to-SCOTUS.pdf>. [<https://perma.cc/RT2M-HRTU>] (discussing SFFA's petition for certiorari).

<sup>294</sup> 42 U.S.C. §§ 2000d to 2000d-7 (prohibiting discrimination under federally assisted programs on grounds of race, color, or national origin).

<sup>295</sup> In its Complaint, SFFA repeatedly discusses Title VI and the Fourteenth Amendment together, emphasizing that a violation of the Fourteenth Amendment is also a violation of Title VI. *See* Complaint, *supra* note 6, para. 412 (“An institution's use of race or ethnicity that is in any way motivated by ‘prejudice or stereotype’ against a particular group violates the Fourteenth Amendment and therefore violates Title VI.”).

<sup>296</sup> *See* 42 U.S.C. §§ 2000d to 2000d-7 (prohibiting discrimination by federally funded institutions).

<sup>297</sup> Four dissenting Justices in *Bakke* found that the UC Davis School of Medicine admissions plan violated Title VI. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 421 (1978) (Stevens, J., dissenting) (“The University's special admissions program violated Title

The plaintiffs in the Harvard case include at least one Asian American applicant with excellent academic credentials who was rejected from Harvard.<sup>298</sup> SFFA claims that Harvard limits the number of Asian American applicants admitted each year.<sup>299</sup> Moreover, SFFA contends that this occurs for a variety of reasons: intentional discrimination, race-conscious admissions policies that benefit Black and Latina/o applicants, legacy preferences for children of alumni which disproportionately benefit White applicants, athletic preferences, and biases in the manner that Harvard evaluated “soft” factors such as applicants’ personal characteristics.<sup>300</sup> Essentially, SFFA contends that Harvard’s entire admissions policy discriminates against Asian Americans.

In its case, SFFA treated negative action and affirmative action as part of the same process.<sup>301</sup> At the district court, the first part of SFFA’s motion for summary judgment focused predominantly on negative action: it argued that Harvard discriminated against Asian Americans vis-à-vis White Americans in various ways.<sup>302</sup> Harvard denied intentionally discriminating against Asian

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VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race.”). Justice Stevens’s opinion was joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist. *Id.* at 408; *see also* Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (“Essential to the Court’s holding [in *Bakke*] reversing that aspect of the California court’s decision was the determination that [the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 251] ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’”); Gratz v. Bollinger, 539 U.S. 244, 305 n.23 (2003) (“[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” (citing *Sandoval*, 532 U.S. at 281)).

<sup>298</sup> For a fuller description of the plaintiffs in the Harvard case, see *supra* notes 169-71 and accompanying text.

<sup>299</sup> Complaint, *supra* note 6, para. 200 (“Harvard intentionally and artificially limits the number of Asian Americans to whom it will offer admission.”).

<sup>300</sup> *See, e.g., id.* para. 120 (“At this time Harvard also used a second system of classification to rate each applicant individually along four dimensions: personal, academic, extracurricular, and athletic.”).

<sup>301</sup> For in-depth analyses of this process, see Feingold, *supra* note 21, at 721-24; and West-Faulcon, *supra* note 21, at 618-22. Professors West-Faulcon and Feingold focus on how an “Asian penalty” in admissions masks a “White bonus,” rather than deriving from affirmative action. *See* Feingold, *supra* note 21, at 721-24; West-Faulcon, *supra* note 21, at 618-22. This Article agrees with their analysis, but it focuses more on Asian Americans’ perspectives on allegations of negative action, in light of the historical and current racial discrimination and stereotyping they have faced.

<sup>302</sup> *See* Plaintiff’s Memorandum of Reasons in Support of its Motion for Summary Judgment at 5-33, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), ECF No. 413 [hereinafter Plaintiff’s Summary Judgment Memorandum] (“Harvard’s admissions officials assign Asian Americans the lowest score of any racial group on the personal rating—a ‘subjective’ assessment of such traits as whether the student has a ‘positive personality’ and ‘others like to be around him or her,’ has ‘character traits’ such as ‘likability . . . helpfulness, courage, [and] kindness,’ is an ‘attractive person to be with,’ is ‘widely respected,’ is a ‘good person,’ and has good ‘human qualities.’” (alterations in original)).

Americans, and the burden was on SFFA to prove intent. The second part of SFFA's case focused on affirmative action: it contended that race-conscious admissions policies also discriminated against Asian Americans in favor of Black and Latina/o American applicants.<sup>303</sup> Here, Harvard did not dispute that it used race intentionally—the question was just whether it did so in a manner consistent with the legal framework established in *Grutter* and *Fisher I and II*.<sup>304</sup>

SFFA charged six counts in its Complaint, all under Title VI.<sup>305</sup> The first four of these involved holistic admissions: Count I alleged intentional discrimination against Asian Americans, arguing that such discrimination was masked by Harvard's holistic admissions process.<sup>306</sup> Counts II, III, and IV alleged that Harvard engages in racial balancing, uses race as more than a “plus” factor, and uses race more than just to fill the last “few places” in its incoming class.<sup>307</sup> All of these speak to the weight of race in Harvard's holistic admissions policy, and to SFFA's allegation that the policy masks specific numerical goals that are proscribed by *Bakke* and *Grutter*. Count V contended that Harvard could achieve the educational benefits of diversity via race-neutral alternatives.<sup>308</sup> Count VI alleged that Harvard violated Title VI by considering race as a factor in admissions at all,<sup>309</sup> and bluntly asserted:

The Supreme Court's decisions holding that there is a compelling government interest in using race as a factor in admissions decisions in pursuit of “diversity” should be overruled. Those decisions were wrongly decided at the time they were issued and they remain wrong today. “Diversity” is not an interest that could ever justify the use of racial preferences under the Fourteenth Amendment and Title VI.<sup>310</sup>

SFFA made much of its argument in the context of the *Grutter-Fisher* framework. As a remedy it requested that Harvard be forbidden from considering race at all, and from even learning the race of applicants through any components of their applications.<sup>311</sup> Unlike the plaintiffs in the *Fisher* litigation, SFFA did not mask its desire to overturn *Grutter*.

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<sup>303</sup> *Id.* at 33-45 (arguing that Harvard engages in “racial balancing, *i.e.*, that the school's goal is to ‘achieve a racial/ethnic “mix” that it considered desirable’ instead of treating applicants as individuals” (quoting *Wessman v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998))).

<sup>304</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 172 (1st Cir. 2020) (explicating Harvard's argument that its race-conscious decisions comported with Supreme Court precedent), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

<sup>305</sup> See Complaint, *supra* note 6, paras. 428-505.

<sup>306</sup> *Id.* paras. 428-42.

<sup>307</sup> *Id.* paras. 443-76.

<sup>308</sup> *Id.* paras. 477-88.

<sup>309</sup> *Id.* paras. 489-505.

<sup>310</sup> *Id.* para. 494.

<sup>311</sup> See *id.* at 119 (seeking “[a] permanent injunction requiring Harvard to conduct all

B. *Allegations of Negative Action*

Through its litigation in the Harvard case, SFFA pursued several strategies to support its allegations of negative action and to illustrate how Asian Americans are stereotyped through the admissions process. In its Complaint, SFFA referred to Harvard's historical discrimination against Jewish applicants in the early twentieth century and to allegations of negative action and the OCR investigation of Harvard in the 1980s.<sup>312</sup> SFFA also used anecdotes that invoked the passive nerd stereotype in its Complaint, and it later put forth evidence that admissions reviewers rated Asian American applicants in a stereotypic manner.<sup>313</sup> SFFA's Complaint also highlighted how Princeton Review and other college admission counseling services specifically advise Asian American applicants on how to circumvent negative action.<sup>314</sup> Additionally, a major part of SFFA's case involved using statistical modeling to argue that Harvard's race-conscious holistic admissions process discriminated against Asian Americans—particularly in its assessment of personal characteristics.<sup>315</sup> And later, in its statement of facts and motion for summary judgment, SFFA highlighted a troubling incident that showed the administration's lack of concern for a Harvard alum's animus against Asian Americans.<sup>316</sup>

1. Harvard's History of Discrimination

In its Complaint, SFFA began with the history of discrimination against Jewish students by Harvard and other elite institutions, dating back to the 1920s.<sup>317</sup> This history, which is not disputed, served as a gateway to SFFA's allegations of negative action by Harvard.<sup>318</sup> SFFA notes that, like Jewish applicants in the early twentieth century, Asian Americans tend to have higher academic credentials than other groups.<sup>319</sup> It claims that when the enrollment of Asian American students began to rise significantly in the 1970s, Harvard's response was analogous to its earlier treatment of Jewish students. SFFA

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admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission"); *see also* Elise C. Boddie, *A Damaging Bid to Censor Applications at Harvard*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/opinion/harvard-affirmative-action-lawsuit.html> ("If a lawsuit over affirmative action is successful, would-be college students may have to hide their race.").

<sup>312</sup> *See* Complaint, *supra* note 6, paras. 148-67.

<sup>313</sup> *Id.* para. 9.

<sup>314</sup> *Id.* paras. 252-61.

<sup>315</sup> *Id.* para. 6.

<sup>316</sup> *See* Plaintiff's Summary Judgment Memorandum, *supra* note 302, at 23-26.

<sup>317</sup> Complaint, *supra* note 6, at paras. 42-124 (detailing Harvard's history of discrimination against different groups of applicants and selective admission).

<sup>318</sup> *Id.* para. 42-99 (describing Harvard's cap on Jewish enrollment to limit number of applicants admitted).

<sup>319</sup> *Id.* para. 150.

discusses how Harvard did not recognize the Coalition of Asian Americans (“CAA”) as a minority student organization and barred Asian American students from participating in Freshman Minority Orientation.<sup>320</sup> The Complaint further discusses how Asian American student organizations argued that Harvard should increase recruitment of Asian Americans and include them in affirmative action programs.<sup>321</sup> It notes that Margaret Chin, one of the authors of “Admissions: Impossible,”<sup>322</sup> was an undergraduate at Harvard and argued in the 1980s that admissions officers saw Asian Americans as high academic achievers but lacking in extracurricular activities and personal qualities.<sup>323</sup>

The Complaint also referred to the 1980s OCR investigation of Harvard’s alleged discrimination against Asian Americans.<sup>324</sup> While that investigation concluded that there was no discrimination by Harvard, SFFA critiqued that conclusion,<sup>325</sup> and the investigation and the discourse surrounding it laid the foundation for Asian Americans’ continuing concerns about negative action.

## 2. Anecdotal Evidence of Racial Stereotyping

Building on such concerns, SFFA pointed to anecdotal evidence of racial stereotyping—particularly the passive nerd stereotype—during Harvard’s more recent admissions cycles. The Complaint referenced admissions reviewers’ various comments about an Asian American applicant: “[h]e’s quiet and, of course, wants to be a doctor”<sup>326</sup> and “scores and application seem so typical of other Asian applications I’ve read: extraordinarily gifted in math with the opposite extreme in English.”<sup>327</sup> It alleged that there were other descriptions of Asian American applicants as “being quiet/shy, science/math oriented, and hard workers.”<sup>328</sup> SFFA asserted Hunter College High School’s college counseling director stated, “When Harvard calls us back and gives us a brief synopsis of why certain [Asian American] kids didn’t make it, they’ll say, ‘There were so

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<sup>320</sup> *Id.* paras. 153-54.

<sup>321</sup> *Id.* para. 155 (“By 1977, the CAA had become the Asian-American Association (‘AAA’). The AAA demanded, among other things, that Harvard expand Asian-American recruitment and include Asian Americans within the college’s ‘affirmative action’ program.”).

<sup>322</sup> *See supra* note 191.

<sup>323</sup> Complaint, *supra* note 6, para. 158-59; *see also supra* notes 191-95 and accompanying text (discussing barriers to Asian Americans’ admissions to top universities).

<sup>324</sup> *Id.* para. 164-67.

<sup>325</sup> *See supra* Section II.B (discussing allegations of negative action in 1980s).

<sup>326</sup> Complaint, *supra* note 6, para. 247.

<sup>327</sup> *Id.* para. 248.

<sup>328</sup> *Id.* para. 246.

many kids in the pool that looked just like this kid.”<sup>329</sup> SFFA gave examples of similar sentiments from other elite universities administrators.<sup>330</sup>

In its motion for summary judgment, SFFA argued the following:

Asian Americans are described as smart and hardworking yet uninteresting and indistinguishable from other Asian-American applicants. They are described, for example, as “busy and bright,” but will “need to fight it out with many similar to [him or her].” Their race is rarely seen as a positive factor in the chances of admissions.<sup>331</sup>

SFFA also pointed to Harvard admissions’ reviewers designation of “Standard Strong” is disproportionately applied to Asian Americans, contending that that label is used “to characterize an application that had strong qualities but not strong enough to merit admission.”<sup>332</sup> It also pointed to data from New York’s Stuyvesant High School, which is one of the top-rated high schools in the country and a feeder school for Harvard.<sup>333</sup> SFFA showed that while 70% of Stuyvesant students are Asian American, less than 50% of those who go to Harvard are Asian American, and White students from Stuyvesant “have a far better chance of being admitted to Harvard than their Asian-American peers.”<sup>334</sup> It furthered noted that Stuyvesant’s director of college counseling testified that Asian American students at the school were as well-rounded as White students, and that “it’s hard to think of anything other than discrimination that could account for this.”<sup>335</sup>

Harvard retorted that its history of discrimination against Jewish applicants was irrelevant and SFFA’s references to that discrimination constituted “a publicity-seeking attempt to distract from its lack of any evidence that Harvard discriminates against Asian-American applicants.”<sup>336</sup> It contended that much of

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<sup>329</sup> *Id.* para. 249.

<sup>330</sup> *Id.* para. 250 (“For example, asked [sic] why Vanderbilt poured resources into recruiting Jewish students instead of Asian Americans, a former administrator said, ‘Asians are very good students, but they don’t provide the kind of intellectual environment that Jewish students provide.’”). SFFA also quotes MIT’s dean of admissions about why a particular Asian American applicant may have been rejected by Harvard: she stated that he may have “looked like a thousand other Korean kids with the exact same profile of grades and activities and temperament. My guess is that he just wasn’t involved or interesting enough to surface to the top.” *Id.* para. 280.

<sup>331</sup> Plaintiff’s Summary Judgment Memorandum, *supra* note 302, at 20 (alteration in original) (internal citations omitted).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 30.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment at 28-29, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), ECF No. 435 [hereinafter Defendant’s Opposition].

the anecdotal evidence was “cherry-picked”<sup>337</sup> and did not prove intentional discrimination. Harvard also noted that SFFA did not even give any evidence of a concerted scheme to discriminate against Asian Americans.<sup>338</sup>

### 3. Specialized College Admissions Counseling for Asian Americans

SFFA contends that “[w]hole new industries have sprung up to help Asian Americans overcome discrimination and secure admission to elite universities.”<sup>339</sup> In fact, SFFA devoted an entire section in its Complaint to detailing how the Princeton Review and other college admissions counseling services give specific advice to Asian American applicants. According to SFFA, much of this advice centers on avoiding racial stereotypes and discouraging any mention of Asian American applicants’ racial, ethnic, or family backgrounds.<sup>340</sup> SFFA presents examples of the Princeton Review’s advice:

Many Asian Americans have been extraordinarily successful academically, to the point where some colleges now worry that there are “too many” Asian Americans on their campuses. Being an Asian American can now actually be a distinct disadvantage in the admissions processes at some of the most selective schools in the country. . . . Increasingly, the standard for affirmative action isn’t minority status, but under-represented minority status. . . . If you are an Asian American—or even if you simply have an Asian or Asian-sounding surname—you need to be careful about what you do and don’t say in your application.

