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Affirmative Action's Asian American Problem

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AFFIRMATIVE ACTION'S ASIAN AMERICAN PROBLEM

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Asian American opponents of affirmative action have received both credit and blame for their pivotal role in toppling racial preferences in university admissions in Students for Fair Admissions v. Harvard *(*SFFA*). Allied conservatives highlighted evidence of discrimination against Asian American applicants as a compelling reason to dismantle affirmative action; liberals either denied this discrimination existed or tolerated it as an acceptable cost of helping other minority applicants. But largely unacknowledged is the precipitating history of the Supreme Court's marginalization of Asian American applicants and its decades of tacit approval of their exclusion from affirmative action programs. This unwritten history is essential to understanding how the Court's affirmative action decisions from* Bakke *to* Fisher *contributed to the eventual demise of racial preferences in admissions. As such, it is a chapter of Asian American and affirmative action history that needs telling.*

This intertwined history also illuminates a path for improving diversity on college campuses in a post-affirmative action era: the consideration of volunteered immigration histories in the admissions process. Immigration histories are not limited by race or nationality and offer a more specific, nuanced, and personal window into the incredible diversity within each ethnic group than broad demographic categories. As a case in point, Asian Americans constitute a highly diverse demographic; yet under previous affirmative action programs, their diversity was largely invisibilized as they were lumped together as an overrepresented monolithic minority. Allowing applicants to reflect on their personal or family immigration histories would reveal diversity within other ethnicities as well, while abiding by SFFA*'s newly articulated equality principles—equality of opportunity and equality of treatment across races.*

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[I]sn't that what the case is about, the discrimination against Asian Americans?[1]

– Chief Justice John Roberts, questioning Harvard's attorney in SFFA

INTRODUCTION

Asian Americans have occupied a unique place in the evolving national debate over affirmative action in higher education. Recent attention has focused on Asian American plaintiffs in *Students for Fair Admissions, Inc. v. President & Fellow of Harvard College* (*SFFA*),[2] who allied with previously unsuccessful White opponents of affirmative action to topple racial preferences in university admissions.[3] Accordingly, the Asian American plaintiffs have received both credit and blame for their pivotal role in the downfall of affirmative action programs from which they were often excluded.[4]

Largely unacknowledged in the media coverage of *SFFA* and in the academic literature is the long, intertwined history of Asian Americans and affirmative action. It is a history that stretches back to the first waves of migration from Asia in the nineteenth century, which gave rise to exclusionary immigration policies and widespread domestic discrimination, from segregation and anti-miscegenation laws to racial violence and wartime internment.[5] This fraught opening chapter of Asian American history led activists to fight for inclusion in affirmative action programs during the Civil Rights era, including for university admissions.[6]

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1. Transcript of Oral Argument at 63, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199).

2. 143 S. Ct. 2141, 2199 (2023).

3. *Id.* at 2199; *see* Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/C5E4-T4DM]; *Immigration and Relocation in US History: Growth and Inclusion*, LIBR. CONG., https://www.loc.gov/classroom-materials/immigration/chinese/growth-and-inclusion/ [https://perma.cc/9FNX-3TMM].

4. *See, e.g.*, ASIAN AM. COAL. FOR EDUC., A HISTORIC VICTORY FOR ASIAN AND ALL AMERICANS 2 (2023), https://asianamericanforeducation.org/wp-content/uploads/2023/06/AACE_Statement_On_SCOTUS_Ruling_June_2023.pdf [https://perma.cc/HX4A-J55P]; Ananya Kalahasti, *Right-Wing Activists, Not Asian Americans, Killed Affirmative Action*, COMMON DREAMS (June 30, 2023), https://www.commondreams.org/opinion/right-wing-activists-and-not-asian-americans-killed-affirmative-action [https://perma.cc/NL6A-PLJG].

5. *See generally* ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY (Reprint ed. 2015) (discussing the history of Asian Americans and the various exclusionary policies that were enacted that impacted different groups of Asian Americans).

6. Jeff Chang, *Asian Americans Spent Decades Seeking Fair Education. Then the Right Stole the Narrative*, GUARDIAN (Apr. 13, 2023, 6:00 PM) https://www.theguardian.com/us-news/2023/apr/13/affirmative-action-asian-americans-us-universities [https://perma.cc/5H6X-FBNV].

Just as some Asian Americans began gaining admissions in greater numbers, thanks in part to early affirmative action programs, some universities began expressing doubt about the need for preferences for Asian American subgroups with higher admissions numbers.[7] Then, the Supreme Court decided *Regents of California v. Bakke*.[8]

While the 1978 *Bakke* decision is known for effectively legalizing limited race-conscious admissions, with Justice Powell's controlling opinion holding up Harvard's holistic review as a model, his opinion also literally marginalized Asian Americans in the affirmative action debate.[9] In a footnote, he lumped them together as a monolith and—echoing universities such as Harvard—questioned their need for racial preferences as an overrepresented minority.[10] With universities parsing *Bakke* closely for legal guidance, his opinion inaugurated the second chapter in the unwritten history of Asian Americans and affirmative action. In this chapter, Asian Americans were increasingly excluded from racial preferences by universities and generally ignored by the Court in cases reaffirming *Bakke*, despite their growing presence as amici on both sides of the affirmative action debate.[11]

This decades-long marginalization and exclusion polarized Asian American communities and propelled some to join forces with previously unsuccessful White opponents of affirmative action. In its challenge to the model Harvard admissions program, the *SFFA* coalition led with headlining claims of discrimination against Asian American applicants, including allegations of an "Asian quota" and "Asian penalty."[12] In this third historical chapter, Asian Americans moved from the margins of *Bakke* to center stage in *SFFA*.

Notably, although affirmative action supporters have accused the Asian American plaintiffs in *SFFA* of being "co-opted" or even "duped" by the White conservative activists who co-founded the

7. Fox Butterfield, *Harvard's "Core" Dean Glances Back*, N.Y. TIMES (June 2, 1984), http://www.nytimes.com/1984/06/02/us/harvard-s-core-dean-glances-back.html [https://perma.cc/5KAK-VTP9].

8. 438 U.S. 265 (1978).

9. *Id.* at 326.

10. *Id.* at 309 n.45.

11. *See generally, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (affirming the constitutionality of race-conscious admissions policies without reference to Asian Americans).

12. Brief for Petitioner at 27, 30, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199).

coalition and bankrolled the litigation,[13] their relationship was more accurately a convergence of interests given the growing opposition to affirmative action within some Asian American communities. In particular, while a 2016 survey of Asian Americans showed majority support (52 percent) for admissions preferences helping "Blacks and minority students," only a small minority of Chinese Americans (23 percent) expressed support.[14] Indeed, the most active supporters of the *SFFA* litigation tended to be first-generation, highly skilled immigrants from mainland China, where university admissions prioritize metrics such as test scores.[15]

Turning to the *SFFA* litigation, we note a jarring juxtaposition between the focus at oral argument on the litigation's central claims of discrimination against Asian Americans and the almost complete absence of acknowledgement of those claims in Chief Justice Roberts's majority opinion. At argument, the Chief Justice set the tone by asking Harvard's attorney, "[I]sn't that what the case is about, the discrimination against Asian Americans?"[16] Piling on, Justice Alito pressed the attorney to explain Harvard's system of personal ratings, in which Asian Americans "rank below whites . . . way below Hispanics and really way below African Americans."[17] And Justice Gorsuch compared Harvard's past discrimination against Jewish applicants to its current treatment of Asian American applicants, noting that "an entire industry" of admissions consultants were advising students to appear "less Asian" on applications to elite colleges because of "Asian quotas effectively, if not in name."[18] On the other side, Justice Sotomayor noted that enrollments for Asian Americans have nonetheless "grown dramatically over time,"[19] and Justice Kagan conspicuously

13. Jay Caspian Kang, *Why the Champions of Affirmative Action Had to Leave Asian Americans Behind*, NEW YORKER (June 30, 2023), https://www.newyorker.com/news/our-columnists/why-the-champions-of-affirmative-action-had-to-leave-asian-americans-behind [https://perma.cc/28WL-78DC]; Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color. Here's How*, NPR (July 2, 2023), https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc [https://perma.cc/7F7U-7N92].

14. Aaron Mak, *Why Some Asian-American Groups Are Supporting a Conservative Effort to Attack Affirmative Action*, SLATE (Oct. 18, 2018, 6:24 PM), https://slate.com/news-and-politics/2018/10/harvard-admissions-trial-asian-american-groups-conservative-affirmative-action.html [https://perma.cc/8HDZ-J4SZ].

