A BLACK MAN MAY ELIMINATE RACE-CONSCIOUS ADMISSIONS IN THE UNITED STATES[†]

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Professor Vinay Harpalani's (Harpalani) article—*Asian Americans, Racial Stereotypes, and Elite University Admissions*—shares undeniable accounts of discrimination against Asian Americans.[1] However, it is the framing of negative action[2] and its impact on Asian American admissions that is most intriguing.

When Harpalani wrote about the affront on race-conscious admissions and California being a focal point of these battles, it sparked the title for this response.[3] The current composition of the Supreme Court[4] and its consolidation of the Harvard University and University of North Carolina cases ("SFFA cases") signaled the direction the Court may be heading—to dismantle race-conscious admissions. This descriptive piece focuses on my estimation of who may write the decision and how the Court may frame overturning forty plus years of precedent.[5]

Harpalani notes that "[b]y conflating negative action and affirmative action, [Students for Fair Admissions ("SFFA")] has attempted to pit Asian Americans

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[1] Vinay Harpalani, *Asian Americans, Stereotypes, and Admissions*, 102 B.U. L. REV. 233, 268 n.191 (2022) (citing David Ho & Margaret Cho, *Admissions: Impossible*, BRIDGE MAG., Summer 1983, at 7, https://osf.io/preprints/socarxiv/gwu6e/).

[2] *See* Harpalani, *supra* note 1, at 263 n.157 (citing 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)).

[3] *See* Harpalani, *supra* note 1, at 274 n.234.

[4] Vivia Chen, *Chief Justice Roberts Is Officially Irrelevant*, BLOOMBERG L. (Sept. 14, 2022, 10:33 AM), https://news.bloomberglaw.com/business-and-practice/chief-justice-roberts-is-officially-irrelevant (discussing how the Court has lost its legitimacy as an apolitical institution).

[5] I mention "forty plus years of precedent" because of the way Students for Fair Admissions ("SFFA") framed its first legal question—whether the Court should overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* would not be the only case to be overruled; it is predicated on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Petition for Writ of Certiorari at i, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022) (No. 20-1199).

against other minority groups."[6] I agree. SFFA purports to protect the interests of Asian Americans over those who are Black, Latinx, or Native American. SFFA's litigation strategy is a classic tactic of divide and conquer.[7] But it is due to this tactic that I contend that a Black man, Justice Clarence Thomas, [8] will likely author the majority opinion that eliminates the use of race-conscious admissions in the United States.[9]

A decision prohibiting race-conscious admissions aligns with Justice Thomas' ideals. Moreover, California has enforced a similar policy for more than twenty-five years. In California, Ward Connerly ("Connerly")—another Black man—helped eliminate the use of race-conscious admissions through Proposition 209.[10] Justice Thomas and Connerly share similar beliefs and they are acquainted with one another.[11]

Justice Thomas is a descendant of West African slaves known as the Gullah Geechee people.[12] In his memoir, Justice Thomas espoused:

> [A]ffirmative action . . . had become a fact of life at American colleges and universities . . . . As much as it stung to be told that I'd done well in the

[6] Harpalani, *supra* note 1, at 282; *see id.* at 240-41 n.21 (citing Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. 590, 628 n.151 (2017)); *see also* Petition for Writ of Certiorari at 8, *Students for Fair Admissions, Inc.*, 142 S. Ct. 895 (No. 20-1199) ("African-American and Hispanic students with PSAT scores of 1100 and up are invited to apply to Harvard, but white and Asian-American students must score a 1350.").

[7] *See* Malcolm X, Black Revolution Is Part of World-Wide Struggle (Apr. 8, 1964), *in* MILITANT, Apr. 27 1964, at 4 ("The greatest weapon the colonial powers have used . . . has always been divide and conquer."). *See generally* A.J. Christopher, *'Divide and Rule': The Impress of British Separation Policies*, 20 AREA 233 (1988).

[8] If Justice Thomas writes the opinion, the United States could be perceived as a "colorblind" nation. *Contra* Brief of Black Women Law Scholars as Amici Curiae in Support of Respondents at 4, *Students for Fair Admissions, Inc.*, 142 S. Ct. 895 (No. 20-1199) ("Far from colorblind, the Constitution has long been conscious of race—almost always to the detriment of Black people and other people of color.").

[9] I reference the United States broadly because Harvard University and the University of North Carolina are private and public institutions of higher education receiving federal funding. SFFA claims their admissions practices violate Title VI, so a decision prohibiting race-conscious admissions policies would impact every U.S. institution receiving federal funding.

[10] In 1996, California voters approved Proposition 209 as a state constitutional amendment forbidding race-conscious policies at public universities and in state government. Harpalani, *supra* note 1, at 276 & nn.248-49.

[11] *See* WARD CONNERLY, LESSONS FROM MY UNCLE JAMES: BEYOND SKIN COLOR TO THE CONTENT OF OUR CHARACTER 25-26 (2008).