. . . You need to avoid being an Asian Joe Bloggs. Asian Joe Bloggs is 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 you sound like this person, 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.

. . . If you share traits with Asian Joe Bloggs you should probably . . . [not] attach a photograph to your application and don’t answer the optional question about your ethnic

<sup>337</sup> *Id.* at 23-27.

<sup>338</sup> *Id.* at 2 (“SFFA does not offer even a *theory* of how a committee comprising some 40 people at any given time could have carried out the supposed scheme in a concerted fashion over many years—without generating a shred of documentary or testimonial evidence of the alleged scheme.”).

<sup>339</sup> Complaint, *supra* note 6, para. 257.

<sup>340</sup> *Id.* paras. 252-61 (detailing college counselors’ acknowledgment of discrimination against Asian Americans at universities).

background . . . especially . . . if you don't have an Asian-sounding surname.<sup>341</sup>

Asian American applicants are especially encouraged to increase their verbal SAT scores, take humanities courses, and to become involved in extracurricular activities that do not involve math, science, computers, or chess. The Princeton Review also advises them not to write their personal essays on family experiences or traversing two cultures, claiming that these are stereotypical "Asian Joe Bloggs topics."<sup>342</sup> In fact, according to SFFA, the Princeton Review discourages Asian American applicants from revealing their racial/ethnic background at all in their essays or applications.<sup>343</sup>

SFFA notes that this phenomenon is not limited to the Princeton Review. It gives the example of Asian Advantage College Consulting, which "promises to help . . . 'Asian-American student[s] applying to elite colleges beat the Asian Quotas.'"<sup>344</sup> It also points to Ivy League Coach, another college admissions consulting organization which gives Asian Americans specific recommendations for their applications.<sup>345</sup>

Further, SFFA's complaint alleges that Asian Americans know that they face discrimination in elite university admissions. It quotes Princeton economist Uwe Reinhardt: "within the Asian community, of which I'm a part, there's this feeling that, for you to get into Harvard or Princeton, you've got to be better than everybody else."<sup>346</sup> SFFA gives examples of Asian American applicants who chose not to identify their race on their applications for fear of discrimination.<sup>347</sup> All of these allegations and concerns about negative action speak to Asian Americans' perceptions of the college admissions process.

#### 4. Holistic Admissions, Statistical Modeling, and the Personal Rating Score

SFFA's claims about the weight and manner that Harvard uses race emanate from the *Grutter* framework, which not only allows but requires that the weight given to race varies from applicant to applicant. Assessing the use of race is more complicated for a holistic admissions policy than for a fixed point system.<sup>348</sup> Consequently, evaluation of SFFA's claims required elaborate and competing statistical models of the admissions process.

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<sup>341</sup> *Id.* paras. 254-56 (discussing advice as quoted from Princeton Review).

<sup>342</sup> *Id.* para. 256.

<sup>343</sup> *See id.*

<sup>344</sup> *Id.* para. 258; *see also* ASIAN ADVANTAGE COLL. CONSULTING, LLC, <http://www.asianadvantage.net/> [<https://perma.cc/S4CN-4RH6>] (last visited Jan. 18, 2022).

<sup>345</sup> Complaint, *supra* note 6, para. 259.

<sup>346</sup> *Id.* para. 263.

<sup>347</sup> *Id.* paras. 270-74.

<sup>348</sup> *See supra* notes 259-63 and accompanying text.

SFFA contends that “[s]tatistical evidence reveals that Harvard uses ‘holistic’ admissions to disguise the fact that it holds Asian Americans to a far higher standard than other students.”<sup>349</sup> The Complaint states:

Put simply, Bakke “legitimated an admissions process that is inherently capable of gross abuse and that . . . has in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.” Today it is used to hide intentional discrimination against Asian Americans. Harvard is using the same “holistic” code words to discriminate for the same invidious reasons and it is relying on the same pretextual excuses to justify its disparate treatment of another high-achieving racial and ethnic minority group.<sup>350</sup>

By linking the claim of intentional discrimination against Asian Americans (Count I) with claims about the weight and manner in which race is used in holistic admissions (Counts II-IV), SFFA combined allegations of negative action with a challenge to affirmative action. This complicated Harvard’s response: Harvard denies that it intentionally discriminates against Asian Americans under the guise of holistic admissions, but it admits that it uses race intentionally (but constitutionally) as part of its holistic admissions process, primarily to benefit Black, Latina/o, and Native American students.

SFFA and Harvard both presented complex and competing statistical models which involved not only grades and test scores of applicants but also other factors considered in admissions, including extracurricular activities, ratings of personal characteristics, high school teacher and counselor recommendations, and ratings by admissions interviewers.<sup>351</sup> The data showed that accepted Asian American applicants, on average, had higher grades and standardized test scores than accepted White applicants.<sup>352</sup> In part, this difference was accounted for by factors such as the underrepresentation of Asian Americans among “Athletes, Legacies, on the Dean’s or Director’s interest list, or Children of faculty and staff (‘ALDCs’)”—all applicant pools who receive an advantage in Harvard’s admissions process.<sup>353</sup>

<sup>349</sup> *Id.* para. 5.

<sup>350</sup> *Id.* para. 3 (alteration in original) (emphasis omitted) (quoting Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 385 (1979)).

<sup>351</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 168-72 (D. Mass. 2019) (describing complex regression models of relationship between admissions factors and race), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

<sup>352</sup> *Id.* at 157 (describing that “standard strong” Asian American applicants “averaged higher academic indexes, math SAT scores and academic ratings than standard strong applicants from other racial groups”).

<sup>353</sup> *Id.* at 138 (“Asian American applicants are less likely than African American and Hispanic applicants, and far less likely than white applicants, to be recruited . . . [ALDCs], all of whom are advantaged in Harvard’s admissions process.”).

But data also indicated that Asian Americans were rated lower in another aspect of the holistic admissions process: the “personal rating” score.<sup>354</sup> This score is derived from various sources: “applicants’ essays, their responses to short-answer questions, teachers’ and guidance counselors’ qualitative observations about applicants, alumni interviewers’ comments, and much other information.”<sup>355</sup> Reviewers determine a student’s personal rating score by examining a variety of “subjective’ factors,” including applicants’ “character traits” and whether they have a “positive personality.”<sup>356</sup> Reviewers assess “humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities.”<sup>357</sup> Asian Americans’ lower personal ratings scores reflect the passive nerd stereotype and mirrored the claims made by David Ho and Margaret Chin in their “Admissions: Impossible” article over three decades earlier.<sup>358</sup>

One of the main methodological disputes between SFFA and Harvard was whether the personal rating score should be included in statistical models of Harvard’s holistic admissions process. SFFA’s expert, Professor Peter Arcidiacono, excluded the personal rating score in his primary model.<sup>359</sup> He contended that race was a part of the personal rating score and that admissions reviewers discriminated against Asian Americans when determining applicants’ scores.<sup>360</sup> Professor Arcidiacono’s primary model also indicated that an Asian

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<sup>354</sup> *Id.* at 162 (“Harvard admissions officers assign Asian American applicants personal ratings that are, on average, slightly weaker than those assigned to applicants from other racial groups . . .”). Asian Americans were also rated lower in the “overall score,” but that was a less significant part of SFFA’s case. *See infra* note 360 (discussing how overall rating factored into SFFA’s arguments).

<sup>355</sup> Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts at 43, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), ECF No. 418 [hereinafter Defendant’s Support].

<sup>356</sup> Plaintiff’s Summary Judgment Memorandum, *supra* note 302, at 7-8.

<sup>357</sup> Caroline S. Engelmayer, *Harvard Ranks Applicants on ‘Humor’ and ‘Grit,’ Court Filings Show*, HARV. CRIMSON (June 16, 2018), <https://www.thecrimson.com/article/2018/6/16/harvard-admissions-behind-the-scenes/> [<https://perma.cc/5UTG-4UMU>].

<sup>358</sup> Ho & Chin, *supra* note 191, at 8 (“The statistics are evidence that Asians have consistently been underrated. . . . We feel that many admissions officers believe in stereotypes that work against Asian American applicants.”); *see also supra* text accompanying notes 191-95.

<sup>359</sup> *SFFA*, 397 F. Supp. 3d at 173 (D. Mass. 2019) (“Professor Arcidiacono excludes the personal rating from the model . . .”). Professor Arcidiacono created several models and did include the personal rating score in some of them, but the one he considered authoritative did not include the personal rating. *See generally* Expert Report of Peter S. Arcidiacono, *SFFA*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-ADB), ECF No. 415-1.

<sup>360</sup> *See* Plaintiff’s Summary Judgment Memorandum, *supra* note 302, at 7-8 (“Harvard’s admissions officials assign Asian Americans the lowest score of any racial group on the personal rating—a ‘subjective’ assessment of such traits . . .”). SFFA contended that alumni

American applicant's chances of admission would increase if they were White, and even more so if the personal rating was taken out.<sup>361</sup> SFFA employed this model to make its case for negative action and argued that Harvard believed that "white applicants have better personalities" than Asian American applicants.<sup>362</sup>

In contrast, Harvard's expert, Professor David Card, contended that any statistical model should include the personal rating score, because it was not a causal variable, but merely correlated with race.<sup>363</sup> Professor Card argued that Asian Americans had lower personal rating scores because of external factors, such as lower teacher's and counselor's recommendations,<sup>364</sup> not because Harvard's admissions reviewers were biased. Consequently, Professor Card

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reviewers' personal rating scores were not biased: only admissions reviewers systematically rated Asian Americans lower. *Id.* ("Harvard tracks two different personal ratings: one assigned by the Admissions Office and another by alumni interviewers. When it comes to the score assigned by the Admissions Office, Asian-American applicants are assigned the lowest scores of any racial group. . . . By contrast, alumni interviewers (who actually meet the applicants) rate Asian Americans, on average, at the top with respect to personal ratings—comparable to white applicants and higher than African-American and Hispanic applicants." (citations omitted)).

Professor Arcidiacono also found discrimination against Asian American applicants in the "overall score." *Id.* at 9. The overall score "is not a formulaic compilation of the scores in the other ratings. Instead, Harvard instructs readers to assign the score by 'stepping back and taking all the factors into account and then assigning that overall rating.'" *Id.* at 7. As with the personal rating score, SFFA contended that Harvard admissions reviewers, not alumni reviewers, were biased when determining overall scores. *Id.* at 9. Harvard retorted that "admissions officers have access to a broad range of application materials, including comments from teachers, guidance counselors, and others, whereas interviewers meet with the applicant for an hour or less." Defendant's Opposition, *supra* note 336, at 18. Harvard also admitted that race may be considered by admissions reviewers as part of an applicant's overall score, "not mechanically, but where the application file indicated a reason that race might be one relevant consideration illuminating the qualities that the applicant might bring to Harvard." Defendant's Motion, *supra* note 355, at 23. For that reason, the overall score should not be included in the admissions model. *SFFA*, 397 F. Supp. 3d at 171 ("Unlike the personal ratings, the experts agree that the academic and extracurricular variables should be included in the admissions outcome model and that the overall rating should not be included because Harvard acknowledges that it is directly affected by racial identity.").

<sup>361</sup> Plaintiff's Summary Judgment Motion, *supra* note 302, at 10 ("An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating. Excluding the biased personal rating from the model, an Asian-American applicant's chance would increase to 34.7% if he were white." (citation omitted)).

<sup>362</sup> *Id.* at 28.

<sup>363</sup> See Defendant's Support, *supra* note 355, at 43 ("Where so much relevant information is statistically unobservable, it is methodologically unsound to conclude that intentional discrimination is the cause of the perceived association between race and personal ratings."); see also Report of David Card, Ph.D., *supra* note 13, para. 19 ("[T]he disparity Prof. Arcidiacono labels 'bias' may very well be explained by factors other than race that the model does not include.").

<sup>364</sup> Report of David Card, Ph.D., *supra* note 13, para. 136 (faulting Professor Arcidiacono's models for "includ[ing] less information on the critical non-academic factors").

argued that the statistical model should include the personal rating score, because just like academic measures and other external criteria, it was an important determinant of whether applicants are admitted.<sup>365</sup> His model indicated that although Asian Americans were slightly less likely to be admitted even when controlling for the personal rating score, this difference was not statistically significant.<sup>366</sup> The personal rating score itself accounted for most of the difference in admissions rates for Asian American and White applicants with similar academic criteria,<sup>367</sup> and disparities in personal ratings scores were not due to biases of Harvard's admissions reviewers.

Harvard also noted the inconsistent interpretation in Professor Arcidiacono's admissions model. He did not interpret factors that favored Asian Americans, such as academic and extracurricular scores, as bias in favor of Asian Americans, but he did interpret their lower personal rating scores as bias against the group.<sup>368</sup>

##### 5. Harvard's Response to an Alum's Racial Animus

SFFA's legal documents revealed other embarrassing information for Harvard. One particularly troubling example illustrated how Harvard's Administration appeared to underplay one of its alum's overtly racist remarks against Asian Americans:

[I]n 2012, [President Drew] Faust received a letter from an alumnus making racist statements about Asian-American applicants. Specifically, the alumnus urged Harvard to adopt "informal quotas." Such quotas "would include foreign students and the country of their origin. For example, I would limit the number of Japanese students to a certain percentage or number. . . . None of this, of course, has to go beyond the confines of the dean's office. The last time I was in Cambridge it seemed to me that there were a large number of oriental students, for example. I

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<sup>365</sup> *Id.* para. 146 (indicating that Professor Arcidiacono's "model has very low predictive accuracy").

<sup>366</sup> *Id.* para. 71 ("[T]he fact that the difference in admissions rates disappears by controlling for just these factors raises serious questions about SFFA's allegations of bias.").

<sup>367</sup> *Id.* paras. 16, 19 (discussing how absence of variables that could explain admissions disparities from Professor Arcidiacono's model).

<sup>368</sup> See Defendant's Support, *supra* note 355, at 43-44 ("[T]he same modeling approach on which Dr. Arcidiacono relies to conclude there is bias *against* Asian-Americans in the personal rating finds bias *in favor* of Asian-Americans in academic and extracurricular ratings. For those ratings, Dr. Arcidiacono attributes the discrepancy 'to unobservable characteristics not reflected in the model'—yet he rejects, for no articulable reason, the proposition that the same explanation applies to the personal rating. According to Dr. Arcidiacono, then, statistical variances that favor Asian Americans should be dismissed as the result of 'unobservable characteristics,' but statistical variances that disfavor Asian Americans are attributed to alleged bias." (citation omitted)).

think they probably should be limited to 5%. . . . I would appreciate hearing what you might think of my comments.<sup>369</sup>

SFFA reported that, rather than rebuking these remarks, Harvard Admissions Director Marlyn McGrath responded to the alum as follows (copying President Faust):

President Faust has asked me to respond to your April 4 letter, in which you offer many thoughtful observations about Harvard College students and the results of the admissions process. . . . All of us at Harvard appreciate your thoughtful letter, as well as your loyalty over the years.<sup>370</sup>

SFFA highlighted that Harvard's response did not take issue with the alumnus's comments about limiting the number of "oriental students" at Harvard or establishing informal quotas.<sup>371</sup> While President Faust acknowledged that the alum's letter was "preposterous,"<sup>372</sup> she did not think it was necessary to rebuke him because he was "a 90-year-old alum who's given some kind of support to scholarships. He graduated with the class of 1942. He probably went off and fought in World War II."<sup>373</sup>

Harvard did not dispute that these incidents occurred as stated in SFFA's motion.<sup>374</sup> It merely (though correctly) stated that the incident had no bearing on the legality of its race-conscious admissions policy.<sup>375</sup> But SFFA's argument exploited the incident and Harvard's response in order to pit people of color against each other. SFFA specifically contended that incidents of explicit bias against Asian Americans are not taken as seriously as those against other racial minority groups:

At her deposition, Faust refused to answer whether a letter saying the same thing about African Americans would have deserved a similar "polite and respectful" response. Nor would she speculate how Asian-American students might react to the letter, because they "have not seen these letters . . . . [T]hese are matters of personal correspondence that are not matters of public scrutiny."<sup>376</sup>

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<sup>369</sup> Plaintiff's Summary Judgment Motion, *supra* note 302, at 22-23 (alterations in original).