15. *Id.*

16. Transcript of Oral Argument, *supra* note 1, at 63.

17. Mak, *supra* note 14.

18. *Id.* at 52.

19. *Id.* at 48.

included Asian Americans in a hypothetical about hiring diverse law clerks.[20]

Yet in his majority opinion, Chief Justice Roberts hardly mentioned discrimination against Asian Americans, continuing the invisibilization that marred previous Supreme Court decisions. In striking down "race-based admissions programs," the decision focused instead on a more general narrative about discrimination against "some racial groups" in favor of others.[21] "Eliminating racial discrimination," Chief Justice Roberts wrote, "means eliminating all of it."[22] The opinion's discussion of specific races was largely limited to criticism of Harvard's admissions process for "rest[ing] on the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer.'"[23] Thus, the Court's Black-White binary, in the words of one Asian American commentator, "ignored the Asian American plaintiffs and chose, instead, to relitigate the same arguments about merit, [W]hite supremacy, and privilege."[24]

In the aftermath of *SFFA*, advocates seeking to preserve or enhance campus diversity are scrambling for admissions policies that abide by the landmark decision. We support these efforts. As university professors and Asian Americans, we think that *SFFA* was wrongly decided and iterate our support for affirmative action in higher education, both to remedy the inequalities from historical discrimination and to enrich learning. But given this new legal reality, we offer a way forward that abides by *SFFA*, promotes diversity, and avoids a longstanding problem with affirmative action programs: the lumping together of applicants by race, ignoring their vastly different backgrounds, circumstances, cultures, and experiences. For Asian American applicants in particular, this grouping was rooted in inaccurate stereotypes about Asian Americans as a monolithic and overrepresented model minority, resulting in their exclusion from affirmative action programs.

Crucially, while *discrimination* on the basis of "race in itself" is barred by *SFFA*, considerations *related* to race may still be taken into

20. *Id.* at 28–29.

21. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2169 (2023).

22. *Id.* at 2150.

23. *Id.* at 2170 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978)).

24. Kang, *supra* note 13.

account.[25] Furthermore, from the majority opinion and related exchanges at oral argument, we discern two newly articulated conditions of equality that must be met—equal opportunity and equal consideration.[26] We propose a new consideration in the admissions process that would satisfy these twin conditions and help universities attain meaningful and nuanced diversity. Namely, universities should offer applicants the opportunity, in an optional essay, to reflect on how their immigration history has shaped their experiences and perspectives.

As the saying goes, America is a nation of immigrants, and the depth, breadth, and richness of its diversity—as well as its persistent struggles with discrimination and equality—are revealed in the many different ways its present inhabitants and prior generations arrived here and have fared since. Broadly conceived, immigration histories are not limited by nationality or race. Moreover, they can span generations, as migration to America at various times under different circumstances can have vastly disparate effects—immediate and intergenerational—on socioeconomics and equity, culture and heritage, and challenges and opportunities. How an individual's personal or family immigration history has shaped who they are, what they have done, and what they believe will be unique to each individual and can offer a more specific and personal window into the incredible diversity within each ethnic group than the broad racial categories that universities have employed for affirmative action.

As a case study, we draw on the rich immigration histories of Asian Americans to illustrate how the consideration of immigration histories can enhance diversity on college campuses. For example, a Japanese American applicant in Oklahoma whose grandparents were interned at Fort Sill during World War II, a Chinese American applicant in New York City's Chinatown whose family lacks lawful immigration status, and an Afghan student in Minnesota whose family has Temporary Protected Status would bring to campus unique life

25. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170, 2176.

26. *See* U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD AND UNIVERSITY OF NORTH CAROLINA* 2 (2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf [https://perma.cc/H2Y7-SXGU]. Guidance from the Biden Administration is typical in mirroring the concluding part of Chief Justice Roberts's opinion, that universities may "assess how applicants' individual backgrounds and attributes—including those related to their race," such as "experiences of racial discrimination," may "position them to contribute to campus in unique ways." *Id.* at 2. However, such guidance has not clearly set forth the twin equality principles that we infer from the opinion and arguments.

experiences and perspectives informed by their immigration histories. Accordingly, affirmative action's longstanding Asian American "problem"—the marginalization and exclusion of Asian Americans as a monolithic model minority, which ultimately propelled them to play a central role in toppling race-conscious admissions—points to its solution. The incredible diversity within the broad ethnic designation is illuminated by wide-ranging immigration histories, which dispel the stereotyping that has marred past affirmative action programs.[27]

* * *

This Article tells the intertwining history of Asian Americans and affirmative action in three parts. Part I recounts the opening chapter, in which Asian Americans from different countries and under different circumstances immigrated to the United States from the mid-nineteenth through the twentieth centuries. Throughout this period, they faced exclusionary immigration policies and widespread domestic discrimination, from segregation and anti-miscegenation laws to racial violence and wartime internment.[28] To remedy this longstanding discrimination, Asian Americans were included in early affirmative action programs after agitation by Asian American activists during the civil rights movement.[29] Understanding these different immigration journeys and subsequent experiences with discrimination is essential to appreciating the diversity among Asian Americans today. This first chapter is also key to appreciating the unique role that Asian Americans have played in affirmative action's development and fateful demise.

Part II tells the second chapter of the history of Asian Americans and affirmative action, which took place during the era of limited race-conscious admissions following the Harvard model approved by the Supreme Court. The success of some Asian Americans in university admissions at the start of this era, partly as a result of early affirmative action programs, led the Court to tacitly approve their exclusion from

27. The Biden Administration's guidance on *SFFA* also offers an Asian American example of generational immigration history that universities can consider—"an applicant's discussion of how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family." *Id.*

28. *Asian Americans Then and Now*, ASIA SOC'Y, https://asiasociety.org/education/asian-americans-then-and-now [https://perma.cc/5GA6-VD3B]; Eric Fish, *How Mixed Chinese-Western Couples Were Treated a Century Ago*, ASIA SOC'Y (Jan. 10, 2017), https://asiasociety.org/blog/asia/how-mixed-chinese-western-couples-were-treated-century-ago [https://perma.cc/7E35-Y2X7].

29. Chang, *supra* note 6.

racial preferences as an overrepresented model minority and marginalize them in affirmative action jurisprudence from *Bakke*[30] to *Grutter v. Bollinger*[31] and *Fisher v. University of Texas at Austin*[32] Their exclusion produced a growing divide within Asian American communities, which manifested in increasing participation as amici on both sides of these affirmative action cases[33] and ultimately led some Asian Americans to align with unsuccessful White opponents to take down the regime of race-conscious admissions as model aggrieved minorities in the *SFFA* litigation.[34] Notably, however, the majority opinion and dissents in *SFFA* again largely invisibilized Asian Americans in the affirmative action debate by framing the issue in predominantly binary—Black and White—terms.

Finally, in Part III, with Asian Americans as a case study, we propose that universities offer applicants the option to reflect on their immigration history, broadly defined to include intergenerational family experiences since arriving in America. Considering how immigration histories have personally impacted the lives and perspectives of applicants can help universities illuminate and attain meaningful and nuanced diversity across nationalities, races, and other demographics in keeping with *SFFA*'s equality principles. We also explain how the consideration of migration histories could benefit diverse minority groups such as African Americans, Hispanics, and Native Americans. Thus, by drawing upon the immigration journeys of Asian Americans as a case study, affirmative action's Asian American "problem" can contribute to its solution in the next chapter of their intertwined histories.

I. ASIAN AMERICAN IMMIGRATION HISTORIES AND EARLY AFFIRMATIVE ACTION

The highly varied immigration journeys of different Asian American groups from the mid-nineteenth through the twentieth centuries are significant for several reasons. First, these journeys constitute the

30. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 n.45. (1978).

31. 539 U.S. 306 (2003)

32. *See* 570 U.S. 297, 331 (2013) (Thomas, J., concurring).

33. *See, e.g.*, Brief of Amici Curiae Asian Am. Coal. for Educ. & Asian Am. Legal Found. in Support of Petitioner at 3–4, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199) (supporting petitioner); Brief of Asian Ams. Advancing Just. et al. as Amici Curiae in Support of Respondents at 27, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199) (supporting respondents).