[12] The Gullah Geechee people settled "in the low country of Georgia, South Carolina, and coastal northern Florida. . . . 'Geechee' was a derogatory term for Georgians who had profoundly Negroid features and spoke with a foreign sounding accent similar to the dialects heard on certain Caribbean islands." CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 2 (2008).

> seminary *despite* my race, it was far worse to feel that I was now at Yale *because* of it. I sought to vanquish the perception that I was somehow inferior to my white classmates . . . . [I]t was futile . . . to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever . . . to discount my achievements.[13]

Another Black man, author and economist Thomas Sowell, affirmed Justice Thomas' belief that "job quotas, charity, subsidies, [and] preferential treatment . . . tend to undermine self-reliance,"[14] which then impacts attempts by ethnic minorities to raise their income.[15]

Connerly lived in Sacramento, California, during his formative years.[16] He later became a University of California Regent[17] and then Chairman of the California Civil Rights Initiative, where he ushered in what would become known as Proposition 209.[18]

In his book, *Creating Equal: My Fight Against Race Preferences*, Connerly writes about a conversation between him and then California Governor, Pete Wilson.[19] Connerly says:

> [T]he conclusion[] I had reached was that "affirmative action"—an attempt to reach out to qualified students and help them gain admission to the university—was not what was going on at UC. Rather, we had created a system of "preferences"—a commitment to put a certain number of black and ethnic students into the university, even if their admission meant discriminating against those who were better qualified.[20]

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[13] *Id.* at 74-75.

[14] *Id.* at 106; *see also* THOMAS SOWELL, RACE AND ECONOMICS 238 (1975).

[15] Thomas, *supra* note 12, at 107 (noting that Black people were uncomfortable with those who broke with conventional wisdom on race). *See generally* THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES (1974).

[16] CONNERLY, *supra* note 11, at 2-3, 14-15.

[17] WARD CONNERLY, CREATING EQUAL: MY FIGHTS AGAINST RACE PREFERENCES 111 (rev. ed. 2007).

[18] Two reports inspired Proposition 209. First, the Cook Report, written by Ellen Cook and James Cook, described how the University of California was discriminating against Asian and White applicants in medical school admissions. *See id.* at 118-24. Second, the Karabel Matrix, written by University of California, Berkeley, sociologist Jerome Karabel, showed a sliding scale admissions matrix where White people and Asian people had to be rated 1,100 points higher than "people of color" to be admitted. *See id.* at 134; *see also id.* at 122 ("[P]oor whites who needed a boost too, were never given a break under affirmative action.").

[19] *Id.* at 133.

[20] *Id.*

Connerly was intentional about using the word "preferences" rather than "affirmative action" in the language of Proposition 209.[21] In 2020, Californians voted no on Proposition 16, which would have repealed Proposition 209.[22]

Harpalani's article mentioned several themes. Two may illustrate how the Court could frame its opinion: First, how the SFFA cases are different, and second, establishing that racial balancing is impermissible.

Foremost, the Court will have to distinguish the SFFA cases to overrule *Grutter* and other cases. One way the SFFA cases are different are that the Court permitted an organization to sue, rather than an individual Asian American plaintiff.[23] Based on data presented during the SFFA cases,[24] the Court may try to show that SFFA's claims are capable of repetition if not resolved now.[25]

Next, the Court has previously ruled that the Equal Protection Clause abhors racial balancing and Title IV requires a similar analysis.[26] Whether the Court applies the Equal Protection Clause or Title IV, Justice Thomas believes that constitutional equality means that everyone is treated the same, irrespective of race.[27] Additionally, Justice Thomas disagrees with the diversity rationale.[28] In sum, the Court will find a way to justify its decision.

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[21] *See id.* at 133, 154-56 ("[A]ffirmative action [is] part of the problem faced by [Black] people, not part of the solution."); *see also Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities*, LEGIS. ANALYST'S OFF.: PROPOSITIONS (Nov. 1996), https://lao.ca.gov/ballot/1996/prop209_11_1996.html [https://perma.cc/KB88-RQ5M].

[22] PROPOSITION 16: ALLOWS DIVERSITY AS A FACTOR IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS (2020), https://lao.ca.gov/ballot/2020/Prop16-110320.pdf [https://perma.cc/G79K-ME86].

[23] Previously, individually named White plaintiffs litigated these cases. Jennifer Gratz prevailed, whereas Barbara Grutter and Abigail Fisher did not. *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. Univ. of Texas (*Fisher II*), 579 U.S. 365 (2016).

[24] After *Fisher II*, institutions must provide data for these cases. *See Fisher II*, 579 U.S. at 380.

[25] The Court may also discredit *Bakke* because it was a plurality decision, rather than a majority one. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[26] *See Grutter*, 539 U.S. at 330; Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 315 (2013).

[27] *See* Scott D. Gerber, *Clarence Thomas,* Fisher v. University of Texas*, and the Future of Affirmative Action in Higher Education*, 50 U. RICH. L. REV. 1169, 1173 (2016); *see also Fisher II*, 579 U.S. at 389 (Thomas, J., dissenting).

[28] *See* Transcript of Oral Argument at 71-73, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (No. 21-707).