<sup>370</sup> *Id.* at 23 (alteration in original).

<sup>371</sup> *Id.* (indicating that "[President] Faust was comfortable with McGrath sending this 'polite and respectful response'").

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Defendant's Opposition, *supra* note 336, at 26 (recounting facts of email exchange as set forth by plaintiffs).

<sup>375</sup> *Id.* ("That correspondence comes no closer to suggesting discriminatory intent, and certainly not undisputedly so.").

<sup>376</sup> Plaintiff's Summary Judgment Motion, *supra* note 302, at 23 (alterations in original).

SFFA thus asserted that “Harvard’s reaction to claims of discrimination . . . against Asian Americans contrasts starkly with how it responds to complaints from other minority groups.”<sup>377</sup>

C. SFFA v. Harvard *Rulings*

Both SFFA and Harvard moved for summary judgment in June 2018, and the court denied the motions. The case went to trial in October 2018, with additional hearings in early 2019. After much anticipation, the district court issued its ruling in October 2019.

1. U.S. District Court for the District of Massachusetts

The U.S. District Court for the District of Massachusetts ruled that Harvard’s race-conscious admissions policy did not violate Title VI of the Civil Rights Act of 1964.<sup>378</sup> In a lengthy opinion, Judge Allison D. Burroughs delved carefully into the details of Harvard’s admissions process: the university’s self-studies of this process; its compelling interest in diversity,<sup>379</sup> statistical models put forth by both SFFA and Harvard,<sup>380</sup> and the prospect of using race-neutral alternatives to attain a diverse student body.<sup>381</sup> She found that Harvard’s policy was consistent with the framework developed in *Grutter* and *Fisher*—guidelines that also apply to Title VI race discrimination.<sup>382</sup> She also found that Professor Card’s statistical model was more logical and accurate because the personal rating score was an important component of the admissions process.<sup>383</sup> Consequently, Judge Burroughs found that Harvard did not intentionally

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<sup>377</sup> *Id.* at 21.

<sup>378</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 196 (D. Mass. 2019) (“Harvard does not employ a race-based quota, set aside seats for minority students, or otherwise ‘define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.’” (quoting *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 311 (2013))), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

<sup>379</sup> *Id.* at 133 (“Harvard values and pursues many kinds of diversity within its classes, including different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities.”).

<sup>380</sup> *Id.* at 162-65 (discussing statistical models provided by experts from both parties).

<sup>381</sup> *Id.* at 177 (“[N]o workable race-neutral alternatives will currently permit Harvard to achieve the level of racial diversity it has credibly found necessary for its educational mission.”).

<sup>382</sup> *See supra* note 297 and accompanying text.

<sup>383</sup> *SFFA*, 397 F. Supp. 3d at 173 (“[T]he Court finds both experts’ approaches to be economically defensible . . . and prefers Professor Card’s inclusion of ALDC applicants, use of year-by-year models, and inclusion of parental occupation, intended career, and staff interview variables, and finds models with and without the personal rating to be worthy of consideration.”).

discriminate against Asian American applicants with respect to either White or underrepresented minority applicants.<sup>384</sup>

Judge Burroughs rejected SFFA's historical and anecdotal evidence, much of which was deemed irrelevant. With regard to comments by admissions reviewers that Asian American applicants were passive, Judge Burroughs noted that applicants of other backgrounds had also garnered similar comments.<sup>385</sup> She found that "SFFA ha[d] not shown that any applicant was referred to by these types of descriptors because of their race or that there was any sort of systematic reliance on racial stereotypes."<sup>386</sup>

Nevertheless, Judge Burroughs noted the possibility of negative action against Asian Americans via implicit bias on the personal rating scores. Her opinion stated that "the disparity between white and Asian American applicants' personal ratings has not been fully and satisfactorily explained."<sup>387</sup> Rather than intentional discrimination however, she posited that implicit bias against Asian Americans—which is not legally actionable<sup>388</sup>—might be at play. Judge Burroughs found that the data suggested external factors, such as high school teacher and counselor recommendations, rather than Harvard's admissions reviewers, are the sources of "some of the disparity."<sup>389</sup> However, she also noted that

[t]he disparity in personal ratings between Asian American and other minority groups is considerably larger than between Asian American and white applicants and suggests that at least some admissions officers might have subconsciously provided tips in the personal rating . . . . It is also possible, although unsupported by any direct evidence before the Court, that part of the statistical disparity resulted from admissions officers' implicit biases that disadvantaged Asian American applicants in the personal rating relative to white applicants . . . .<sup>390</sup>

Judge Burroughs opined that Harvard's admissions process could be improved by "conducting implicit bias trainings for admissions officers, maintaining clear guidelines on the use of race in the admissions process . . . and monitoring . . . any significant race-related statistical disparities in the rating

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<sup>384</sup> *Id.* at 203 ("Harvard's admissions process survives strict scrutiny. It serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity.").

<sup>385</sup> *Id.* at 157 ("The docket binder that contains notes to the effect that several Asian American applicants were 'quiet' or 'flat' also includes notes for white, African American, and Hispanic applicants who were also described as 'quiet,' 'shy,' or 'understated.'").

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 171.

<sup>388</sup> See *supra* note 162 and accompanying text.

<sup>389</sup> *SFFA*, 397 F. Supp. 3d at 171 (noting difficulty in attributing source of noticeable disparity).

<sup>390</sup> *Id.* (citation omitted).

process.”<sup>391</sup> Even if one dismisses SFFA’s alleged link between negative action and affirmative action, the Harvard case still exposed the possibility of unconscious bias against Asian Americans.

## 2. U.S. Court of Appeals for the First Circuit

The U.S. Court of Appeals for the First Circuit affirmed the district court’s ruling. The First Circuit reiterated Judge Burroughs’s conclusion that Harvard did not intentionally discriminate based on race and essentially adopted her opinion.<sup>392</sup> It did not address implicit bias against Asian Americans, except to note that such bias by Harvard’s admissions reviewers was just “possible,” not “likely” (as contended by SFFA).<sup>393</sup> The First Circuit also noted that “there was ample non-statistical evidence suggesting that Harvard admissions officers did not engage in any racial stereotyping,”<sup>394</sup> and it emphasized other possible reasons for the differences in personal ratings scores besides racial stereotyping and implicit bias. “Privilege is correlated with race. . . . Asian American students are more likely than white students to attend public high schools where overloaded teachers and guidance counselors may provide more perfunctory recommendations.”<sup>395</sup> Such perfunctory recommendations would be considered in the personal rating score and might depress such scores for Asian Americans.<sup>396</sup> Nevertheless, the First Circuit also left open the possibility that Asian Americans were disadvantaged by racial stereotypes.

In February 2021, SFFA filed a petition for a writ of certiorari in the U.S. Supreme Court.<sup>397</sup> In June 2021, the U.S. Supreme Court issued a Call for Views of the Solicitor General in the case, requesting that the Biden Administration weigh in on whether the Supreme Court should grant SFFA’s petition.<sup>398</sup> This delayed the Court’s decision on whether to hear the case until the October 2021

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<sup>391</sup> *Id.* at 204.

<sup>392</sup> *See* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203-04 (1st Cir. 2020), *cert. granted*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.).

<sup>393</sup> *Id.* at 203 (noting that district court’s speculation that implicit bias “might have caused a statistically significant effect” does not render erroneous “finding that there was no ‘intent by admissions officers to discriminate based on racial identity’”).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 201.

<sup>396</sup> *See id.*

<sup>397</sup> *Petition for Writ of Certiorari, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Feb. 25, 2021), 2021 WL 797848.

<sup>398</sup> *See* Vivi E. Lu & Dekyi T. Tsotsong, *Supreme Court Delays Decision on Reviewing Harvard Admissions Lawsuit*, HARV. CRIMSON (June 15, 2021, 12:22 PM), <https://www.thecrimson.com/article/2021/6/14/supreme-court-delays-hearing-admissions-lawsuit/> [<https://perma.cc/E6LZ-346U>] (“The high court invited the acting Solicitor General to file a brief outlining the view of the federal government on the case, which could decide the future of affirmative action in college admissions.”); *see also SFFA*, 141 S. Ct. 2753 (2021) (mem.).

term.<sup>399</sup> In the meantime, SFFA lost its case against UNC Chapel Hill in the district court, and it petitioned the Supreme Court to bypass the U.S. Court of Appeals for the Fourth Circuit and hear the Harvard and UNC Chapel Hill cases together.<sup>400</sup> The Biden Administration filed its cert-stage amicus brief in December 2021, arguing that the Court should not grant SFFA's cert petition in the Harvard case.<sup>401</sup> The Supreme Court consolidated the Harvard and UNC Chapel Hill cases and granted cert on January 24, 2022.<sup>402</sup> And regardless of the Court's ultimate decision, the divisions embodied by the case extend beyond affirmative action.

#### D. *Beyond Affirmative Action: Standardized Testing Debates*

The Harvard case and affirmative action are not the only issues that invoke stereotypes and animus against Asian Americans or that threaten to pit Asian Americans against other people of color. Debates around standardized testing in admissions have generated controversies that have an even greater potential to create divisions. Such tests rightly or wrongly constitute part of the pipeline to elite admissions, and they are viewed as a barrier by some groups and an opportunity by others.<sup>403</sup> Compared to affirmative action, the policies that result from debates on standardized tests will affect far more students and families from a much wider range of racial and socioeconomic backgrounds.

<sup>399</sup> See Amy Howe, *Justices Request Government's Views on Harvard Affirmative-Action Dispute*, SCOTUSBLOG (June 14, 2021, 12:40 PM), <https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/> [<https://perma.cc/X2DP-M26M>] (“[T]he call for the government's views likely postpones the case until next spring at the earliest.”).

<sup>400</sup> See Lu & Tsotsong, *supra* note 174.

<sup>401</sup> Brief for United States as Amicus Curiae at 10, *SFFA*, No. 20-1199 (U.S. Dec. 8, 2021).

<sup>402</sup> *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D.N.C. Oct. 18, 2021), *cert. granted and consolidated*, *SFFA*, No. 20-1199, 2022 WL 199375 (U.S. Jan. 24, 2022) (mem.); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203-04 (1st Cir. 2020), *cert. granted*, 2022 WL 199375. For a procedural history of the Harvard case, see SCOTUSBLOG, *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/> [<https://perma.cc/K2SR-7DS2>] (last visited Jan. 18, 2022). For a procedural history of the UNC Chapel Hill case, see SCOTUSBLOG, *Students for Fair Admissions, Inc. v. University of North Carolina*, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/> [<https://perma.cc/LF8A-PNPD>] (last visited Jan. 18, 2022).

<sup>403</sup> See Kyle Spencer, *For Asians, School Tests Are Vital Steppingstones*, N.Y. TIMES, Oct. 27, 2012, at A18 (describing standardized tests in New York City public schools as vital for immigrants to get into elite institutions).

### 1. New York City's Specialized High School Admissions Test

For several years, there has been an ongoing debate about eliminating New York City's Specialized High School Admissions Test ("SHSAT").<sup>404</sup> Since 1971, SHSAT has been the sole criterion for admission to the eight most selective public schools in NYC, which has created concern for racial equity advocates.<sup>405</sup> In 2019, 895 students were admitted to the prestigious Stuyvesant High School: 587 were Asian or Asian American, 194 were White, and only 7 were Black.<sup>406</sup> Black students were also highly underrepresented at other selective high schools.<sup>407</sup> These racial disparities in admissions, which have existed for years, have justifiably caused concern. In June 2018, New York City Mayor Bill de Blasio proposed eliminating the SHSAT as the basis for admission to specialized high schools.<sup>408</sup> The proposal involved phasing out the SHSAT over three years,<sup>409</sup> and replacing it with a plan that admits the top 7% of the class in each middle school.<sup>410</sup> But Asian American parents organized in opposition, contending that they had not been properly involved in the

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<sup>404</sup> See Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.'s Most Selective High School, out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html> ("[Mayor] de Blasio's proposal to scrap the entrance exam for the schools and overhaul the admissions process has proved so divisive that the state's most prominent politicians . . . have mostly avoided taking a definitive position . . .").

<sup>405</sup> *Id.* ("[T]he exam tends to produce specialized schools with classes that do not reflect the school system as a whole.")

<sup>406</sup> *Id.* SFFA also contends that Harvard discriminated against Asian American students from Stuyvesant in favor of White students. See *supra* notes 333-35 and accompanying text.

<sup>407</sup> See Shapiro, *supra* note 404 ("Another highly selective specialized school, the Bronx High School of Science, made 12 offers to black students this year, down from 25 last year.")

<sup>408</sup> *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools*, N.Y.C.: OFF. OF THE MAYOR (June 3, 2018) [hereinafter *Mayor de Blasio and Chancellor Carranza Announce Plan*], <https://www1.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high> [<https://perma.cc/T7SJ-XD8X>] (detailing plan to eliminate SHSAT and expand Discovery program); see also Bill de Blasio, *Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, CHALKBEAT (June 2, 2018, 12:00 PM), <https://www.chalkbeat.org/posts/ny/2018/06/02/mayor-bill-de-blasio-new-york-city-will-push-for-admissions-changes-at-elite-and-segregated-specialized-high-schools> [<https://perma.cc/G8MD-7AAM>] ("[W]e need to scrap the SHSAT and start over.")

<sup>409</sup> *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 408; see also Clio Chang, *Whose Side Are Asian-Americans On?*, NEW REPUBLIC (Sept. 24, 2018), <https://newrepublic.com/article/151328/whose-side-asian-americans-on> ("Under de Blasio's proposal, the SHSAT would be phased out over three years and eventually replaced with a system that automatically admits the top [seven] percent of students from every middle school in the city . . .").

<sup>410</sup> *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 408; see also Alvin Chang, *The Fraught Racial Politics of Entrance Exams for Elite High Schools*, VOX (June 14, 2018, 9:10 AM), <https://www.vox.com/2018/6/14/17458710/new-york-shsat-test-asian-protest> (detailing plan to eliminate SHSAT and replace with plan described above).

conversation.<sup>411</sup> They worried that the proposed reform would significantly lower their children's enrollment in New York City's elite schools.<sup>412</sup> In 2021, 28% of Asian American students who took the SHSAT received admissions offers for specialized high schools, compared to 27.4% of White students, 7.1% of Native American students, 4.3% of Latina/o students, and 3.5% of Black students.<sup>413</sup> Similar to the Harvard case, the SHSAT debate threatens to pit Asian Americans against other minority groups. But the stakes here are even higher, as a much larger number of students are affected. One report found that Mayor de Blasio's plan to eliminate SHSAT would cut Asian American enrollment in half at the selective schools, while increasing Black enrollment by fivefold.<sup>414</sup>

Consequently, the prospect of eliminating the SHSAT has caused much controversy. New York State Senator John Liu, who chairs the State Senate's standing committee on New York City Education, organized a community forum on the issue in April 2019. He contended that, when the City was devising the proposal, "the Asian community[, in particular,] was completely excluded, not inadvertently, but intentionally and deliberately."<sup>415</sup> The Pacific Legal Foundation filed a lawsuit against the City on the parents' behalf, arguing that the plan to eliminate the SHSAT discriminates against Asian Americans.<sup>416</sup>

<sup>411</sup> Elizabeth A. Harris & Winnie Hu, *Plan to Diversify Elite High Schools Draws the Ire of Asian Groups*, N.Y. TIMES, June 6, 2018, at A18 (profiling organizing attempts by Asian parents including protest outside City Hall).