34. Kalahasti, *supra* note 4.

starting point for understanding the intertwined relationship between Asian Americans and affirmative action. The exclusionary immigration policies that Asian immigrants overcame, coupled with discriminatory laws that severely restricted their ability to naturalize, own property, and marry, and segregated them from American society, motivated Asian American activists to fight for their civil rights, including a fight to be included in early affirmative action programs.[35] Second, these immigration journeys are also the foundation for illuminating the diversity among Asian Americans today and countering the model minority myth that has stereotyped and marginalized them in the affirmative action debate for nearly half a century. In retelling these journeys,[36] we proceed in largely chronological order, interspersing discussion of relevant legal and social changes—like changes to U.S. immigration laws. We conclude with an analysis of the important role that Asian Americans, newly mobilized around a panethnic identity, played in the development of early affirmative action programs.

A. Immigration and Exclusion

1. Chinese Immigration

Chinese nationals were the first Asians to immigrate to America and for many years comprised the largest group of Asian immigrants. The first Chinese arrived in California in 1849 as part of the gold rush.[37] Fleeing war and economic instability, Chinese workers also played instrumental roles in building American railroads and developing the mines, farms, factories, and fishing industries along the west coast.[38] By 1870, Chinese immigrants made up 20 percent of California's workforce, even though they were only 0.002 percent of the U.S. population.[39]

The visibility of Chinese workers and recessions in the second half of the nineteenth century made these workers targets for racist hostility and violence in western states where they were concentrated.[40] California law during this time period already severely

35. Chang, *supra* note 6.

36. An insightful resource to understand Asian American history is RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989).

37. LEE, *supra* note 5, at 59.

38. *Asian Americans Then and Now*, *supra* note 28.

39. *Id.*

40. LEE, *supra* note 5, at 71.

restricted the rights of its Chinese residents—for example, imposing onerous taxes on them, denying their entry into certain professions, segregating their housing and schooling, and disqualifying them from testifying in state courts.[41] This anti-Chinese sentiment soon erupted into violence. From the 1850s until the 1900s, Chinese immigrants faced violence from armed mobs, angry at competition for jobs and instances of purported crimes.[42] This violence started in campsites around goldfields, causing Chinese to abandon them, and spread to cities, leaving multiple Chinese dead, with thousands more forced from their homes and businesses.[43]

This regional hostility and violence soon spilled over into federal legislation. At the urging of California legislators, Congress in 1882 enacted the Chinese Exclusion Act, which generally barred Chinese immigration for ten years and prohibited Chinese immigrants from naturalizing.[44] Even Chinese who had immigrated prior to the Act were prohibited from reentering, as Mr. Chae Chan Ping discovered when he left the United States in 1887 to visit his wife and child in China and was denied reentry in 1888.[45] Though he had been given a certificate by the federal government allowing reentry as an exception to the Act, the certificate was revoked while he was in China.[46] The Supreme Court subsequently upheld the denial of his reentry, describing Chinese immigrants as "foreigners . . . who will not assimilate with us" and who could be denied entry as an exercise of national sovereignty.[47]

The ban on Chinese immigration was extended in 1902 and made permanent in 1904.[48] The flow of Chinese immigrants then slowed considerably but did not stop altogether. From 1882 to 1943, approximately three hundred thousand Chinese entered the United States,

41. *Asian American History*, UNIV. PA., https://www.sas.upenn.edu/~rle/History.html [https://perma.cc/94SD-86V9]; Maura Dolan, *Chinese Immigrant, Denied Law License in 1890, Gets One Posthumously*, L.A. TIMES (Mar. 16, 2015), https://www.latimes.com/local/lanow/la-me-ln-chinese-lawyer-20150316-story.html [https://perma.cc/6HZQ-S6YA].

42. LEE, *supra* note 5, at 93.

43. *Id.*

44. *Id.* at 94. Previously, in 1875, the Page Act had barred Chinese women from entering for "lewd and immoral purposes," which supplied immigration officials with a pretext to deny most Chinese women entry and promoted racist and sexist stereotypes. Page Act of 1875, Pub. L. No. 43-141, § 141, 18 Stat. 477, 477.

45. Ping v. United States, 130 U.S. 581, 582 (1889).

46. *See id.* at 582.

47. *Id.* at 606.

48. *Id.*

some lawfully under limited exemptions, but many unlawfully.[49] As the first group to face targeted immigration restrictions based on their ethnicity, the Chinese also became the first "illegal immigrants."[50]

2. Japanese Immigration

With legal immigration from China largely curtailed, U.S. employers turned to Japanese workers to fill the demand for labor in various industries. The Japanese government, after initially banning emigration, faced American military pressure to open its economy and relented in 1858, letting its citizens leave.[51] American traders and labor recruiters swarmed the Japanese countryside to recruit workers for Hawaii's plantations, extolling the economic opportunities in glowing terms.[52] The first Japanese immigrants came to Hawaii in 1885, working in the state's sugar plantations.[53] Wages there were substantially higher than on farms in Japan, but harsh working conditions and discrimination on plantations incentivized them to look for better opportunities on the mainland.[54] There, Japanese workers filled the jobs that Chinese workers once held on railroads and in lumber mills, fish canneries, mines, and orchards along the West Coast.[55]

Japanese immigration differed in important ways from earlier waves of Chinese immigration. More Japanese women immigrated, so Japanese communities in the United States were populated with families putting down roots.[56] These communities maintained strong ties with their native country, cultivating both Japanese nationalism and American assimilation as they tried to integrate into American society.[57] In addition, because Japan was an industrialized power with a strong military, the racist view that Japanese immigrants were both superior and more menacing than other Asian immigrants took hold.[58] Many Whites feared that the Japanese immigrants in their midst were

49. *Id.*
50. *Id.*
51. LEE, *supra* note 5, at 110.
52. *Id.*
53. *Id.* at 111–12.
54. *Id.* at 112, 114.
55. *Id.* at 116.
56. *Id.* at 124. As noted, prior to the Chinese Exclusion Act of 1882, the Page Act of 1875 had the intended effect of barring most Chinese women from entry and thereby preventing birthright citizenship of Chinese immigrants. *See supra* note 44; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 703–04 (1889) (upholding birthright citizenship of Chinese Americans).
57. LEE, *supra* note 5, at 122.
58. *Id.*

actually colonizers sent to take over the West Coast.[59] The "yellow peril" paranoia that had originated in Germany—the fear that Japan, after its surprising defeat of China in the Sino-Japanese War, would next attempt to conquer the West—found a ready audience in America.[60]

Anti-Japanese fervor grew, manifesting in racial violence against Japanese immigrants in San Francisco and other Western cities and the formation of political organizations to lobby for the exclusion of Japanese and other Asian immigrants.[61] Facing these pressures, the United States negotiated a "Gentlemen's Agreement" in 1908, whereby Japan agreed to stop issuing new passports to laborers wishing to immigrate to the United States.[62] With this agreement, Japan avoided the humiliation of a Japanese exclusion law, like that enacted against the Chinese, and the United States avoided openly antagonizing a strong military power.[63] While Japanese laborers already in the United States and their families were allowed to continue traveling between the two countries, new immigration from Japan largely halted.[64]

3. Korean Immigration

The first Korean immigrants arrived in the United States in 1902.[65] Like the Japanese, they first worked on the Hawaiian plantations before migrating to other industries on the mainland, often working alongside Chinese and Japanese laborers who had arrived earlier.[66] They faced many of the same challenges that other Asian immigrants faced during this time period—discrimination, dangerous working conditions, and racial hostility from White Americans—but their immigration experiences were also complicated by the Japanese colonization of their home country.[67] After Japan defeated China in the Sino-Japanese War in 1894 and Russia in the Russo-Japanese War in 1904, Japan declared Korea to be a protectorate, formally annexing it in 1910

59. *Id.* at 124.
60. *Id.* at 123–24.
61. *Id.* at 124–25.
62. *Id.* at 129 (noting the Agreement allowed for "parents, wives, and children of [Japanese] laborers already resident" in the United States to immigrate).
63. *Id.* at 124, 129.
64. *Id.* at 129–30.
65. *Id.* at 137.
66. *Id.*
67. *Id.*

until Korea gained independence in 1945.[68] After initially allowing Koreans to immigrate to America, the Japanese-controlled government later limited that immigration to prevent Koreans from competing with Japanese labor in the United States and to keep Koreans in the country to work on Japanese projects.[69]

Not surprisingly, the Koreans who managed to immigrate to America viewed themselves as exiles; while some sought better economic opportunities in the United States, others sought freedom from the "Japanese enemy."[70] The political motives for immigrating may also explain why the occupational backgrounds of Korean immigrants were more diverse than Asians who had immigrated before them. Besides farmers and laborers, Korean immigrants were also ministers, students, scholars, and former soldiers.[71] Furthermore, 70 percent were literate, and 40 percent were Christian.[72] Korean churches thus quickly became centers of their immigrant communities not only as places to worship, but also places to speak Korean and organize activities for the independence movement in Korea.[73]

The Japanese prohibition on Korean immigration kept the Korean American population in the United States very modest in size, but small groups of Koreans still managed to immigrate, including a group of refugee students who escaped from Japan and "picture brides," Korean women who were allowed to join their new husbands who had immigrated earlier.[74] However, after Congress enacted the Immigration Act of 1924 (the Johnson-Reed Act, explained in more detail below) barring any "alien ineligible for citizenship" from immigrating, Korean immigration, along with immigration from most other Asian countries, was largely halted.[75]

4. South Asian Immigration

South Asian immigrants from present-day India and Pakistan started immigrating later than Chinese and Japanese immigrants and

68. *Id.* at 138, 145.

69. *Id.* at 138; *see also* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 5 1241, 1283 n.283 (1993) (noting the Japanese government's curtailing of Korean immigration to the United States).

70. LEE, *supra* note 5, at 140, 145.

71. *Id.* at 139–40.

72. *Id.* at 140.

73. *Id.* at 145.

74. *Id.* at 140–41.

75. *See* Immigration Act of 1924, Pub. L. No. 139, § 13(c), 43 Stat. 153, 162. On the inability of Asians to naturalize, see *infra* Section II.B.1.

in much smaller numbers.[76] The first South Asian workers arrived in 1909, and from 1910–1932, only 8,055 South Asians were admitted.[77] For South Asians, mostly from the Punjabi countryside, the trip to North America was longer and more expensive than from other Asian countries, so immigration was mostly limited to working-age men.[78] Because of their status as British subjects, many South Asians initially immigrated to Canada (then under British rule) and afterward moved to the United States.[79]

South Asian immigrants arrived in the United States to find an environment of rampant anti-Asian racism, and they too fell victims to discrimination and sometimes violence.[80] Because they immigrated in smaller numbers, they faced more challenges in forming the social and political organizations that other Asian groups had organized to fight discrimination.[81] Like those of Koreans, the immigration experiences of South Asians were strongly influenced by campaigns to fight colonization—British colonial rule—in their native country.[82] Their fight for equal treatment in the United States was intertwined with the fight of South Asians for independence from Great Britain.[83] Because South Asians were technically British subjects, the United States had to tread carefully in its attempts to limit their immigration.[84] One informal way to limit South Asian immigration was to deny admissions on the grounds that they were "likely to become a public charge."[85] Because this ground was so vaguely defined, immigration inspectors could deny entry to many South Asian applicants on pretextual grounds for having "a very poor physical appearance" or looking "weak and emaciated."[86] Based on statistics from the U.S. Bureau of Immigration, 55 percent of all South Asian applicants processed at the

76. LEE, *supra* note 5, at 151.
77. *Id.*
78. *Id.* at 152–53.
79. *Id.* at 155; *see also* Erin Blakemore, *Canada's Long, Gradual Road to Independence*, HISTORY (May 2, 2023), https://www.history.com/news/canada-independence-from-britain-france-war-of-1812 [https://perma.cc/M4UE-S56F] (describing how Great Britain created the Dominion of Canada in 1867, a confederation that "was still under British rule and did not have full legal autonomy").
80. LEE, *supra* note 5, at 163, 171.
81. *Id.* at 159–60.
82. *Id.* at 160.
83. *Id.* at 161.
84. *Id.* at 165–66.
85. *Id.* at 166.
86. *Id.*

immigration station on Angel Island were denied admission.[87] By comparison, only 9 percent of Chinese applicants (who were applying for admission under the exceptions allowed under the Chinese Exclusion Act and related laws) were denied entry during those same years.[88]

Despite these informal measures to stop South Asian immigration, political pressure continued to build for a total ban on their admission.[89] That pressure finally manifested in the Immigration Act of 1917, which barred all immigration from an Asiatic zone that included "most of China, all of India, Burma, Siam, and the Malay states, part of Russia, all of Arabia and Afghanistan, most of the Polynesian Islands, and all of the East Indian Islands."[90] Because Japanese and Chinese immigration was already restricted by previous laws and diplomatic agreements, South Asian immigrants were understood to be the main target of this new law.[91] Another door for Asian immigration was closed.

Restrictions on Asian immigration were solidified when Congress enacted the Immigration Act of 1924 (the Johnson-Reed Act), which imposed numerical limits, creating a national origins quota system.[92] In this system, each nationality's quota was based on the number of persons of their national origin who were already in the United States in 1920.[93] By design, because persons from northern and western Europe made up the largest groups in the United States at that time, they were given the largest quotas.[94] While immigrants from Western Hemisphere countries could still enter largely without restriction, immigrants from southern and eastern Europe faced sharply reduced limits.[95] Asian immigrants were completely shut out of the national origins system. The 1924 Act barred immigration of all "aliens ineligible to citizenship," which meant that Asians, as non-Whites who could

87. *Id.* at 167.
88. *Id.*
89. *Id.*
90. *Id.* at 171.
91. *Id.*
92. Charles Gordon et al., *Immigration Law and Procedure*, *in* IMMIGRATION AND REFUGEE LAW AND POLICY 15, 17 (Stephen H. Legomsky & David B. Thronson eds., 7th ed. 2019).
93. *Id.*
94. *Id.*
95. *Id.*

not naturalize under the existing naturalization laws, were not allocated visas.[96]

5. Filipino Immigration

After the enactment of the 1917 and 1924 Immigration Acts, the only Asians allowed to immigrate freely were Filipinos.[97] Because the United States annexed the Philippines following the Spanish-American War in 1898, Filipinos were considered "U.S. nationals" rather than foreigners and thus exempt from the Asiatic Barred Zone.[98] Filipinos therefore were attractive targets for U.S. companies looking for cheap labor.[99] Filipinos were also encouraged to immigrate by American missionaries, doctors, and teachers extolling the virtues of the United States and encouraging Filipinos to think of themselves as Americans.[100] These factors motivated 150,000 Filipinos to immigrate to the United States in the early twentieth century.[101]

As U.S. nationals, Filipinos had some privileges that other Asian immigrants did not, such as the ability to enlist in the U.S. Navy with its better salaries.[102] Even so, they faced the same forms of discrimination experienced by earlier waves of Asian immigrants: harsh working conditions, wage exploitation, and anti-Asian violence.[103] As the most recent arrivals, they confronted the additional challenge of being at the bottom of the immigrant hierarchy.[104] At Hawaiian plantations where many Filipinos started their American journeys, they were literally at the bottom, occupying the most poorly built camps at the base of hills, exposed to sewage that ran downhill from the houses of Portuguese, Spanish, Japanese, Chinese, and Korean workers who lived above them.[105]

From Hawaii, Filipinos slowly migrated to the continental United States, initially as stewards or servants to U.S. Navy officers.[106] By the 1920s and 1930s, along with Mexicans, Filipinos were the main

96. *Id.* More information on naturalization restrictions imposed on Asian Americans can be found below at notes 124–30.
97. LEE, *supra* note 5, at 176.
98. *Id.* at 175–76.
99. *Id.* at 177.
100. *Id.* at 176–77.
101. *Id.* at 174.
102. *Id.*
103. *Id.* at 180, 184.
104. *Id.* at 178.
105. *Id.*
106. *Id.* at 176.

workforce in California's agricultural fields.[107] Because farm work was limited to the growing seasons, Filipino workers went to Alaska in the off seasons to work in canneries.[108] By the 1930s, Filipinos made up 15 percent of the state's cannery workers.[109] With their growing numbers and rising anti-Asian sentiments, especially on the West Coast, some Whites came to see Filipinos less as "little brown brothers" and more as an "Asiatic invasion" worse than the previous waves of Asian immigrants.[110] Particular animosity was lodged at Filipino men, who partnered with White women in greater numbers than did previous Asian immigrants.[111] Indeed, California in 1933 extended its anti-miscegenation laws to prohibit Filipino-White marriages.[112]

California was also the most dangerous place for Filipinos to live. Though anti-Filipino violence existed up and down the West Coast, racism and violence were the most virulent in cities and counties throughout California.[113] In Stockton, landlords and hotel owners refused to rent to Filipinos. Filipino men were often arrested for engaging in legal everyday activities in public, such as waiting for a ride, reading a magazine, or talking with a White woman.[114] In a notorious example of this violence, a mob of White men attacked a Filipino dance hall in Watsonville in 1929 after the local newspaper printed a photo of a Filipino man embracing his White fiancée, who had her family's approval for the engagement.[115] In the four days of rioting that followed, one Filipino was killed and many others were beaten.[116]