<sup>412</sup> See Rong Xiaoqing, *Test Anxiety*, CITY J. (Apr. 4, 2021), <https://www.city-journal.org/asian-american-activists-fighting-ncy-school-reform> [<https://perma.cc/PHZ5-XR5X>] (explaining Asian parents' concern that proposal would create more opportunities for Black and Hispanic students at expense of qualified Asian American students); see also Pooja Salhotra, *Fight Intensifies over Exam That's Said to Keep Black Students out of NYC's Elite High Schools*, BEDFORD & BOWERY (Dec. 4, 2020), <https://bedfordandbowery.com/2020/12/fight-intensifies-over-exam-said-to-keep-black-students-out-of-nycs-elite-high-schools/> [<https://perma.cc/8JXS-ZR9N>] ("Some Asian parents and lawmakers argue that the proposal would ultimately discriminate against low-income Asian students . . .").

<sup>413</sup> *Specialized High School Offers to Black, Latino Students in NYC See Decline*, NBC N.Y. (Apr. 29, 2021, 1:28 PM), <https://www.nbcnewyork.com/news/local/specialized-high-school-offers-to-black-latino-students-in-nyc-are-down-from-last-year/3027445/> [<https://perma.cc/KK69-T5QP>].

<sup>414</sup> See N.Y.C. INDEP. BUDGET OFF., *ADMISSIONS OVERHAUL: SIMULATING THE OUTCOME UNDER THE MAYOR'S PLAN FOR ADMISSIONS TO THE CITY'S SPECIALIZED HIGH SCHOOLS 1, 4* (2019), <https://ibo.nyc.ny.us/iboreports/admissions-overhaul-simulating-the-outcome-under-the-mayors-plan-for-admissions-to-the-citys-specialized-high-schools-jan-2019.pdf> [<https://perma.cc/G4J2-UNXH>] (predicting that share of Asian American students at specialized high schools would fall from 60.9% to 31.3% under new plan and Black student enrollment would increase from 3.7% to 18.7%).

<sup>415</sup> Chris Fuchs, *At Forum on NYC's High School Admissions, Frustration Rules*, NBC NEWS (Apr. 12, 2019, 5:56 PM), <https://www.nbcnews.com/news/asian-america/forum-nycs-high-school-admissions-frustration-rules-n993966> [<https://perma.cc/QX69-6QK2>].

<sup>416</sup> *Complaint, Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, No. 1:18-cv-

Mayor de Blasio retreated from his initial proposal but still argued that the SHSAT was “broken,” as it leads to specialized high school enrollments that do not reflect New York City’s demographics.<sup>417</sup> The Mayor faced additional backlash for suggesting that opponents of the proposed admissions reforms were also “opponents of ‘justice and progress.’”<sup>418</sup>

Unlike most applicants to Harvard, the students affected by the SHSAT are generally not from privileged backgrounds. In the 2012-13 academic year, 46.8% of students accepted to the specialized high schools, based on their SHSAT scores, were receiving free or reduced price lunch.<sup>419</sup> In 2014, 29% of Asian Americans in New York City lived below the poverty line: the highest percentage of any group.<sup>420</sup> Most of the Asian American students in New York City’s selective schools are from low-income families,<sup>421</sup> and all groups have long viewed these schools as a means to upward mobility.<sup>422</sup> Many are first- or second-generation immigrants who face discrimination, racial stereotyping, and

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11657 (S.D.N.Y. filed Dec. 13, 2018), ECF No. 1; *see also* Lauren Camera, *Asian-Americans Sue New York City Over School Desegregation Plan*, U.S. NEWS (Dec. 14, 2018), <https://www.usnews.com/news/education-news/articles/2018-12-14/asian-americans-sue-new-york-city-over-plan-to-desegregate-elite-high-schools> (“The group [of Asian American parents] filed a federal lawsuit in Manhattan on Thursday against New York City Mayor Bill De Blasio and Richard Carranza, chancellor of the New York City Department of Education, arguing that the plan to reserve 20 percent of seats for low-income students who barely miss the cut-off score for admission discriminates against Asian-American children.”).

<sup>417</sup> *See* ‘Our Plan Didn’t Work’: De Blasio Indicates Openness to Keeping the SHSAT, SPECTRUM NEWS N.Y.1 (Sept. 25, 2019), <https://www.ny1.com/nyc/all-boroughs/politics/2019/09/26/shsat-bill-de-blasio-says-plan-to-scrap-specialized-high-school-exam-did-not-work> [<https://perma.cc/WD5W-97S3>] (recapping interview where Mayor de Blasio and Chancellor Carranza indicated that they were open to hearing alternatives to proposed plan scrapping SHSAT).

<sup>418</sup> Chris M. Kwok, *The Inscrutable SHSAT*, 27 ASIAN AM. L.J. 32, 34 (2020) (citation omitted).

<sup>419</sup> *See* Kenny Xu, *The Test Will Set You Free*, TABLET (July 12, 2021), <https://www.tabletmag.com/sections/news/articles/inconvenient-minority-kenny-xu> [<https://perma.cc/W3XB-H5NP>].

<sup>420</sup> Victoria Tran, *Asian Americans Are Falling Through the Cracks in Data Representation and Social Services*, URB. INST.: URB. WIRE (June 19, 2018), <https://www.urban.org/urban-wire/asian-americans-are-falling-through-cracks-data-representation-and-social-services> [<https://perma.cc/UV42-GF6V>] (“In 2014, Asian Americans represented 17.9 percent of people living in poverty in New York City and had the highest poverty rate of any racial or ethnic group at 29 percent, according to NYC Opportunity tabulations provided to Urban Institute researchers.”).

<sup>421</sup> *See* Alia Wong, *4 Myths Fueling the Fight over NYC’s Exclusive High Schools*, ATLANTIC (Mar. 21, 2019), <https://www.theatlantic.com/education/archive/2019/03/stuyvesant-admissions-controversy-fact-or-fiction/585460/> (stating that most Asian American students at specialized high schools are low income and that, under SHSAT system, more Asian Americans at specialized high schools were low income than any other racial group).

<sup>422</sup> *See* Xu, *supra* note 419 (discussing how Jewish Americans were first to take advantage of standardized tests to overcome prejudice and gain admission to elite high schools).

other barriers. These barriers may not be as great as those faced by Black and Latina/o students, but characterizing these Asian American students as “privileged” is also misleading. It is understandable that their families could view efforts to remove the SHSAT as a reflection of the peril of the mind trope—a xenophobic backlash to the large population of Asian Americans in the specialized schools.

This dilemma over testing goes beyond New York City. The Pacific Legal Foundation has also filed suit on behalf of Asian American parents against the school board of Fairfax County, Virginia, after its Thomas Jefferson High School for Science and Technology—rated the top public high school in the nation by *U.S. News and World Report*<sup>423</sup>—changed its admissions policy to eliminate standardized testing.<sup>424</sup> As in New York City, the Fairfax County School Board hopes to improve representation of Black and Latina/o students with the new admissions policy, and Asian American families feel like their children are the ones who will be harmed.<sup>425</sup>

None of this means that selective high schools should continue to use standardized testing for admissions. The underrepresentation of Black and Latina/o students at specialized schools is prevalent in many urban school districts,<sup>426</sup> and it should be great cause for concern. But everyone involved should recognize the difficult and intractable issues here. At a minimum, Asian American parents and children are stakeholders, and every effort should be made to include them in the conversation about admissions reforms.<sup>427</sup> And even if the

<sup>423</sup> 2021 *Best U.S. High Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/national-rankings> (ranking Thomas Jefferson High School for Science and Technology first) (last visited Jan. 18, 2022); see also Mark Hand, *Thomas Jefferson Named Top High School in U.S. Again: U.S. News*, PATCH (Apr. 30, 2021, 2:47 PM), <https://patch.com/virginia/greateralexandria/thomas-jefferson-named-top-high-school-u-s-again-u-s-news> [<https://perma.cc/6NPH-9R2E>].

<sup>424</sup> See Complaint and Demand for Jury Trial para. 46, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. filed Mar. 10, 2021), 2021 WL 918497 (alleging that school board eliminated admissions exam to accomplish “racial balancing”); Matthew Barakat, *Suit Alleging Admissions Discrimination at Thomas Jefferson HS Moves Forward*, NBC4 WASH. (May 21, 2021, 4:40 PM), <https://www.nbcwashington.com/news/local/northern-virginia/suit-alleging-admissions-discrimination-at-thomas-jefferson-hs-moves-forward/2679625/> [<https://perma.cc/6LTJ-PWVS>] (detailing law suit filed by Pacific Legal Foundation).

<sup>425</sup> See Bakarat, *supra* note 424 (“The Fairfax County School Board, seeking to increase diversity at the school, drastically overhauled the admissions process at the school . . . . Opponents of the changes say . . . that the changes target Asian American families who prospered under the old system.”).

<sup>426</sup> See Richard V. Reeves & Ashley Schobert, *Elite or Elitist? Lessons for Colleges from Selective High Schools*, BROOKINGS INST. (July 31, 2019), <https://www.brookings.edu/research/elite-or-elitist-lessons-for-colleges-from-selective-high-schools/> [<https://perma.cc/X4XK-NL24>] (detailing low enrollment of Black, Latina/o, and Asian American students, particularly low-income students, at selective schools in various cities).

<sup>427</sup> The exclusion of Asian Americans from decision-making was also at issue in the allegations of negative action during the 1980s. See *supra* text accompanying notes 200, 228.

SHSAT and similar tests are eliminated, the voices of Asian American families affected should be heard and considered.

## 2. College Entrance Exams

Relatedly, the movement to eliminate college entrance exams has also gained traction in recent years. More than 1,200 colleges and universities now allow admission without requiring standardized test scores.<sup>428</sup> Some of these institutions had already made these tests optional before the COVID-19 pandemic. Other institutions implemented this measure temporarily, as a response to the COVID-19 pandemic. Others had made the tests optional even before the pandemic.<sup>429</sup> The University of California system has led the way here and will no longer consider SAT or ACT scores, even as an option.<sup>430</sup> When this policy was first proposed, it received staunch criticism from the Asian American Coalition for Education, which stated:

[T]he test-blind movement . . . undermines the merit-based principle to the detriments of our nation's technological progress and national security. . . . [P]hasing out objective and transparent measures in college admissions will further deprive disadvantaged students, including too many Asian-American children, of their fair chances to succeed academically.

. . . [The] plan will particularly harm Asian-American students who are inappropriately labeled as "overrepresented" at UC, in spite of tremendous within-group socioeconomic and cultural diversities. With standardized tests being dropped, Asian-American children become easy victims of various radical acts of racial balancing, through which some colleges use opaque and subjective admission criteria including racial stereotypes to limit Asian-American admissions.<sup>431</sup>

Harvard itself made the SAT and ACT optional because of the pandemic, and it recently announced that it will continue to make the tests optional through at

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<sup>428</sup> Bianca Quilantan, *Colleges Dump Online SAT and ACT, Fueling Anti-Testing Movement*, POLITICO (May 21, 2020, 8:18 PM), <https://www.politico.com/news/2020/05/21/colleges-dump-online-sat-and-act-fueling-anti-testing-movement-274284> [<https://perma.cc/9QAC-8RM3>] ("Altogether, more than 1,200 schools say applicants can skip the tests, including those who made the move before the pandemic.")

<sup>429</sup> *Id.*

<sup>430</sup> *See id.*; Christine Tran & Saumya Gupta, *University of California Announces It Will Not Use SAT, ACT in Admissions Decisions*, DAILY BRUIN (May 14, 2021), <https://dailybruin.com/2021/05/14/university-of-california-announces-it-will-not-use-sat-act-in-admissions-decisions> [<https://perma.cc/JM7Z-WW26>].

<sup>431</sup> *AACE Strongly Opposes University of California President's Proposal to Abandon SAT and ACT in Student Admissions*, ASIAN AM. COAL. FOR EDUC. (May 19, 2020), [https://asianamericanforeducation.org/en/pr\\_20200519/](https://asianamericanforeducation.org/en/pr_20200519/) [<https://perma.cc/DVX3-R53V>].

least 2026.<sup>432</sup> Some commentators have contended that this will make Harvard's admissions process even more subjective and facilitate further discrimination against Asian Americans.<sup>433</sup>

The issue of testing is contested among Asian Americans, and there are different views on the effect of eliminating college entrance exams. One recent study suggested that replacing holistic admissions with test-only admissions would have a negligible effect on Asian American enrollment at selective universities and would work to the detriment of some Asian Americans, especially those from low-income backgrounds.<sup>434</sup> Another study indicated that eliminating standardized testing could potentially increase enrollment of Southeast Asian Americans<sup>435</sup>—a group that faces some of the same challenges as Black, Latina/o, and Native Americans. And studies have shown biases against certain Asian American groups in some of the tests.<sup>436</sup>

<sup>432</sup> See Nick Anderson, *Harvard Won't Require SAT or ACT Through 2026 as Test-Optional Push Grows*, WASH. POST (Dec. 16, 2021), <https://www.washingtonpost.com/education/2021/12/16/harvard-test-optional-college-admissions/>.

<sup>433</sup> See, e.g., William A. Jacobson, *Harvard Dropping SAT Requirement for Several More Years Enables More Anti-Asian Discrimination*, LEGAL INSURRECTION (Dec. 29, 2021, 8:00 AM), <https://legalinsurrection.com/2021/12/harvard-dropping-sat-requirement-for-several-more-years-enables-more-anti-asian-discrimination/> [<https://perma.cc/P2S7-7Z2Z>] (arguing that Harvard discriminates against Asian Americans through “use of ‘soft’ factors in admissions decisions” and that elimination of requirement for college entrance exams is “an obvious ploy to hide the evidence of anti-Asian discrimination”).

<sup>434</sup> See ANTHONY CARNEVALE & MICHAEL C. QUINN, GEORGETOWN UNIV. MCCOURT SCH. PUB. POL'Y, CTR. ON EDUC. & WORKFORCE, *SELECTIVE BIAS: ASIAN AMERICANS, TEST SCORES, AND HOLISTIC ADMISSIONS 8* (2021), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/cew-selective-bias-fr.pdf> [<https://perma.cc/6LZK-X2S6>]. The study examined admissions data from ninety-one of the most selective colleges and universities in the U.S. and found that “[e]ven if standardized test scores were the only factor considered in admissions, the Asian American share of enrollment at the most selective colleges would increase by no more than 2 percentage points,” raising the average Asian American share of student at said schools from 12% to 14% overall. *Id.* at 7-8. Additionally, the simulation that was run in the study showed that 20% of Asian American students currently attending these selective institutions would not have been admitted without a holistic review process. *Id.* at 8 (“[O]ne in five of the Asian American students attending these colleges would not have been admitted under a test-only admissions policy.”).