In the wake of this growing anti-Filipino sentiment and violence, Congress considered a Filipino exclusion law, similar to the ones already enacted against Chinese and other Asian immigrants.[117] But because the Philippines was an American colony, the United States would be in the awkward position of prohibiting Filipinos from entering their mother country.[118] Instead, Philippine nationalists and Filipino exclusionists formed an odd coalition to persuade Congress both

107. *Id.* at 180.
108. *Id.* at 181.
109. *Id.*
110. *Id.* at 184.
111. *Id.* at 185.
112. *Id.*
113. *Id.*
114. *Id.* at 185–86.
115. *Id.* at 186.
116. *Id.*
117. *Id.* at 187.
118. *Id.*

to grant independence to the Philippines just ten years after attaining commonwealth status and to prohibit any meaningful future Filipino immigration by classifying Filipinos as "aliens."[119] The resulting Tydings-McDuffie Act of 1934 was signed by President Franklin D. Roosevelt.[120]

B. Life in Asian America: Restriction and Reform

1. Legal Restrictions

With the Tydings-McDuffie Act, the United States had effectively walled itself off from Asian immigration. While many of these restrictive laws had limited exceptions (like the Gentleman's Agreement that allowed Japanese men who had sufficient savings to bring their wives over),[121] the streams of Asian immigration that the United States experienced during the first decades of the twentieth century dried up by the 1930s. The Chinese population, for instance, dropped from about 107,000 in 1890 to 61,000 in 1920.[122] After World War II, immigration laws were modified slightly to allow limited numbers of Asians to immigrate (like the War Brides Act of 1946), but for the most part, meaningful immigration from Asia had been halted.[123]

Those Asians who had arrived before the immigration bans took effect or who qualified to immigrate under the limited exceptions experienced intense discrimination. Besides the anti-Asian violence described earlier, Asian Americans also experienced significant de jure discrimination. Legally, Asian immigrants remained perpetual outsiders because they were unable to naturalize and acquire the privileges and protections of citizenship. Per the Nationality Act of 1790, naturalization was limited to "free white persons."[124] Though the Reconstruction era Naturalization Act of 1870 extended naturalization to "aliens of African nativity and to persons of African descent,"[125] Asians

119. *Id.* at 188. The law set the immigration quota at fifty Filipinos per year.

120. *Id.*

121. *Gentlemen's Agreement of 1907–1908*, IMMIGR. HIST., https://immigrationhistory.org/item/gentlemens-agreement/ [https://perma.cc/7EAV-LYWT].

122. *Immigration and Relocation in US History: Growth and Inclusion*, LIBR. CONG., https://www.loc.gov/classroom-materials/immigration/chinese/growth-and-inclusion/ [https://perma.cc/9FNX-3TMM].

123. *Asian Immigration*, IMMIGR. HIST., https://immigrationhistory.org/lesson-plan/asian-migration/ [https://perma.cc/6HGB-K97M].

124. *Id.*

125. *Naturalization Act of 1870*, IMMIGR. HIST., https://immigrationhistory.org/item/naturalization-act-of-1870/ [https://perma.cc/5ZG8-RDVN].

remained ineligible. The Chinese Exclusion Act of 1882, besides barring new Chinese immigrants from entering the United States, also specifically excluded Chinese already in America from naturalizing.[126] In 1922, Japanese immigrants challenged their ineligibility for naturalization, arguing that they were, in fact, White for purposes of the Naturalization Act of 1870.[127] South Asian immigrants made the same argument one year later.[128] Both groups of Asian plaintiffs lost.

The phrase "ineligible for citizenship" was often used as shorthand to discriminate against Asian immigrants. As previously noted, the Immigration Act of 1924 prohibited the immigration of "aliens ineligible to citizenship," eliminating any meaningful Asian immigration.[129] States also seized upon the citizenship eligibility to enact laws that discriminated against Asian immigrants.[130] In 1913, California enacted its alien land law, prohibiting "aliens ineligible for citizenship" from buying land or leasing it for longer than three years.[131] This law targeted Japanese farmers who had built successful farms, using ethnic networks for labor, equipment, transportation, and marketing.[132] Fifteen states enacted similar alien land laws, and the Supreme Court upheld their constitutionality in a pair of 1923 cases, *Porterfield v. Webb*[133] and *Terrace v. Thompson*.[134]

2. World War II, Japanese Internment, and Asian American Integration

The advent of World War II marked both a nadir and a positive turning point in the legal treatment of Asian Americans in the United States. The most consequential and invidious policies targeted

126. *Chinese Exclusion Act aka "An Act to Execute Certain Treaty Stipulations Relating to Chinese,"* IMMIGR. HIST., https://immigrationhistory.org/item/an-act-to-execute-certain-treaty-stipulations-relating-to-chinese-aka-the-chinese-exclusion-law/ [https://perma.cc/QRX2-LWHJ].

127. Ozawa v. United States, 260 U.S. 178, 194–95 (1922).

128. United States v. Bhagat Singh Thind, 261 U.S. 204, 205–06 (1923).

129. Gordon et al., *supra* note 92, at 17.

130. LEE, supra note 5, at 132.

131. *On This Day—May 3, 1913 | California Law Prohibits Asian Immigrants from Owning Land*, EQUAL JUST. INITIATIVE, https://calendar.eji.org/racial-injustice/may/3 [https://perma.cc/AEX9-XHFA].

132. *Id.*

133. 263 U.S. 225, 233 (1923).

134. 263 U.S. 197, 222 (1923); *see On This Day*, *supra* note 131. Although not enforced in later years, some of these alien land laws remained on the books until as late as 2018. *One-Pager: Florida S.B. 264*, ASIAN AMS. ADVANCING JUST. (May 25, 2023), https://www.advancingjustice-aajc.org/sites/default/files/2023-06/FL%20SB%20264%20One%20Pager%2005232023%20%28Final%29.pdf [https://perma.cc/9A63-D446].

Japanese Americans. After the surprise Japanese attack at Pearl Harbor, approximately twenty thousand Japanese Americans, mostly men, were arrested as "enemy aliens" and incarcerated for the remainder of the war.[135] Those arrested were determined to be guilty by association, either because they were community leaders or had a history of contact with the Japanese embassy or consulates.[136] Nevertheless, their arrests nominally followed rules established by both the United States and international law.[137]

By contrast, the 120,000 Japanese Americans, from infants to the elderly, who were forcibly relocated from their homes on the West Coast into internment camps throughout the United States were targeted solely based on their Japanese ancestry.[138] On February 19, 1942, President Franklin Roosevelt signed Executive Order 9066, directing military commanders to establish restricted zones in which entire communities could be excluded without due process or compensation.[139] Given just one week's notice, Japanese Americans were forced to abandon or sell their homes, businesses, and other valuables, often at steep losses, before being removed to desolate War Relocation Authority camps surrounded by barbed wire and guard towers.[140]

A twenty-three-year-old Japanese American named Fred Korematsu refused to relocate and was arrested.[141] He challenged the constitutionality of the exclusion and internment. In *Korematsu v. United States*,[142] in 1944, the Court by a six–three vote upheld the mass racial exclusion while denying that the constitutionality of mass detention was an issue presented in the case.[143] Justice Black's majority opinion ironically laid down the modern rule that all racial classifications are subject to strict scrutiny but then upheld the undifferentiated exclusion of Japanese Americans on national security grounds.[144] Among the dissenters, Justice Murphy decried that the exclusion "goes over the

135. LEE, supra note 5, at 216.
136. *Id.* at 215–16.
137. *Id.*
138. *Id.* at 229.
139. *Id.* at 222.
140. *Id.* at 229, 230, 232.
141. For an excellent podcast on Fred Korematsu's path to the Supreme Court, see *More Perfect—American Pendulum I*, RADIOLAB (Oct. 2, 2017), https://www.radiolab.org/podcast/radiolab-presents-more-perfect-american-pendulum-i [https://perma.cc/2DR6-F28Z].
142. 323 U.S. 214 (1944).
143. *Id.* at 221.
144. *See id.* at 216; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.2 (7th ed. 2023).

very brink of constitutional power and falls into the ugly abyss of racism" and described its victims as "heirs of the American experiment . . . entitled to all the rights and freedoms guaranteed by the Constitution."[145] In the ensuing decades, *Korematsu* has been widely denounced as one of the Court's "[s]upreme mistakes."[146] Indeed, it has been purportedly "overruled" by the Roberts Court, in rejecting comparisons to its approval of President Trump's immigration ban targeting Muslim-majority countries.[147]

On the same day *Korematsu* was handed down, the Court also decided *Ex Parte Endo*,[148] a challenge brought by a Japanese American who had been investigated by the United States and deemed loyal, but who nonetheless remained detained in an internment camp.[149] In an attempt to mitigate the outcome and sidestep criticism of *Korematsu*, the Court in *Endo* held that the continued detention of "subject citizens who are concededly loyal" exceeded the authorization of Executive Order 9066.[150] With this decision and the end of World War II in sight, the Truman administration in early 1945 unwound its mass detention, declaring that Japanese Americans "would be permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens."[151]

Japanese Americans suffered a grievous injustice during WWII, but for other Asian Americans, the war presented opportunities to improve their legal and social standing in the United States. Because some of their native countries were also victims of Japanese aggression or were allies of the United States in the war, they were regarded by some White Americans as "good Asians."[152] For example, China was a U.S. ally against Japan, which increased American sympathy

145. *Korematsu*, 323 U.S. at 233, 242 (quotations omitted).

146. Carol J. Williams, *Legal Scholars Examine the U.S. High Court's 'Supreme Mistakes*,*'* L.A. TIMES (Apr. 2, 2011), https://www.latimes.com/local/la-xpm-2011-apr-02-la-me-scotus-scandals-20110402-story.html [https://perma.cc/HL6L-3PJ2].

147. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 n.3 (2023) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018)).

148. 323 U.S. 283 (1944).

149. *Id.* at 294.

150. *Id.* at 297. However, *Endo* did not mandate the immediate release of all interned Japanese Americans. The namesake of the case, Mitsuye Endo, had successfully petitioned for a writ of habeas corpus, and presumably (absent unilateral executive action) other detainees would have to seek their release as well as "loyal" American citizens.

151. Kristen Hayashi, *The Return of Japanese Americans to the West Coast in 1945*, NAT'L WWII MUSEUM (Mar. 26, 2021) https://www.nationalww2museum.org/war/articles/return-japanese-americans-west-coast-1945 [https://perma.cc/TZB4-9P2Y].

152. LEE, *supra* note 5, at 252.

for Chinese Americans in their communities.[153] Chinese Americans also threw themselves into supporting the U.S. war effort—and by extension, the Chinese war effort—by working in shipyards and factories, buying war bonds, and volunteering their time, which further endeared them to Americans.[154] President Roosevelt led efforts to repeal the Chinese exclusion laws, exhorting, "China is our ally. Today we fight by her side."[155] On December 17, 1943, he signed the Magnuson Act, which formally ended Chinese exclusion.[156]

With the advent of WWII, Filipino Americans also experienced a positive change of fortune. When the Japanese military invaded the Philippines, seven hours after bombing Pearl Harbor, U.S. and Filipino soldiers battled the Japanese side-by-side.[157] Four months later, the Philippines fell to Japan, but the image of the "Fighting Filipinos" helped shift the general public's perception of Filipino Americans, from backward "little brown brothers" to brave, loyal, and patriotic allies.[158] Filipino Americans protested laws that prohibited them from serving in the U.S. military, and President Roosevelt responded by creating all-Filipino regiments that fought for the United States.[159] Filipino Americans also worked in shipyards and other military industries, advancing both national interests and individual interests through better-paying jobs in agriculture.[160] These circumstances improved the social status of Filipino Americans, culminating in the Luce-Cellar Act of 1946, which allowed them to naturalize.[161]

3. Immigration Reform

In 1952, with the enactment of the McCarran-Walter Immigration and Nationality Act, Congress eliminated the racial restrictions on naturalization, which allowed other Asian immigrants, including those from Japan, to become citizens.[162] The 1952 Act, however, still maintained the national origins quota system and limited visas for immigrants from Asian countries to one hundred per year.[163] Meaningful

153. *Id.* at 253.
154. *Id.* at 253–54.
155. *Id.* at 256.
156. *Id.*
157. *Id.* at 258.
158. *Id.*
159. *Id.* at 259.
160. *Id.*
161. *Id.*
162. *Id.* at 271.
163. *Id.*

immigration reform for would-be Asian immigrants had to wait until 1965, when Congress enacted the Hart-Cellar Act, which eliminated the discriminatory national origins quota system and replaced it with a preference system for family-based and employment-based immigration, equally available to immigrants from all countries.[164] Significantly, for our purposes, the Act also abolished the special immigration restrictions on Asians and generally prohibited immigration discrimination based on race, sex, nationality, place of birth, or place of residence.[165]

These immigration reforms had long been championed by President Kennedy. In his 1958 book, *A Nation of Immigrants*, he celebrated the contributions that immigrants had made to the United States and called for reform to eliminate the discriminatory treatment of immigrants by race.[166] In lobbying Congress, he described his proposed legislation as helping to "eliminate discrimination between peoples and nations on a basis that is unrelated to any contribution that immigrants can make and is inconsistent with our traditions of welcome. Our investment in new citizens has always been a valuable source of our strength."[167] After President Kennedy's assassination, President Johnson continued the mission for immigration reform. Though less convinced of its merits, he appreciated that immigration reform was needed to achieve his dream of "eliminat[ing] from this Nation every trace of discrimination and oppression that is based upon race or color."[168] Enacted one year after the landmark 1964 Civil Rights Act, the Hart-Cellar Act earned praise from President Johnson for advancing equality and righting past wrongs.[169]

Both Johnson and advocates of the national origins quota system believed that the Hart-Cellar Act would only have limited impact on the streams of immigration to the United States.[170] But the opposite

164. *Id.* at 285.

165. *Id.* at 271.

166. *Id.* at 284.

167. John F. Kennedy, *Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws*, AM. PRESIDENCY PROJECT (July 21, 1963), https://www.presidency.ucsb.edu/documents/letter-the-president-the-senate-and-the-speaker-the-house-revision-the-immigration-laws [https://perma.cc/XFZ9-ENET].

168. Lyndon B. Johnson, *Address Before a Joint Session of the Congress*, AM. PRESIDENCY PROJECT (Nov. 27, 1963) https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-0 [https://perma.cc/Z22C-DLRS].

169. Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill*, AM. PRESIDENCY PROJECT (Oct. 3, 1965) https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-immigration-bill-liberty-island-new-york [https://perma.cc/M7DQ-EFDN].

170. *Id.*

proved true, as immigration soon surged. In the three years after the Act took effect (1966–1968), 380,000 people immigrated to the United States (compared with 290,000 immigrants in the preceding five years, 1961–1965).[171] The composition of post-Act immigration is also significant, with Asian immigration rising from 22,000 per year in 1961–1965 to 52,000 per year in 1966–1968.[172] In subsequent years, the numbers of immigrants from Asia quickly outstripped the numbers from Europe. Until 1977 and the influx of refugees from Southeast Asia, the biggest sending countries in Asia were (in descending order) China, Korea, the Philippines, and Japan.[173]

171. Morrison G. Wong, *Post-1965 Asian Immigrants: Where Do They Come from, Where Are They Now, and Where Are They Going?*, 487 ANNALS AAPSS 150, 155 (1986).

172. *Id.*

173. *Id.*

Table 1: Average Annual Number of Immigrants (in Thousands)[174]

Region	**1961–1965**	**1966–1968**	**1969–1973**	**1974–1977**	**1978–1981**
Total	290	380	377	436	547
Europe	122	135	104	79	68
Asia	22	52	103	152	235
China	5	20	20	26	29
Japan	4	4	5	5	4
Cambodia	-	-	0	0	5
Korea	2	3	14	31	31
Laos	-	-	0	0	9
Philippines	3	11	28	38	41
Vietnam	-	0	2	4	53
Rest of Asia	8	13	33	49	63
North America	119	165	140	166	188
South America	24	21	21	27	38
Africa	3	4	7	8	13
Oceania	1	2	3	4	4

4. Southeast Asian Refugees

Against this context of restriction and reform, the United States experienced its last large wave of Asian immigration in the 1970s and 1980s, a wave comprised of refugees fleeing communist takeovers in

174. *Id.*

Vietnam, Laos, and Cambodia.[175] As a former French colony, Vietnam was divided by the 1954 Geneva Accords between a communist North Vietnam and an anti-communist South Vietnam, supported by the United States.[176] The U.S. intervention in Vietnam grew from providing military advisors during the Eisenhower administration to committing as many as 540,000 U.S. troops by the end of the Johnson administration.[177] The United States also engaged in clandestine operations in nearby Laos and Cambodia, recruiting Hmong soldiers in Laos and supporting the Lon Nol government in Cambodia against the communist Khmer Rouge.[178] With U.S. troop deaths rising, American involvement in the Vietnam War grew extremely unpopular at home. Candidate Richard Nixon campaigned on a promise of finding "peace with honor," and as President, his Nixon Doctrine shifted the bulk of fighting to South Vietnamese troops, with U.S. troops fully withdrawn by 1973.[179]