<sup>435</sup> See DOUGLAS H. LEE, COLO. STATE UNIV., *RACE & INTERSECTIONAL STUD. IN EDUC. EQUITY, ELIMINATING STANDARDIZED TESTING TO INCREASE ACCESS: SOUTHEAST ASIAN AMERICANS AND THE UNIVERSITY OF CALIFORNIA SYSTEM 2-7* (2020), [https://35pytx37zdp5j4hfr35of829-wpengine.netdna-ssl.com/rise/wp-content/uploads/sites/23/2020/05/RISEreport\\_SATii-UCSystem-SEAsians\\_final.pdf](https://35pytx37zdp5j4hfr35of829-wpengine.netdna-ssl.com/rise/wp-content/uploads/sites/23/2020/05/RISEreport_SATii-UCSystem-SEAsians_final.pdf) [<https://perma.cc/3X8A-5K2B>].

<sup>436</sup> See Nicole Gon Ochi & OiYan Poon, *Asian Americans and Affirmative Action—UNC Amicus Brief*, 24 UCLA ASIAN PAC. AM. L.J. 29, 33 n.16 (2020) (citing ROBERT TERANISHI, LIBBY LOK & BACH MAI DOLLY NGUYEN, EDUC. TESTING SERV. & NAT'L COMM'N ON ASIAN AM. & PAC. ISLANDER RSCH. IN EDUC., *iCOUNT: A DATA QUALITY MOVEMENT FOR ASIAN*

Nevertheless, Professor Julie Park notes that “[t]est prep is a rite of passage” among many Asian American students.<sup>437</sup> Test preparation companies also target Asian Americans, who have the highest rate of taking test preparation courses of any racial group.<sup>438</sup> In countries such as China and South Korea, intense test preparation and high-stakes exams are the norm, and many East Asian American immigrant families view the SAT and ACT as analogous to those exams.<sup>439</sup> Asian Americans “get frequent messages from an early age about the importance of doing well on tests”<sup>440</sup> and may view the elimination of tests as a xenophobic reaction to their own success.

Again, this does not mean that standardized testing for college admissions should be preserved. Inasmuch as college entrance exams are a barrier to the admission of underrepresented students, that barrier should be removed.<sup>441</sup> But everyone should be cognizant of the effect this may have on Asian American students and families and how they may come to view the “test-blind movement” as another way to ostracize and exclude them.

Even more than affirmative action, debates over selective high school and college admissions testing have the potential to create conflict between Asian Americans and other people of color. This is already happening: in the 2021 New York City mayoral election, Republican Curtis Sliwa won a higher

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AMERICANS AND PACIFIC ISLANDERS IN HIGHER EDUCATION 18 (2013), <https://files.eric.ed.gov/fulltext/ED573772.pdf> [<https://perma.cc/5BC7-KKKE>] (explaining that Filipino American and Hmong American students can be at significant disadvantage on SAT compared to other Asian American groups).

<sup>437</sup> Julie J. Park, *Test Prep Is a Rite of Passage for Many Asian-American Students*, CONVERSATION (Nov. 28, 2018, 6:42 AM) [hereinafter Park, *Test Prep Is a Rite of Passage*], <https://theconversation.com/test-prep-is-a-rite-of-passage-for-many-asian-americans-107244> [<https://perma.cc/EGZ8-8VBP>]; see also Julie J. Park, *It Takes a Village (or an Ethnic Economy): The Varying Roles of Socioeconomic Status, Religion, and Social Capital in SAT Preparation for Chinese and Korean American Students*, 49 AM. EDUC. RSCH. J. 624, 626 (2012) (“For a significant portion of . . . Asian American students, taking SAT prep is a rite of passage . . .”).

<sup>438</sup> See Park, *Test Prep Is a Rite of Passage*, *supra* note 437 (describing how test prep companies have targeted certain communities by advertising in Asian languages and setting up shop in heavily Asian American neighborhoods). Park has found that “that over half of Korean-Americans and 42 percent of Chinese-Americans took an SAT prep course prior to college, compared to 35.6 percent of white students, 32.4 percent of Hispanic students and 40.4 percent of black students.” *Id.*

<sup>439</sup> See *id.*

<sup>440</sup> *Id.*

<sup>441</sup> Whether removing standardized testing will increase racial diversity is a contested issue. See, e.g., Editorial, *Testing Still Has Role in Admissions*, PITT. POST-GAZETTE, May 7, 2021, at A8 (arguing that colleges and universities should continue considering standardized test scores because other means of reviewing applicants are even more correlated to household income).

percentage of votes in majority Asian American enclaves,<sup>442</sup> where there were campaign signs in English and Chinese noting his support for the “merit-based SHSAT.”<sup>443</sup> Controversies over testing parallel the affirmative action debate, but they could affect the prospects of many more students of all racial backgrounds. Solutions to these dilemmas will not be easy: they may have to be very nuanced, and it will take a lot of mutual understanding and some compromise to find resolutions that are acceptable to all groups.

#### IV. ASIAN AMERICANS IN THE DISCOURSE ON RACE

Although the Harvard case is a weak legal challenge to affirmative action and does not reveal definitive evidence of negative action, it takes advantage of a context in which Asian Americans have legitimate concerns. History has taught Asian Americans that they will face discrimination, particularly as they advance in American society, and admission to elite universities is a primary means of such advancement. SFFA’s allegations of negative action resonate for many Asian Americans and are reinforced in the college application process. For example, Asian Advantage College Consulting, which was referenced by SFFA in its Complaint, states that it will help applicants “[b]eat the Asian [q]uotas[.]”<sup>444</sup> It cautions Asian American applicants from appearing like stereotypical high-achievers in science and technical professions.<sup>445</sup> Its website states that the highly qualified Asian American applicant “will be subjected to a higher standard of admission. College admissions directors will say that in addition to academic criteria, their applicants will be evaluated through ‘holistic’ methods. This is a code word for racial discrimination and an undocumented quota system.”<sup>446</sup>

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<sup>442</sup> Rong Xiaoqing, Clifford Michel, Suhail Bhat & Will Welch, *Chinese Voters Came Out in Force for the GOP in NYC, Shaking Up Politics*, CITY (Nov. 11, 2021, 7:34 PM), <https://www.thecity.nyc/politics/2021/11/11/22777346/chinese-new-yorkers-voted-for-sliwa-gop-republicans> [<https://perma.cc/4KL4-ZYPT>] (“Sliwa scored 44% of the vote in precincts where more than half of residents are Asian—surpassing his 40% of votes in white enclaves, 20% in majority-Hispanic districts and 6% in majority-Black districts.”).

<sup>443</sup> See Jay Caspian Kang, Opinion, *Democrats Still Don’t Understand Asian American Voters*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/opinion/republican-democrat-asian-voter.html>.

<sup>444</sup> ASIAN ADVANTAGE COLL. CONSULTING, <http://www.asianadvantage.net/> [<https://perma.cc/S4CN-4RH6>] (last visited Jan. 18, 2022).

<sup>445</sup> Asian Advantage discourages students from appearing as “Asian Robots,” explaining that “[t]he typical profile of the Asian ‘robot’ is the well-rounded student who excels in multiple areas. In academics, this usually includes science and math, and in extracurricular activities, music and volunteering. Thus, you’ll see many of these Asian-American applicants with high grades and SAT/ACT scores, along with a seemingly impressive list of awards and achievements in science fairs, musical competitions and school-based activities like debate and the robotics club.” *Id.*

<sup>446</sup> *Id.*

Rather than directly challenging negative action or affirmative action, Asian Advantage College Consulting seems to take both as a given and purports to help Asian American college applicants navigate them. Unfortunately, in the process, it furthers SFFA's project of conflating affirmative action and negative action.

Progressive Asian Americans and other racial equity advocates cannot let SFFA capture the narrative on negative action. The Harvard case illustrates the importance of viewing racial ideology in a relational manner—through the positioning of all groups together rather than the consideration of each group separately. The conflation of affirmative action and negative action is part of a larger ideology that sustains America's racial hierarchy by pitting Asian Americans against other people of color. This ideology reaches beyond affirmative action, and it is sustained not only through structural differences in opportunities for groups, but also through the racial stereotypes that are propagated about these groups. Asian Americans should reject SFFA's project and support affirmative action. Even if that means a slight decrease in the number of Asian Americans at elite universities, it is important for Asian Americans to look “[b]eyond self interest.”<sup>447</sup>

It is also important for everyone interested in racial equity and justice to address negative action, along with the racial stereotypes and implicit and explicit biases it invokes. Racial justice advocates should understand the historical and contemporary challenges faced by each minority group, in order to work together to combat racism. There is growing attention to antiracist initiatives in America,<sup>448</sup> and Asian Americans should be included more in that discourse. This requires that people of all backgrounds learn about the racial positioning of Asian Americans and the issues and challenges they confront. Additionally, Asian Americans must take initiative to raise their own race-consciousness and understand their position in the racial structure and ideology of America.

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<sup>447</sup> See Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *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, 129 (1996).

<sup>448</sup> See, e.g., Jeffrey M. Jones & Camille Llyod, *Larger Majority Says Racism Against Black People Widespread*, GALLUP (July 23, 2021), <https://news.gallup.com/poll/352544/larger-majority-says-racism-against-black-people-widespread.aspx> [https://perma.cc/M6DA-A8Z2] (“Americans continue to be concerned about the treatment of Black people in the U.S., with that concern increasing significantly since 2015, particularly in the past two years amid a greater public awareness and sensitivity to racial inequities.”); Jemima McEvoy, *Sales of ‘White Fragility’—and Other Anti-Racism Books—Jumped Over 2000% After Protests Began*, FORBES (July 22, 2020, 11:12 AM), <https://www.forbes.com/sites/jemimamcevoy/2020/07/22/sales-of-white-fragility-and-other-anti-racism-books-jumped-over-2000-after-protests-began/> (noting that sales of books about race increased 6800% after George Floyd was murdered in May 2020). See generally IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019).

A. *Racial Ideology and the Positioning of Asian Americans*

Regardless of whether Harvard is guilty of any wrongdoing, SFFA's case has brought attention to negative action, and it has shed light on stereotypes of Asian Americans. But SFFA has misframed these issues and pitted different groups of people of color against each other. Rather than supporting SFFA's case, racial stereotypes reveal the broad ideological structure of American racism. The ideological dimension of racism, which operates through what Professors Michael Omi and Howard Winant have called "racial projects," employs racial stereotypes and other schemata to position different minority groups in opposition to each other, while reinforcing social and political structures that oppress all of them.<sup>449</sup>

1. Racial Triangulation

Professor Claire Jean Kim's racial triangulation framework illustrates how Asian Americans are positioned with respect to other minority groups—particularly Black Americans.<sup>450</sup> Professor Kim discusses the positioning of Asian Americans in terms of "relative valorization" and "civic ostracism."<sup>451</sup> "Relative valorization" involves the dominant group exalting one minority group over another (for example, valorizing Asian Americans over Black Americans), "in order to dominate both groups, but especially the latter [group]."<sup>452</sup> This is readily apparent with the model minority stereotype. "Civic ostracism" involves demeaning the valorized group (Asian Americans) as "immutably foreign and unassimilable" to justify marginalizing them.<sup>453</sup> The

<sup>449</sup> See OMI & WINANT, *supra* note 16, at 56 (defining "racial project" as "simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines" (emphasis omitted)).

<sup>450</sup> See Kim, *supra* note 1, at 106-07.

<sup>451</sup> *Id.* at 107.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* Recent discussion of Justice Stephen Breyer's replacement on the U.S. Supreme Court led to another example of the relative valorization of Asian Americans at the expense of Black Americans. Shortly after Justice Breyer announced his retirement, Ilya Shapiro, who was about to start a faculty position at Georgetown Law School, tweeted that South Asian American Sri Srinivasan was "objectively [the] best pick for [President] Biden" to appoint, but that Biden would instead choose a "lesser Black woman" because of his prior promise to appoint a Black woman to the Court. See Blake Montgomery, *New Georgetown Law Exec Deletes 'Appalling' Tweets About Biden SCOTUS Picks*, DAILY BEAST (Jan. 27, 2022, 4:46 PM), <https://www.thedailybeast.com/new-georgetown-law-department-head-ilya-shapiro-tweets-bidens-scotus-nominee-will-be-lesser-black-woman> [<https://perma.cc/8CLS-2HGA>]. Georgetown Law School Dean William Treanor denounced Shapiro's remarks. *Id.* But the Georgetown Black Law Students Association (BLSA) went a step further and called for Shapiro's appointment to be revoked. @GeorgetownBLSA, TWITTER (Jan. 28, 2022, 12:51 PM), <https://twitter.com/GeorgetownBLSA/status/1487121210039230469> [<https://perma.cc/M2EU-SLVZ>]. In addition to noting how Shapiro's remarks reflected racist stereotypes, the

perpetual foreigner stereotype exemplifies this process. The peril of the mind and passive nerd tropes show how valorization and ostracism can intersect, not only in debates over affirmative action and negative action, but also in other areas.

Within U.S. racial ideology more broadly, these processes of valorization and ostracism position groups in opposition to each other. Stereotypes of Black Americans and Asian Americans stand in stark contrast: Black Americans are stereotyped as unintelligent, overly aggressive, and criminal, while Asian Americans are viewed as intelligent but passive, docile, and socially inept. In this light, Black Americans are criminalized or subjugated to menial positions, while Asian Americans are bound to technical positions rather than leadership roles. White Americans then become the social ideal: those who have all of the qualities necessary for leadership and higher level positions. This is precisely the frame that underlies negative action.

## 2. Model Minority as a Divisive Weapon

While all racial stereotypes are harmful, the model minority has been particularly insidious in maintaining racial inequality. Through the model minority stereotype, Asian American success has long been attributed to cultural orientations such as a “Confucian [w]ork [e]thic.”<sup>454</sup> Conservatives have employed the model minority stereotype to argue that Black Americans, Latina/os, and Native Americans simply need to work harder to attain social and economic mobility, rather than relying on affirmative action and other government policies.<sup>455</sup> But Asian Americans are largely voluntary

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BLSA noted that “Shapiro’s comments pit South Asian communities against Black communities in furtherance of White supremacy[,]” which “undermines the inclusive environment Georgetown University claims to ‘stand for.’” *Id.*

<sup>454</sup> See McGrath, *supra* note 69; see also Nicholas Kristof, Editorial, *The Asian Advantage*, N.Y. TIMES, Oct. 11, 2015, at SR1 (“[O]ne factor [driving Asian American educational success] is East Asia’s long Confucian emphasis on education.”). But see Jennifer Lee, *It Takes More than Grit: Reframing Asian American Academic Achievement*, SOC. SCI. RSCH. COUNCIL: ITEMS (Jan. 23, 2018), <https://items.ssrc.org/from-our-programs/it-takes-more-than-grit-reframing-asian-american-academic-achievement/> [<https://perma.cc/5XRR-8WW8>] (rebutting Kristof’s argument and asserting “that there is nothing essential about Asian culture or values that promote exceptional academic outcomes”).

<sup>455</sup> See Kat Chow, *‘Model Minority’ Myth Again Used as a Racial Wedge Between Asians and Blacks*, NPR (Apr. 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> [<https://perma.cc/D67G-244S>] (rehashing “a classic and tenacious conservative strategy” that involves, first, “ignoring the role that selective recruitment of highly educated Asian immigrants has played in Asian American success,” and second, “making a flawed comparison between Asian Americans and other groups, particularly Black Americans, to argue that racism, including more than two centuries of black enslavement, can be overcome by hard work and strong family values”); Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016),

immigrants—having come to the United States with vision and drive for upward mobility.<sup>456</sup> This is in stark contrast to the slave trade that brought the majority of Black Americans here, or the relegation to subjugated caste-like status that Native Americans and some Latina/o Americans have experienced.<sup>457</sup>

As noted earlier, to the extent that it reflects differences in achievement, the model minority was largely the product of U.S. immigration policy—occupational preferences for Asian immigrants with degrees in engineering and other scientific fields during the Cold War.<sup>458</sup> With these educational advantages, Asian Americans often had more control over their destinies and more opportunities to accumulate wealth and social capital over generations.<sup>459</sup> Post-1965 Asian American immigrants and their children often grew up in educated home environments and had access to the social, cultural, and economic capital that comes with education.<sup>460</sup> Even after the government curbed back occupational immigration preferences,<sup>461</sup> family-related immigration preferences gave many first-generation Asian Americans access to resources through their social and familial networks.<sup>462</sup> Consequently, even

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<https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/> (citing ELLEN D. WU, *THE COLOR OF SUCCESS* (2015)) (“By the 1960s, anxieties about the civil right movement caused white Americans to further invest in positive portrayals of Asian Americans. The image of the hard-working Asian became an extremely convenient way to deny the demands of African Americans. . . . [B]oth liberal and conservative politicians pumped up the image of Asian Americans as a way to shift the blame for black poverty. If Asians could find success within the system, politicians asked, why couldn’t African Americans?”).