The weakened South Vietnamese government quickly fell to North Vietnamese troops in April 1975.[180] In the ensuing chaos, the U.S. government scrambled to evacuate by helicopter U.S. personnel and Vietnamese allies who would be vulnerable to communist persecution.[181] Another 73,000 Vietnamese (including the authors and their families) left by fishing boats or South Vietnamese navy vessels.[182] This first wave of Vietnamese refugees included elite or middle-class immigrants with education, English, and American connections.[183] Such social capital helped some transition to life in the United States, but many faced dislocation and hardship starting from scratch.[184] Around 4,600 Cambodians with similar backgrounds were evacuated to the United States as the brutal Khmer Rouge took power.[185] In Laos, however, there was no similar large-scale evacuation of Hmong.[186] As the Pathet Lao advanced, only 2,500 Hmong were evacuated,

175. *See* LEE, *supra* note 5, at 315.
176. *Id.*
177. *Id.* at 316.
178. *Id.* at 317.
179. *Id.*
180. *Id.* at 320.
181. *Id.*
182. *Id.* at 321.
183. *Id.*
184. *Id.* The dislocation that many experienced is memorably portrayed by Viet Thanh Nguyen in his Pulitzer-winning novel, *The Sympathizer*. VIET THANH NGUYEN, THE SYMPATHIZER (2015).
185. LEE, *supra* note 5, at 321.
186. *Id.*

including General Vang Pao, who had led a secret army financed by the Central Intelligence Agency.[187]

After this initial wave of resettlement, refugees from Southeast Asia continued to make perilous journeys to escape persecution, poverty, and war in their native countries.[188] Their escapes often involved sea voyages on rickety boats, risking dangerous weather and deadly pirates, or overland trips through jungles amidst warring factions to arrive at refugee camps in Indonesia, Malaysia, Thailand, the Philippines, or Hong Kong.[189] These later waves tended to have less education and fewer job skills; their perilous journeys, long stays in refugee camps, and loss of family members along the way also inflicted physical and mental wounds that made integration into U.S. society even more challenging.[190]

Though they did not face the overtly racist laws that earlier Asian Americans did, these Southeast Asian immigrants faced discrimination and violence in their new communities.[191] Vietnamese fishermen who settled in Texas, for example, suffered attacks from the Ku Klux Klan who were angry about the new economic competition.[192] For those arriving in the United States after 1982, there were also fewer federal programs to help with resettlement.[193] However, freed of the race-based bans that previous generations of Asian immigrants faced, many who resettled were able to sponsor over family members once they met income and other requirements. All in all, 1.2 million people from Southeast Asia immigrated to the United States between 1975 and 2010.[194]

5. Asian Americans and the Civil Rights Movement

As evident by post-1965 immigration patterns, Asian Americans benefited from the civil rights movement that inspired the 1965

187. Douglas Martin, *Gen. Vang Pao, Laotian Who Aided U.S., Dies at 81*, N.Y. TIMES (Jan. 8, 2011), https://www.nytimes.com/2011/01/08/world/asia/08vangpao.html [https://perma.cc/JA6Z-Y8CA]; LEE, *supra* note 5, at 322.

188. *Id.* at 327.

189. *Id.*

190. *Id.*

191. *Id.* at 339

192. John Burnett, *Decades After Clashing with the Klan, A Thriving Vietnamese Community in Texas*, NPR (Nov. 25, 2018, 7:55 AM) https://www.npr.org/2018/11/25/669857481/decades-after-clashing-with-the-klan-a-thriving-vietnamese-community-in-texas [https://perma.cc/8CRW-RBVF].

193. LEE, *supra* note 5, at 327.

194. *Id.* at 314.

immigration reforms.[195] Asian Americans also played important roles in this movement, including in the push for proactive measures that are now generally described as affirmative action.[196]

The origins of affirmative action can be traced to the civil rights movement of the 1950s and 1960s, culminating in the passage of the 1964 Civil Rights Act.[197] Title VII of the Act, which prohibited discrimination in private employment, used the term "affirmative action" to describe remedies such as backpay that a court could award to an employee who experienced discrimination.[198] The term was borrowed from the 1935 National Labor Relations Act, and in that context, "affirmative action" referred to remedies that unionized workers whose rights were violated under the Act could seek from federal courts.[199]

It wasn't until a series of executive orders by Presidents Kennedy and Johnson that the term "affirmative action" took on the more proactive meaning currently used in the higher education context. In 1961, President John F. Kennedy issued Executive Order 10925, which prohibited federal contractors from discriminating on the basis of "race, creed, color, and national origin" and required them to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[200] This Executive Order, however, did not specify any particular actions that federal contractors were required to take.[201] In 1965, President Lyndon Johnson advanced the concept of affirmative action one step further with Executive Order 11246, which created the Office of Federal Contract Compliance to monitor contractors' compliance with the Civil Rights Act's non-discrimination provisions.[202] This Executive Order required government contractors to "develop a written affirmative action compliance program" for hiring those in protected classes.[203] In 1967, President

195. *Id.* at 284.
196. Chang, *supra* note 6.
197. Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 610–611 (1998).
198. *Id.* at 611–12.
199. *Id.*
200. *Id.* at 612 (emphasis added).
201. *Id.* at 612–13.
202. *Id.* at 613.
203. *Id.*

Johnson amended Executive Order 11246 to expand affirmative action for women.[204]

It was the then-Department of Housing, Education, and Welfare (HEW) that first applied the concept of affirmative action to higher education. In 1972, the Department's Office of Civil Rights issued its Higher Education Guidelines, which applied affirmative action to college hiring, encouraging schools to take race, ethnicity, and gender into account in employment decisions.[205] In 1973, HEW amended its regulations of Title VI to extend voluntary affirmative action to college admissions "to overcome the effects of conditions" that limited participation by particular racial or ethnic groups.[206]

With this federal encouragement, many colleges and universities created affirmative action programs. An instructive example of early affirmative action programs were measures taken by the University of California (UC) to increase the enrollment of low-income and minority students. In 1964, UC administrators created Educational Opportunity Programs that consisted of community outreach, recruitment at the junior high level, and tutoring for targeted students once they enrolled.[207] In 1967, the UC system went beyond outreach, instituting "special action" admissions policies in which an applicant's membership in a racial minority group could be considered as supplemental criteria, but only for a certain percentage of the admissions pool.[208] In 1979, one year after the *Bakke* decision, UC President David Saxton instructed UC chancellors that they could consider race and ethnicity in all admissions decisions.[209]

These early affirmative action programs included Asian Americans, borrowing from the Department of Labor's definition of "minorities," which included "Orientals."[210] As described in Section I.B, Asian Americans faced virulent and open discrimination from their earliest days in the United States.[211] Nevertheless, it took decades of

204. *Affirmative Action Policies Throughout History*, AM. ASS'N FOR ACCESS, EQUITY & DIVERSITY, https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp [https://perma.cc/TEB9-JNB4].

205. West, *supra* note 197 at 618–19.

206. *Id.* at 619.

207. LEE, *supra* note 5, at 132–33.

208. *Id.* at 133.

209. *Id.*; *see infra* Section II.A.

210. *See* Ellen Wu, *Asian Americans Helped Build Affirmative Action. What Happened?*, SLATE (Nov. 2, 2022), https://slate.com/human-interest/2022/11/affirmative-action-proportionality-history-activism.html [https://perma.cc/QZ5U-Z5D3].