<sup>456</sup> See Lee, *supra* note 454 (discussing how hyperselectivity of Asian immigrants has contributed to model minority stereotypes).

<sup>457</sup> See OGBU, *supra* note 64, at 21-28.

<sup>458</sup> PRASHAD, KARMA, *supra* note 27, at 4 (discussing how Asian American success is result of state selection through immigration, not result of natural or cultural selection).

<sup>459</sup> “Social capital” is defined as “the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition—or in other words, to membership in a group—which provides each of its members with the backing of the collectively owned capital, a ‘credential’ which entitles them to credit, in the various senses of the word.” Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241, 248-49 (John G. Richardson ed., 1986).

<sup>460</sup> See Harpalani, *supra* note 62, at 141 (“[T]he result of state selection whereby the U.S. state, through the special-skills provisions in the 1965 Immigration Act, fundamentally reconfigured the demography of South Asian America.” (quoting PRASHAD, KARMA, *supra* note 27, at 4)).

<sup>461</sup> PRASHAD, KARMA, *supra* note 27, at 78-79 (detailing how changes in immigration laws have slowed immigration of technical workers from South Asian countries since 1980s).

<sup>462</sup> See Harpalani, *supra* note 62, at 143 (citing Maxine P. Fisher, *Creating Ethnic Identity: Asian Indians in the New York City Area*, 7 *URB. ANTHROPOLOGY* 271, 273 (1978); PRASHAD, KARMA, *supra* note 27, at 78-79) (“Many recent South Asian immigrants fill working class occupations and lack the economic and educational advantages of the immediate post-1965

now, many first- and second-generation Asian Americans have had opportunities to become high academic-achieving students and successful professionals—opportunities that many Black, Latina/o, and Native Americans have generally lacked. These structural differences are often ignored in the discourse on Asian American achievement.

Additionally, international comparisons illustrate the shortcomings of the “Confucian work ethic” hypothesis. As Professor Jennifer Lee notes:

If culture can explain the high achievement of some Asian groups, then we should expect these groups to excel in the greater United States and abroad, but this is not the case. While Koreans in the United States exhibit high educational outcomes, Koreans in Japan fare poorly. Moreover, unlike second-generation Chinese in the United States, their counterparts in Spain exhibit the lowest educational aspirations and expectations of all groups . . . .<sup>463</sup>

All of these are reasons for Asian Americans to reject the model minority stereotype. But furthermore, the model minority stereotype also directly harms Asian Americans by obscuring the numerous obstacles that Asian Americans still face.

#### B. *Unmasking Challenges Faced by Asian Americans*

The model minority stereotype obscures various challenges faced by Asian Americans. On the surface, the stereotype appears to be positive, portraying Asian Americans as high achievers. However, it masks large inequalities between Asian American groups, discrimination faced by Asian Americans in employment, and the pressures that high-achieving Asian American youth face in school.

##### 1. Inequalities Between Asian American Groups

Not all Asian American groups have high levels of educational attainment or economic success. In 2015, 54% of Asian American adults over twenty-five had attained at least a bachelor’s degree, compared to 32% of U.S. adults over twenty-five as a whole.<sup>464</sup> However, many Asian American groups were at or

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immigrants. To an extent, these newer immigrants have been able to capitalize instead on the larger community’s success and draw on ethnic, social, and economic networks as an alternative form of social capital; for example, in forming and maintaining businesses.” (footnotes omitted).

<sup>463</sup> Lee, *supra* note 454 (citing ALEJANDRO PORTES, ROSA APARICIO GOMEZ, & WILLIAM HALLER, SPANISH LEGACIES: THE COMING OF AGE OF THE SECOND GENERATION 101 (2016)).

<sup>464</sup> Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Origin Groups in the U.S.*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-origin-groups-in-the-u-s/> [<https://perma.cc/6FY9-TZBZ>]; Michael T. Nietzel, *New from U.S. Census Bureau: Number of Americans with a Bachelor’s Degree Continues to Grow*, FORBES (Feb. 22, 2021, 5:09 PM),

below the U.S. average, with only 32% of Vietnamese Americans, 23% of Burmese and Hmong Americans, 18% of Laotian Americans, and 15% of Bhutanese Americans having attained at least a bachelor's degree.<sup>465</sup>

There is also a large economic divide within the Asian American population. Although Asian Americans have a lower poverty rate than Americans as a whole (10% versus 13%),<sup>466</sup> there are vast differences between groups: for example, almost 25% of Burmese and Mongolian Americans and 19% of Bangladeshi Americans live below the federal poverty line, while only 6% of Indian Americans live below the federal poverty line.<sup>467</sup> In New York City, 29% of Asian Americans lived below the federal poverty line, the highest percentage of any ethnic group in the city.<sup>468</sup> A 2018 report from the Pew Research Center indicated that income inequality among Asian Americans is rising faster than within any other group.<sup>469</sup> Even for groups that are fare better economically than the U.S. average, there are significant disparities within specific groups. And while 13.7% of the U.S. population as a whole received Supplemental Nutrition Assistance Program benefits in 2015, several Southeast Asian American groups were at 20% or well over: Bhutanese (67.30%), Burmese (44.26%), Hmong (32.18%), Cambodian (23.17%), and Laotian (20.76%).<sup>470</sup>

While Asian immigrants in the 1960s and 1970s came to the United States via the occupational preferences of the 1965 Immigration Act, immigrants since the late 1980s are more likely to have come based on family preferences.<sup>471</sup> To an extent, these newer immigrants can draw on ethnic, social, and economic networks to obtain employment or to start and maintain businesses. But the more recent skilled professionals who immigrate to the United States from South Asian countries do so mostly on temporary H1-B visas.<sup>472</sup> They tend to earn low wages, their jobs often lack benefits, and they often leave when employers no

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<https://www.forbes.com/sites/michaeltietzel/2021/02/22/new-from-us-census-bureau-number-of-americans-with-a-bachelors-degree-continues-to-grow/?sh=322a9b377bbc> (stating that between 2015 and 2019, 32.1% of all U.S. adults twenty-five years or older held bachelor's degrees).

<sup>465</sup> Buddiman & Ruiz, *supra* note 464.

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> Tran, *supra* note 420.

<sup>469</sup> Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> [<https://perma.cc/K8TP-NRP7>] (“In 2016, Asians at the 90th percentile of their income distribution had 10.7 times the income of Asians at the 10th percentile. The 90/10 ratio among Asians was notably greater than the ratio among blacks (9.8), whites (7.8) and Hispanics (7.8).”).

<sup>470</sup> Tran, *supra* note 420.

<sup>471</sup> See, e.g., PRASHAD, KARMA, *supra* note 27, at 78-79 (noting that “percentage of South Asian immigrants entering the United States based on family preferences in the mid-1990s was much greater than those entering on employment preferences”).

<sup>472</sup> See Harpalani, *supra* note 62, at 142.

longer want their services.<sup>473</sup> Many of them live with uncertainty in their professional and personal lives.

Beyond these economic challenges, not all Asian Americans are viewed as model minorities. Racial stereotypes also vary for groups based on locality and circumstances.<sup>474</sup> Some Asian American groups, such as Filipino Americans are seen as “less qualified, less educated, and more prone to crime”<sup>475</sup>—in the same way that Black and Latina/o Americans are stereotyped. The model minority thus obscures not only structural differences among Asian Americans but also experiences of being stereotyped in everyday situations.

## 2. Discrimination Against Asian Americans in Employment

The model minority stereotype also obscures the fact that even when Asian Americans are high achievers, they continue to face discrimination in employment. They often hit a “glass ceiling”—an invisible professional barrier that they cannot pass. Rather than unemployment, the more prevalent issue has been underemployment. Asian Americans have to accept positions for which they are overqualified and underpaid, with little opportunity for advancement.<sup>476</sup> For example, in a recent study of 60,000 U.S. households, using U.S. Census data spanning 2008 to 2016, sociologists Van Tran, Jennifer Lee, and Tiffany Huang found that Asian Americans were less likely to obtain high-level professional jobs than White Americans with similar qualifications.<sup>477</sup> The researchers noted that “US-born, college-educated Asian Americans fall behind their native white counterparts with respect to professional attainment, earnings, promotions, and leadership roles.”<sup>478</sup> Similarly, a 2010 study by sociologists ChangHwan Kim and Arthur Sakamoto found that Asian American men who

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<sup>473</sup> *Id.*

<sup>474</sup> *See id.* at 121-22 (noting how racialization morphs based on context).

<sup>475</sup> Louise Hung, *Who Is Forgotten in the “Model Minority” Myth?*, GLOB. COMMENT (Dec. 7, 2017), <http://globalcomment.com/forgotten-model-minority-myth/> [<https://perma.cc/7D93-CS57>] (“Filipino-Americans do not garner the same social status as Chinese-Americans or Japanese-Americans might. They are often stereotyped as less qualified, less educated, and more prone to crime—stereotyping more in keeping with Latinx, Native American, and Black experiences.”).

<sup>476</sup> *See generally, e.g.*, Marilyn Fernandez, *Asian Indian Americans in the Bay Area and the Glass Ceiling*, 41 SOCIO. PERSPS. 119 (1998) (using 1990 U.S. Census data for employment and earnings in San Francisco Bay Area to examine “glass ceiling” effect on Asian Indian Americans).

<sup>477</sup> *See* Van C. Tran, Jennifer Lee & Tiffany J. Huang, *Revisiting the Asian Second-Generation Advantage*, 42 ETHNIC & RACIAL STUD. 2248, 2266 (2019) (finding that second-generation Asian Americans in professional positions report have no advantage over White Americans in labor market despite stronger academic credentials).

<sup>478</sup> *Id.*

were born in the United States, and who completed all their schooling in the United States earn less than White men with similar credentials.<sup>479</sup>

Ironically, the model minority stereotype itself is related to such underemployment. Professor Lee notes that “[t]he same stereotypes that help Asians succeed in the educational domain (i.e. being smart, competent and hardworking) may actually hurt them in the labor market, where Asian Americans are sometimes perceived to be less vocal, less assertive, [and] lacking in social skills and leadership potential.”<sup>480</sup> The passive nerd image that played a prominent role in the Harvard case and in university admissions controversies since the 1980s also comes into play in the employment world.

Being perceived as passive and socially inept is part of the everyday experience of Asian Americans.<sup>481</sup> Even if they are high achievers, their opportunities may be limited because of these stereotypes. And all of this is in addition to the overt discrimination that Asian Americans face.

### 3. Pressure to Succeed

The view of Asian Americans as high achievers itself is a mixed bag. Professors Jennifer Lee and Min Zhou have suggested how Asian Americans may benefit from “stereotype promise”:

[B]eing viewed through the lens of a positive stereotype . . . can enhance . . . performance[,] . . . generat[ing] a self-fulfilling prophecy of “Asian American exceptionalism,” [which] reproduces inequalities at the

<sup>479</sup> See ChangHwan Kim & Arthur Sakamoto, *Have Asian American Men Achieved Labor Market Parity with White Men?*, 75 AM. SOCIO. REV. 935, 940-41 (2010) (comparing Asian American men’s earnings with White men and finding level of labor market parity varied according to “level at which they entered the U.S. educational system”).

<sup>480</sup> Press Release, Am. Assoc. for the Advancement of Sci., *Asian-Americans Do Better at University, but Face Barriers in the Workplace* (Mar. 21, 2019), [https://www.eurekalert.org/pub\\_releases/2019-03/tfg-aad031819.php](https://www.eurekalert.org/pub_releases/2019-03/tfg-aad031819.php) [<https://perma.cc/5KXN-LH7L>]. There may be more nuance here. One recent study found that East Asian Americans are underrepresented in leadership positions but South Asian Americans are not. See generally Jackson G. Lu, Richard E. Nisbett & Michael W. Morris, *Why East Asians but Not South Asians Are Underrepresented in Leadership Positions in the United States*, 117 PROC. NAT’L ACAD. SCI. 4590 (2020). The authors attributed this difference to East Asian Americans’ tendency to “communicate less assertively.” *Id.* at 4598.

<sup>481</sup> See, e.g., Vinay Harpalani, *Ambiguity, Ambivalence, and Awakening: A South Asian Becoming “Critically” Aware of Race in America*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 71, 77 (2009) (South Asian American noting that “[my] own relationship with our teachers, most of whom were White, also reflected common racial stereotypes. As a student, our teachers seemed to like me, and some of them taught me very well in classes. But to them, I was the typical Asian American ‘model minority’—a nice kid who did well in school and stayed out of trouble, but who was rather dull on a personal level. . . . [W]hile I did well academically, I missed out on an important intangible element of school: the mentorship and social bonding that many of my White honors classmates received from our teachers.” (footnote omitted)).

high end of the educational distribution, giving Asian American students a distinct advantage in the domain of education.<sup>482</sup>

To the extent it occurs, stereotype promise stands in contrast to the well-documented “stereotype threat” which may hinder Black Americans’ academic performance, particularly in high pressure situations and when stereotypes about intelligence are triggered.<sup>483</sup> As Professors Lee and Zhou note, different stereotypes create higher expectations and lead to different treatment that advantage Asian Americans.<sup>484</sup>

But stereotype promise can also have negative effects. The pressure to succeed academically is well known among Asian American youth. Sometimes it comes from family. “Tiger parenting” refers to the strong emphasis that some parents place on their children to succeed academically, and it has been stereotypically associated with Asian American parents.<sup>485</sup> The model minority stereotype itself also creates such pressures, which can be reinforced by families, teachers, peers, and others.<sup>486</sup>

All of this can take a toll on the mental health of Asian Americans during their teenage and young adult years.<sup>487</sup> Data indicate that Asian Americans are the

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<sup>482</sup> Jennifer Lee & Min Zhou, *From Unassimilable to Exceptional: The Rise of Asian Americans and “Stereotype Promise,”* 16 *NEW DIVERSITIES* 7, 7 (2014); see also LEE & ZHOU, *supra* note 31, at 4 (“[H]ow do we explain the exceptional academic achievement of the children of Asian immigrants, including those whose parents were penniless immigrants and refugees when they arrived in the United States . . . ?”).

<sup>483</sup> Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCH.* 797, 797 (1995) (defining “stereotype threat” as “being at risk of confirming, as self-characteristic, a negative stereotype about one’s group” and testing stereotype threat in study of Black participants taking difficult verbal test). See generally Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *AM. PSYCH.* 613 (1997) (examining how stereotypes influence academic achievement of Black Americans and women).

<sup>484</sup> See Lee & Zhou, *supra* note 482, at 18 (explaining high achievement of Asian Americans as self-fulfilling prophecy stemming from their teachers’ and peers’ high expectations).

<sup>485</sup> See sources cited *supra* note 115 (discussing tiger parents and effects of parenting style on children).

<sup>486</sup> See *supra* Section I.A.

<sup>487</sup> See Sapna Cheryan & Galen V. Bodenhausen, *When Positive Stereotypes Threaten Intellectual Performance: The Psychological Hazards of “Model Minority” Status*, 11 *PSYCH. SCI.* 399, 401 (2000) (concluding from study of forty-nine female Asian American undergraduate students that “even a positively stereotyped social identity can constitute a threat to academic performance”); Sunmin Lee, Hee-Soon Juon, Genevieve Martinez, Chiehwen E. Hsu, E. Stephanie Robinson, Julie Bawa & Grace X. Ma, *Model Minority at Risk: Expressed Needs of Mental Health by Asian American Young Adults*, 34 *J. CMTY. HEALTH* 144, 144 (2009) (noting “pressure [on Asian American young adults] to meet parental expectations of high academic achievement and live up to the ‘model minority’ stereotype”); Kimmy Yam, *The Mental Health Toll of Being a ‘Model Minority’ in 2020*, NBC NEWS (Dec.

only group for whom the leading cause of death among those fifteen to twenty-four years old is suicide.<sup>488</sup> In 2015, at Gunn High School in Palo Alto, California—rated as one of the top schools in the nation for science and technical fields—three Asian American students died by suicide over a period of six months.<sup>489</sup> And one study has indicated that Asian Americans suicide victims under the age of twenty-five “were more than two times as likely as White Americans to have experienced school problems as a precipitating factor for suicide.”<sup>490</sup> The authors attributed this, in part, to “the pressures of the model minority stereotype.”<sup>491</sup>

Even when the outcome is not suicide, the pressure to succeed academically can lead to depression and other negative mental health outcomes for Asian Americans.<sup>492</sup> The model minority stereotype may also inhibit Asian Americans from seeking mental health services.<sup>493</sup> Studies have shown that Asian Americans are less likely than White Americans to use such services and tend to have more severe symptoms when they do use the services.<sup>494</sup> All universities

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23, 2020, 5:00 AM), <https://www.nbcnews.com/news/asian-america/mental-health-toll-being-model-minority-2020-n1249949> [<https://perma.cc/7CVT-Y6KU>] (noting “cultural resistance to asking for help”).

<sup>488</sup> See Melonie Heron, *Deaths: Leading Causes for 2019*, 70 NAT'L VITAL STATS. REPS., at 1, 61 (July 26, 2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-09-508.pdf> [<https://perma.cc/2N9G-REUV>]; Amelia Noor-Oshiro, *Asian American Young Adults Are the Only Racial Group with Suicide as Their Leading Cause of Death, so Why Is No One Talking About This?*, CONVERSATION (Apr. 23, 2021, 8:26 AM), <https://theconversation.com/asian-american-young-adults-are-the-only-racial-group-with-suicide-as-their-leading-cause-of-death-so-why-is-no-one-talking-about-this-158030> [<https://perma.cc/6U25-5Y6G>] (reporting suicide rate disparity in Asian American young adult community compared to all other racial groups in same age range).

<sup>489</sup> See Jeff Yang, Opinion, *Do Asian Students Face Too Much Academic Pressure?*, CNN (July 2, 2015, 7:48 AM), <https://www.cnn.com/2015/07/02/opinions/yang-genius-girl/index.html> [<https://perma.cc/H3E4-R227>].

<sup>490</sup> Y. Joel Wong, Lei Wang, Shaozhan Li & Huabing Liu, *Circumstances Preceding the Suicide of Asian Pacific Islander Americans and White Americans*, 41 DEATH STUDS. 311, 315 (2017).

<sup>491</sup> *Id.*; see also Reginald C. Oh, *Asian Americans and the Pursuit of Unhappiness*, WASH. MONTHLY (Nov. 10, 2021), <https://washingtonmonthly.com/2021/11/10/asian-americans-and-the-pursuit-of-unhappiness/> [<https://perma.cc/W4JW-KJRB>] (discussing how model minority stereotype is related to mental health issues among Asian Americans).

<sup>492</sup> See Dahyeon Kim, *Too Well-Off to Seek Help?: The Model Minority Myth of Asian Americans*, ANXIETY & DEPRESSION ASS'N AM. (Apr. 1, 2021), <https://adaa.org/learn-from-us/from-the-experts/blog-posts/professional/too-well-look-for-help-model-minority-myth-asian> [<https://perma.cc/A8V3-J9Q3>] (“The model minority myth places high expectations on Asian Americans, leading to feelings of self-doubt, inadequacy, psychological problems, and suicidality.”).

<sup>493</sup> See *id.* (citing model minority stereotype as one source of Asian Americans’ reluctance in availing themselves of mental health services).

<sup>494</sup> *Id.*; see also Koko Nishi, *Mental Health Among Asian Americans*, AM. PSYCH. ASS'N

and educational institutions should make sure to provide Asian Americans with the proper culturally relevant resources to deal with these challenges.

C. *Addressing the Context for Negative Action*

In addition to addressing challenges masked by the model minority stereotype, universities should ensure that both racial animus and implicit biases against Asian Americans are taken seriously. It is important to fully recognize and appreciate diversity among Asian American groups and to understand why those differences are salient. And raising race-consciousness among Asian Americans is also a key endeavor, as it allows both them and other groups to see more clearly how the various struggles of people of color are connected.

1. *Rebuking Racial Animus*

Suspicious and allegations of negative action in admissions have often come up in the context of more overt racial animus that Asian Americans face on college campuses, along with universities' lax responses. In the mid-1980s, Brown University Admissions Director Jim Rogers went largely unpunished for his remark that Brown could shrink its admitted class size "by cutting the first ten Kims off the top of the list."<sup>495</sup> Such racist comments were not taken as seriously by universities three decades ago,<sup>496</sup> and perhaps the response would be different today.

Or would it? As discussed in Section III.B.5, Harvard's blasé response to an alum's overtly racist letter in 2012 suggests that perhaps it would not. This is troubling. Many Asian Americans already perceive that racist expressions against them are not taken seriously and that universities marginalize them in various ways.<sup>497</sup> SFFA exploited this sentiment to divide people of color. The fact that a ninety-year-old alum donated to Harvard or may have fought in World War II does not in any way justify such tolerance of his overt racism. The Harvard administration should have been more pointed and clear that it does not tolerate such bigotry and that Harvard is not interested in receiving further

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(2012), <https://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-mental-health> [<https://perma.cc/556R-NZEH>] ("Asian Americans are three times less likely to seek mental health services than Whites.").

<sup>495</sup> TAKAGI, *supra* note 1, at 65.

<sup>496</sup> *See id.* at 66 (noting that Director Rogers was not removed from his position following racist remark).

<sup>497</sup> *See, e.g.,* Ji-Yeon Yuh, Opinion, *On Racism Against Asians and Asian Americans at Northwestern*, DAILY NW. (Oct. 4, 2021), <https://dailynorthwestern.com/2021/10/04/opinion/yuh-on-racism-against-asians-and-asian-americans-at-northwestern/> [<https://perma.cc/8N2S-46VW>] (arguing that failure to include Asian Americans "in diversity initiatives is . . . damaging because it promotes the lie that anti-Asian racism doesn't exist. That is, it promotes the lie that Asian Americans and Asians are just like White people."). Professor Ji-Yeon Yuh, the Director of the Asian American Studies Program at Northwestern University, also critiqued the university for only including Asian Americans in diversity statistics "when it benefits them." *Id.*

donations from anyone who espouses such views against Asian Americans or any other group. To do otherwise only enables more bigotry.

Additionally, the fact that Asian American students did not find out about the letter does not excuse Harvard's lax response. Hidden incidents can always be revealed at some point, as happened in the Harvard case, and the institutions and the individuals who lead them should become accountable. For example, in 2020 Dean Will Norton resigned from his position at the University of Mississippi School of Journalism and New Media after emails revealed his repeated lack of response and enablement of a donor's racist and sexist views.<sup>498</sup>

Reactions to racist incidents represent an institution's values, and information about an alum's comments and Harvard's nonchalant reaction could easily lead Asian Americans to question whether Harvard takes discrimination against them seriously. Moreover, by contrasting the way Harvard treats discrimination against Asian Americans with how it treats similar incidents against Black Americans, SFFA and other conservative interests can readily promote divisions between these groups. Harvard and all institutions must be vigilant in condemning all racist sentiments against Asian Americans.<sup>499</sup>

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<sup>498</sup> See Emma Pettit, *Downfall of a Dean: How Accusations of Courting a Racist Donor Derailed a Career and Disrupted a Program*, CHRON. HIGHER EDUC. (Aug. 5, 2021), <https://www.chronicle.com/article/downfall-of-a-dean>. Norton's conduct here was more egregious than that of President Faust or Dean McGrath. When the donor "referred to the tennis star Serena Williams with a gorilla emoji [and] complained about 'black hookers' and 'gangbangers' . . . [Norton] either expressed vague agreement or ignored the businessman's comments and moved the conversation along." *Id.* Nevertheless, SFFA could readily try to use this comparison to argue that such incidents are taken more seriously when they involve minority groups besides Asian Americans.

<sup>499</sup> Recently, University of Pennsylvania Carey Law School ("Penn Law") Professor Amy Wax expressed racist sentiments about Asian Americans and stated, "There's nothing with stereotyping when stereotyping is understood correctly." See Glenn Loury, *Amy Wax – Contesting American Identity*, GLENN SHOW, at 25:35 (Dec. 20, 2021), <https://glennloury.substack.com/p/amy-wax-contesting-american-identity> [<https://perma.cc/B5ZB-Z4M3>]. She later stated that "as long as most Asians support Democrats and help to advance their positions, I think the United States is better off with fewer Asians and less Asian immigration." See Glenn Loury, *Amy Wax Redux*, GLENN SHOW (Jan. 2, 2022), <https://glennloury.substack.com/p/amy-wax-redux> [<https://perma.cc/KU6L-P5VF>].

Professor Wax's comments drew outrage, and a petition signed by hundreds of Penn Law students and alumni, along with others, called for her suspension and a reevaluation of tenure standards and freedoms. See Jared Mitovich, *Penn Law Professor Amy Wax's Anti-Asian Comments Spark National Scrutiny*, DAILY PENNSYLVANIAN (Jan. 5, 2022, 12:49 AM), <https://www.thedp.com/article/2022/01/amy-wax-asian-american-comments-penn-law> [<https://perma.cc/L68G-6P8A>]. Additionally, Penn Law Dean Theodore Ruger released a statement noting that "[l]ike all racist generalizations, Wax's recent comments inflict harm by perpetuating stereotypes and placing differential burdens on Asian students, faculty, and staff to carry the weight of this vitriol and bias." *A Statement from Dean Ruger in Response to Recent Comments Made by Professor Wax*, UNIV. OF PA. CAREY L. SCH. (Jan. 3, 2022),

## 2. Combatting Implicit Bias

It is important that Asian Americans know that universities are working to combat racial stereotypes and negative action (to the extent it occurs), even if that is not legally required. Doing so is also consistent with universities' missions to promote diversity and "break down racial stereotypes" and is part of the compelling interest upheld in *Grutter* and *Fisher II*.<sup>500</sup> Harvard should take seriously Judge Allison D. Burroughs's suggestion for implicit bias trainings, delineating clear guidelines for consideration of race, and monitoring the admissions process for race-related disparities. If, as Judge Burroughs suggested, the major source of implicit bias in Asian American applicants' personal ratings scores is high school teachers and counselors' recommendations, then Harvard and other universities should take this into account in their admissions reviews; if the applicants' personal ratings are affected significantly because they go to larger public schools with overloaded teachers and counselors, Harvard should also take that into account. Doing so may help not only Asian American applicants, but many other applicants of color, especially those from lower socioeconomic strata.

## 3. Recognizing Diversity Among Asian Americans

Beyond addressing overt and unconscious biases, inclusion of Asian Americans in racial discourse also means recognizing the complexity of their identities. The category of "Asian American" itself groups together East Asian Americans (including those descended from China, Korea, Japan, or Taiwan), South Asian Americans (including those descended from India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, or the Maldives Islands), Southeast Asian Americans (including those descended from Burma, Thailand, Vietnam, Laos, Cambodia, Malaysia, Singapore, the Philippines, Indonesia, Brunei, or Timor-Leste), Pacific Islanders, and Native Hawaiians.<sup>501</sup> While these groups

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<https://www.law.upenn.edu/live/news/14369-a-statement-from-dean-ruger-in-response-to-recent> [<https://perma.cc/6GN7-3FU6>]. Dean Ruger further stated, "That Wax's speech may be protected does not permit this Law School to ignore the real harms such speech causes. . . . Wax's views are diametrically opposed to the policies and ethos of this institution." *Id.* Dean Ruger later announced that he will begin "initiat[ing] a process that could lead to sanctions against . . . Wax for her racist comments." Susan Snyder, *Penn Law Dean Starts Process that Could Lead to Sanctions on Professor Amy Wax*, INQUIRER (Jan. 18, 2022), <https://www.inquirer.com/news/amy-wax-penn-law-sanctions-20220118.html> [<https://perma.cc/K2JB-LDE2>].

<sup>500</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319-20, 330 (2003) ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (citing *Grutter*, 539 U.S. at 330).

<sup>501</sup> See, e.g., *Census Data & API Identities*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, <https://www.api-gbv.org/resources/census-data-api-identities/> [<https://perma.cc/T9NU-XEVQ>] (last visited Jan. 18, 2022).

may have some commonalities, they also have different experiences and perspectives. Both the differences and the commonalities can be significant, but it is important to disaggregate data by groups to examine all perspectives.<sup>502</sup>

In this realm, universities can learn from their own students. Asian American students at elite universities have taken the lead in promoting both diverse and unified identities. For example, at the University of Pennsylvania, many student organizations focus on specific national, ethnic, or cultural identities: Arab, Bangladeshi, Bengali, Chinese, Hawaiian, Hong Kongese, Indonesian, Iranian/Persian, Japanese, Korean, Lebanese, Malaysian, Pakistani, Singaporean, Taiwanese, and Thai.<sup>503</sup> But other student organizations promote a broader identity: the Asian Pacific Student Coalition, South Asia Society, and Assembly of South East Asian Nations.<sup>504</sup> The university also has the Pan-Asian American Community House (“PAACH”), a cultural resource center which brings together all Asian American students and others who want to learn about Asian American experiences.<sup>505</sup>

PAACH was created in 2000 through student activism,<sup>506</sup> and it illustrates the role that college students themselves can have educating universities about racial diversity. Young adulthood is a particularly salient time for students to grapple with these issues. And universities should take note and carefully consider when it is useful to classify Asian Americans together, and when it would be more informative to separate them by subgroups. These decisions have implications for race-conscious admissions policies, recruitment efforts, campus diversity programming, and campus support services, among other areas.

#### 4. Raising Race-Consciousness

Institutions such as PAACH and Asian American student organizations also help to raise race-consciousness among Asian Americans—a critical endeavor as racial justice initiatives are under attack. SFFA’s lawsuits are also part of a larger racial project to quell race-consciousness more broadly. Beyond

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<sup>502</sup> See Vinay Harpalani, *Understanding the Nuances: Diversity Among Asian American Pacific Islanders*, LSSSE: INSIGHTS BLOG (May 21, 2021), <https://lssse.indiana.edu/blog/guest-post-understanding-the-nuances/> [<https://perma.cc/7U6R-L6BF>] (“Lumping together all of these groups, without appreciation for their unique histories, experiences, and challenges, can obscure important differences, which in turn reinforces stereotypes.”).

<sup>503</sup> See *Student Organizations*, UNIV. OF PA.: PAN-ASIAN AM. CMTY. HOUSE, <https://paach.vpul.upenn.edu/organizations/> [<https://perma.cc/2QAJ-S99V>] (last visited Jan. 18, 2022) (listing various organizations available for persons of certain Asian or Asian American ethnic, cultural, or faith-based identities).

<sup>504</sup> See *id.*

<sup>505</sup> See *History of PAACH*, PAN-ASIAN AM. CMTY. HOUSE, [https://paach.vpul.upenn.edu/about\\_history/](https://paach.vpul.upenn.edu/about_history/) [<https://perma.cc/S9FL-WH54>] (last visited Jan. 18, 2022) (explaining history of PAACH’s establishment and signature programs that were created thereafter).

<sup>506</sup> See *id.* (describing PAACH’s creation as result of Asian Pacific Student Coalition, who campaigned school’s administration).

affirmative action, the recent conservative attacks on Critical Race Theory seek to eliminate race not only from admissions, but also from pedagogy.<sup>507</sup> Raising race-consciousness, simply by talking about race and racism, is an important endeavor, and Asian Americans have an important role to play here—by both raising their own consciousness and by educating others about their struggles and issues.

Unfortunately, another consequence of the model minority stereotype is that Asian Americans are not encouraged to think about race, and many do not do so until college or even graduate school.<sup>508</sup> But conversations about race and racism should always include Asian Americans, even if the focus is on issues such as police brutality, which are more salient for other groups, because Asian Americans should learn about and have a voice on these issues, and because the model minority and other racial stereotypes position all groups in America's racial hierarchy.

Asian Americans have their own unique position in that hierarchy. Even when they appear to share particular advantages with White Americans, the two groups should not be lumped together.<sup>509</sup> Because of the manner in which

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<sup>507</sup> See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS: FIXGOV (Aug. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/7M5X-PR77>] (reviewing anti-Critical Race Theory legislation that seeks to ban, or have successfully banned, critical race theory from classrooms). Recently in New York City, Asian American opponents of eliminating the SHSAT have also expressed some opposition to teaching Critical Race Theory. See Xiaoqing et al., *supra* note 442 (“[T]he Chinese American Citizens Alliance of Greater New York, [which is] leading campaigns to keep the SHSAT and gifted-and-talented programs[,] . . . has taken on race-focused education, using ‘critical race theory’ as a term of derision.”).

<sup>508</sup> See, e.g., Lee, *supra* note 21, at 1494; see also Harpalani, *supra* note 481, at 79 (noting graduate school was when author first thought deeply about his South Asian American identity). Additionally, university admissions reviewers should recognize that some Asian Americans develop their race-consciousness in college or even graduate school, and this may shape their identities and campus contributions in ways not captured by their applications. See, e.g., *id.* (noting author's development of race-consciousness in graduate school, after having been stereotypical science major and premedical student in college).

<sup>509</sup> But see Feingold, *supra* note 21, at 733. Professor Feingold notes:

Harvard could employ a more limited version of racial-cloaking designed to avoid negative action as manifest in Harvard's current admission regime. In practice, this could entail a policy whereby Harvard, at moments in the evaluation process where Asian Americans face specific vulnerabilities of racial bias, subsumes all White and Asian candidates into a single racial category. The appeal of such a strategy is straightforward. Unable to distinguish between the race of Asian and White applicants, Harvard's admissions officials would be unable to penalize Asian applicants to the benefit of their White counterparts. This narrower intervention would attend to the underlying harm (that is, Asian penalty) and its corresponding beneficiaries (that is, White students) without compromising Harvard's ability to continue engaging in affirmative action.

American racial ideology operates, Asian Americans will always have a different set of perspectives and experiences than White Americans.<sup>510</sup> Even when they have structural advantages over other minority groups, Asian Americans still have to navigate racial stereotypes that situate them in particular ways. Additionally, invoking the unique experiences and perspectives of Asian Americans allows them to see racism more clearly.

For all of these reasons, Asian Americans should be encouraged to think and write about their own racialized experiences. SFFA's desire to have Harvard eliminate references to race from all applications has implications for race-consciousness that go beyond admissions.<sup>511</sup> But hearing Asian Americans' unique perspectives on race can also educate others, including university administrators.<sup>512</sup> Moreover, for Asian Americans to establish or recognize common ground with other people of color, they have to be able to process and articulate their own individual experiences—to see how they individually fit into America's racial hierarchy. All of this will promote the inclusion of Asian Americans in the discourse on race in America.

#### CONCLUSION: BUILDING COALITIONS AMONG PEOPLE OF COLOR

The Harvard case illustrates how Asian Americans fit into the complex ideology of American racism. For the past four decades, conservative activists have sought to link affirmative action that benefits Black, Latina/o, and Native Americans with negative action that discriminates against Asian Americans. SFFA's lawsuits are the culmination of that strategy: they represent a broad

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*Id.* (footnote omitted). At those specific times when the chances of discrimination are the greatest, Professor Feingold's suggestion might be applicable and even appealing to some Asian Americans. However, as Professor Feingold himself cautions, this suggestion is a "thought experiment" and articulates the problem it poses:

Such a policy would entail the multiple complications associated with colorblindness generally . . . [like the] . . . potential to burden applicants (whether Asian American or White) who cannot articulate a comprehensive and intelligible self-narrative without invoking race. For these reasons and others, a practice of targeted racial cloaking—even if feasible—would necessitate tremendous care and attention before any actual implementation. Failure to do so could invite perverse and unintended consequences without actually remedying the underlying harm.

*Id.* at 733-34. Professor Feingold also argues that "SFFA's request for total colorblindness would, in fact, harm the many Asian Americans who cannot tell a comprehensive and fully textured self-narrative without invoking race." *Id.* at 730 (citing Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISC. 64, 67 (2016)).

<sup>510</sup> See, e.g., Yuh, *supra* note 497 (noting importance of differentiating between White and Asian American students).

<sup>511</sup> See Feingold, *supra* note 21, at 730 (arguing against "SFAA's request for total color blindness"); see also Harpalani, *supra* note 481, at 79 (articulating salience of race in author's identity).

<sup>512</sup> See, e.g., sources cited *supra* notes 503-05.

racial project that can pit different minority groups against each other. The political consequences of doing so could be devastating for racial equity.

In spite of the efforts of SFFA and other conservative organizations, 70% of Asian Americans support affirmative action.<sup>513</sup> Many Asian Americans recognize that they are well represented at elite universities, and that race-conscious admissions policies have a very small impact on their representation.<sup>514</sup> Asian American scholars and activists have argued that their immediate self-interest should not be the main consideration for issues such as affirmative action and racial equity.<sup>515</sup>

However, support for affirmative action varies by ethnic group and other factors.<sup>516</sup> Chinese Americans in particular are more likely to oppose affirmative action; some Chinese Americans have vocally opposed affirmative action on social media platforms such as WeChat.<sup>517</sup> Rank-and-file Asian Americans are more divided than civil rights organizations, and there are a growing number of Asian American organizations that have taken stances against affirmative action.<sup>518</sup>

Consequently, Asian Americans and all people of color should recognize the commonality of their struggles and the synergy of their social movements. Even Asian American opponents of affirmative action see some of these common struggles—unlike their White counterparts, they largely agree that racism is a significant problem in America.<sup>519</sup> And there can also be common ground in

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<sup>513</sup> See Jennifer Lee, Janelle Wong & Karthick Ramakrishnan, *Asian Americans Support for Affirmative Action Increased Since 2016*, AAPI DATA: DATA BITS (Feb. 4, 2021), <http://aapidata.com/blog/affirmative-action-increase/> [https://perma.cc/4MHZ-YNKL]; see also GARCES & POON, *supra* note 21, at 15-16 (discussing sustained evidence of Asian American support for affirmative action).

<sup>514</sup> See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1050 (2002) (“Claims of displacement tend to inflate the degree of racial conflict inherent in race-conscious admissions, thereby heightening the pressure to be ‘for’ or ‘against’ affirmative action.”).

<sup>515</sup> See Chin et al., *supra* note 447, at 131 (arguing Asian Pacific Americans “can play an invaluable role in society’s progress toward a community of justice that transcends self-interest”).

<sup>516</sup> Janelle Wong, Jennifer Lee & Van Tran, *Asian Americans’ Attitudes Toward Affirmative Action: Framing Matters*, AAPI Data: DATA BITS (Oct. 1, 2018), <http://aapidata.com/blog/aa-attitudes-affirmative-action/> [https://perma.cc/C5W4-27JK] (reporting Chinese Americans are least supportive of affirmative action of five Asian ethnic groups surveyed); Lee et al., *supra* note 513 (reporting same).

<sup>517</sup> See GARCES & POON, *supra* note 21, at 22-23 (discussing WeChat’s role in galvanizing opposition to affirmative action among Chinese American immigrants).

<sup>518</sup> See *id.* at 17-20 (“The results of this study suggest that contemporary Asian American anti-affirmative action efforts are more accurately described as predominantly led by Chinese American immigrants, and that advocacy for affirmative action represents a more demographically diverse coalition of Asian Americans . . .”).

<sup>519</sup> See *id.* at 18 (“Unlike white affirmative action opponents over the last several decades,

building solutions. It is no coincidence that in the 1960s, as America grappled with domestic and global changes, civil rights advances for Black Americans coincided with the expansion of immigration from Asia. Throughout American history, Black and Asian American antiracist movements have long drawn upon each other to support a variety of causes, from combatting racist violence to fighting for ethnic studies programs on college campuses.<sup>520</sup> Public attention to the oppression of one group emboldens other groups to fight. In the past year, Stop AAPI Hate<sup>521</sup> has gained momentum because the Black Lives Matter<sup>522</sup> movement brought public attention to racial violence and demanded action against it.<sup>523</sup> Even subtler issues, such as combatting racial stereotyping and implicit bias through trainings and education, are common ground for all people of color and more generally for everyone interested in racial equity and justice.<sup>524</sup>

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Asian American policy opponents acknowledged the general presence and problem of racism in the U.S.”).

<sup>520</sup> See Anika Raju, *Black and Asian Solidarity in American History: The Power of Unity Exemplified by 5 Major Events*, ASIAN AMS. ADVANCING JUST. (Feb. 25, 2021), <https://medium.com/advancing-justice-aajc/black-and-asian-solidarity-in-american-history-the-power-of-unity-exemplified-by-5-major-events-391025bbf228> (reviewing interconnectedness of Asian and Black American communities’ fights to “dismantle White supremacy”). See generally WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* (1993) (recounting Asian American activist movements from late 1960s to early 1990s). A recent study indicates that Black Americans have even more progressive attitudes towards immigration than Asian Americans. See Niambi Carter, Janelle Wong & Lisette Gallarzo Guerrero, *Reconsidering Group Interests: Why Black Americans Exhibit More Progressive Attitudes Toward Immigration than Asian Americans*, DU BOIS REV., Dec. 14, 2021, at 1.

<sup>521</sup> STOP AAPI HATE, <https://stopaapihate.org/> [<https://perma.cc/QE6P-PHDY>] (last visited Jan. 18, 2022).

<sup>522</sup> BLACK LIVES MATTER, <https://blacklivesmatter.com/> (last visited Jan. 18, 2022).

<sup>523</sup> A recent poll indicated that a significant majority of Asian Americans are concerned about violence and hate and blame former President Donald Trump for exacerbating negative sentiments towards Asian Americans. See Rishika Dugyala & Beatrice Jin, *Trauma and Trump Make Asian American Voters a More Cohesive Bloc, New Poll Reveals*, POLITICO (Oct. 3, 2021, 7:00 AM), <https://www.politico.com/interactives/2021/asian-american-community-voting-trends-polling/> [<https://perma.cc/SK4X-NBA5>] (noting that poll results show “71 percent of [Asian American Pacific Islander] adults blame Donald Trump for the discrimination against the community”).

<sup>524</sup> Both people of color and White Americans have an interest in breaking down racial stereotypes. See *supra* note 500 and accompanying text (discussing Supreme Court’s recognition of diversity as a compelling interest). Additionally, research has indicated that a dual focus on race and class—one that emphasizes both racial and financial inequities together—may be an effective way to build progressive political coalitions among all racial groups. See Ian Haney López & Anat Shenker-Osorio, Perspective, *The Answer to GOP Dog Whistles? Democrats Should Talk More About Race, Not Less.*, WASH. POST (Aug. 22, 2018), [https://www.washingtonpost.com/outlook/the-answer-to-gop-dog-whistles-democrats-should-talk-more-about-race-not-less/2018/08/22/7cfa4d3a-a184-11e8-8e87-c869fe70a721\\_story.html](https://www.washingtonpost.com/outlook/the-answer-to-gop-dog-whistles-democrats-should-talk-more-about-race-not-less/2018/08/22/7cfa4d3a-a184-11e8-8e87-c869fe70a721_story.html) (“An honest conversation with voters about how the right has

SFFA's lawsuits are an immediate threat to unity among people of color. But they also afford the opportunity to raise race-consciousness among Asian Americans and to educate all groups about American racial ideology and hierarchy. Asian Americans have a large role to play here, but all advocates for racial justice and equity have to understand where Asian Americans are coming from. The inclusion of Asian Americans' history and perspectives in the affirmative action and negative action debates, and their positioning in America's racial hierarchy more generally, should be a significant part of any conversation on American racism.<sup>525</sup> This process can help to build robust coalitions among people of color, and it can turn SFFA's racial project on its head.

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weaponized racial fear to build support for plutocracy can create a new progressive majority, a coalition of economic populists and racial-justice advocates who recognize that economic and racial justice will be won together.”). *See generally* IAN HANEY LÓPEZ, MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA (2019); RACE-CLASS NARRATIVE: NATIONAL DIAL SURVEY REPORT (2018), <https://static1.squarespace.com/static/5f24255e9d1b7b6ac0edc795/t/5f4febaa7575094197f2e2d8/1599073212673/LRP-Report.Race-Class-Narrative.National-C4.pdf> [<https://perma.cc/LMB6-2DZN>]. Future research could aim to disaggregate how different groups such as Asian Americans (and Asian American subgroups) react to race-class messaging and how to effectively target this messaging to those groups.

<sup>525</sup> Inclusion of Asian Americans can begin during K-12 education. In 2021, Illinois became the first state to require Asian American history in its public school curriculum. *See* Act of July 9, 2021, Pub. Act No. 102-44, § 5, 2021 Ill. Legis. Serv. (West) (codified at 105 ILL. COMP. STAT. 5/27-20.8 (2022)); *see also* Kimmy Yam, *Illinois Becomes First State to Require Teaching Asian American History in Schools*, NBC NEWS (July 12, 2021, 7:46 PM), <https://www.nbcnews.com/news/asian-america/illinois-becomes-first-state-require-teaching-asian-american-history-schools-n1273774> [<https://perma.cc/HBQ2-DRJQ>] (noting that Illinois now “mandates that schools teach ‘the contributions of Asian American communities to the economic, cultural, social, and political development of the United States,’ in addition to Asian American civil rights advancements, among other aspects of history”). In January 2021, New Jersey became the second state to do so. *See* S. 4021, 219th Leg., 2d Sess. (N.J. 2022); *see also* Nicole Chavez, *New Jersey Becomes Second State to Require Asian American History to Be Taught in Schools*, CNN (Jan. 18, 2022, 3:33 PM), <https://www.cnn.com/2022/01/18/us/new-jersey-schools-asian-american-history/index.html> [<https://perma.cc/9WPJ-HUFL>] (noting that New Jersey “will make it mandatory for K-12 schools to include Asian American and Pacific Islander history in their curriculums starting on the 2022-2023 school year”).