211. *See supra* Section I.B.

political advocacy by different Asian American groups to persuade governments, at both the state and federal levels, to include Asian Americans, along with other minorities, in affirmative governmental assistance programs to counteract that longstanding discrimination. Indeed, as far back as the 1940s, the Japanese American Citizens League (JACL) testified in federal hearings about employment discrimination.[212] After WWII, the JACL returned to lobby the Truman administration, building the case that Japanese Americans who had been forced into internment camps had experienced historic discrimination and thus deserved targeted government assistance.[213] Testifying at hearings organized by Truman's Committee on Civil Rights, the husband-wife team of Mike and Etsu Masaoka presented extensive evidence that Japanese Americans had suffered because they were not allowed to enter occupations that required U.S. citizenship, as they were ineligible for citizenship under anti-Asian laws.[214] The Masaokas also lobbied for reparations for wartime losses that Japanese Americans suffered from internment and for a halt to the deportations of Japanese immigrants.[215]

In its 1947 final report, the Committee endorsed many policies that the JACL advocated for (including reparations).[216] Perhaps most importantly, the federal government recognized Japanese Americans as a minority group deserving of governmental affirmative action.[217] Building on the JACL's efforts, other Asian American groups, including Filipino and Chinese organizations, joined efforts to lobby for state and city-level laws against discrimination in hiring and employment practices.[218] During these post-war years, twenty-nine states and dozens of cities enacted fair employment laws that included Asian Americans in their protections against discrimination and in affirmative hiring preferences.[219]

Another major contribution to the creation of affirmative action programs was the work of Japanese American John Yoshino, who served on the staff of Eisenhower's Committee on Government Contracts and its successor, Kennedy's Committee on Equal Employment

212. Wu, *supra* note 210.
213. *Id.*
214. *Id,*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*

Opportunity. In this insider position, he pushed the two presidential administrations to collect data about "Orientals" to document the employment discrimination that Asian Americans experienced, further building the case that they should be included in any affirmative action programs.[220] Yoshino and his colleagues also played an important role in developing the proportionality principle, to assess and remedy racial inequalities. The principle posits that the racial makeup of an entity, such as a company or university, should reflect that of its community.[221] By looking at the numbers, any minority underrepresentation can be flagged, and proactive measures can be taken to remedy it.[222] This proportionality principle still animates discussions about affirmative action and diversity more generally today.[223]

There were two keys to the successes of these early Asian American efforts. First were the deliberate efforts by the JACL and other Asian American groups to link their struggles against long-standing discrimination with those faced by African Americans.[224] Indeed, Asian American activists were important partners in the civil rights movement, showing up at protests and lobbying Congress for desegregation, voting rights, and other landmark civil rights legislation.[225] The civil rights movement was primarily focused on discrimination against African Americans, but the involvement of JACL and other Asian American groups underscored the common problems that racial minorities in the United States faced.[226]

The second key was the development of a common Asian American identity. The first public use of the term "Asian American" is credited to UC Berkeley graduate students Yuji Ichioka and Emma Gee in 1968, who wanted to create a student organization to increase the visibility of Asian-descent activists on campus.[227] Inspired by the Black Power movement and the American Indian movement, Ichioka,

220. *Id.*
221. *Id.*
222. *Id.*
223. *See A Negative Reaction to Affirmative Action*, 105 HARV. L. REV. 1801, 1803 (1992). Notably, for example, the University of North Carolina compared the share of particular minorities enrolled as undergraduates to their share in the state's overall population to determine whether they would receive preferences as "underrepresented" minorities. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2237 (2023).
224. Wu, *supra* note 210.
225. *Id.*
226. *Id.*
227. Anna Purna Kambhampaty, *In 1968, These Activists Coined the Term 'Asian American'—And Helped Shape Decades of Advocacy*, TIME (May 22, 2020), https://time.com/5837805/asian-american-history/ [https://perma.cc/674J-UK6T].

a Japanese American, and Gee, a Chinese American, wanted a term that would unite different Asian-descent groups under one umbrella.[228] Their new group, the Asian American Political Alliance, purposefully recruited Asians of diverse descents in order to increase the group's influence.[229] As Ichioka recounted: "There were so many Asians out there in the political demonstrations but we had no effectiveness. Everyone was lost in the larger rally. We figured that if we rallied behind our own banner, behind an Asian American banner, we would have an effect on the larger public."[230] This pan-Asian approach also reflected increased integration in the post-war era, as ethnic enclaves such as Chinatowns opened up to other Asian American groups.[231]

6. Asian Americans and Early Affirmative Action

With the convergence of increased Asian immigration and Asian American inclusion in early affirmative action programs, we see substantial increases in their university enrollments in the 1970s and 1980s. Between 1976 and 1988, the number of Asian American students enrolled at all institutions of higher education more than doubled, from 198,000 to 497,000, and the percentage of Asian American students grew from 2 percent to 4 percent of the total number of students.[232] This rising enrollment occurred at highly competitive schools as well: from 1976–1986, Asian American enrollment increased at Berkeley from 16.9% to 27.8%; at Stanford from 5.7% to 14.7%; at Harvard from 3.6% to 12.8%; and at the Massachusetts Institute of Technology from 5.7% to 14.7%.[233]

Some commentators attributed this rise in college enrollment to an Asian American work ethic, giving rise to a "model minority" explanation for any Asian American successes. For example, in 1966, William Petersen wrote "Success Story, Japanese-American Style" in *The New York Times Magazine*, describing how Japanese Americans overcame racism and wartime internment to enjoy professional and

228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. LEE, *supra* note 5, at 134.
233. *Id.*

educational success.[234] Similar stories followed, likening Asian Americans to White Americans and citing Asian values of strong family bonds, discipline, and respect for authority.[235]

As Asian American enrollments grew, so did skepticism among university administrators and government officials about whether Asian Americans should continue to benefit from affirmative action programs. The policy changes at UC Berkeley's Boalt Hall School of Law over this period are illustrative of this skepticism. In 1970, the school established a special admissions program for Asian American applicants, but five years later, the faculty proposed to eliminate the program, given the apparent success of Asian Americans in the regular admissions process.[236] The Asian American Law Students Association strongly protested, detailing challenges that Asian Americans still faced, including hurdles in English acquisition, discrimination in housing and employment, and the dearth of Asian American attorneys.[237] Still, the school eliminated special admissions for Japanese Americans and capped special admissions for Chinese, Korean, and Filipino Americans at less than 3 percent of all special admissions per year.[238]

Without complete empirical data, it's difficult to know how many other schools followed the lead of Berkeley School of Law in limiting the consideration of Asian American applicants under their affirmative action programs.[239] We do know that several other prominent law schools during this period either dropped Asian Americans from their affirmative action programs or did not consider them at all when creating their programs: for example, at least by 1973, the University of

234. *See* William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES (Jan. 9, 1966) https://www.nytimes.com/1966/01/09/archives/success-story-japaneseamerican-style-success-story-japaneseamerican.html [https://perma.cc/NB6Y-B3PS].

235. One of the authors remembers reading TIME magazine's "The New Whiz Kids: Why Asian Americans are doing so well and what it costs them," in high school and wondering whether this "whiz kids" phenomenon was real and how it squared with her experiences growing up with urban poverty, attending extremely under-resourced schools, and living in a single-parent household. *See* David Brand, *The New Whiz Kids: Why Asian Americans Are Doing So Well, and What It Costs Them*, TIME (Aug. 31, 1997), https://content.time.com/time/subscriber/article/0,33009,965326-1,00.html [https://perma.cc/EX76-XNGH].

236. LEE, *supra* note 5, at 136.

237. *Id.* at 136–37.

238. *Id.*

239. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 386–87 (2004) (stating that law schools started excluding Asian Americans, or more established Asian Americans like Chinese Americans, from preference programs in the 1970s and 1980s).

Washington Law School did not include Asian Americans as preferred minorities;[240] in 1974, the University of Colorado School of Law similarly excluded Asian Americans from its special admissions programs;[241] and in 1975, the University of Michigan School of Law dropped Asian American students from its affirmative action programs.[242]

Thus, we see a complicated and shifting landscape in the late 1970s as the Court confronted its first major case challenging affirmative action in admissions, *Regents of the University of California v. Bakke*.[243] After experiencing decades of racist laws that severely limited their ability to immigrate—and further discriminated against them once they arrived—Asian Americans successfully made their case for inclusion in early affirmative action programs for university admissions. Yet as the overall enrollments of Asian American students rose, some universities limited or excluded Asian Americans altogether from their preference programs, even as they expanded affirmative action for other racial minorities. These initial exclusions set the stage for the Court's decades-long marginalization of Asian Americans from the benefits of race-conscious admissions and debates over its constitutionality, which in turn led some Asian Americans to challenge and ultimately topple the system as model aggrieved minorities.

II. MARGINALIZATION AND EXCLUSION OF ASIAN AMERICANS FROM RACIAL PREFERENCES IN ADMISSIONS

The landmark 1978 case of *Regents of the University of California v. Bakke*, the first case in which the Supreme Court considered the legality of race-conscious admissions in higher education, is generally known for effectively establishing two foundational precepts.[244] First, it barred racial quotas in admissions.[245] Second, it allowed the non-dispositive use of racial preferences in a holistic assessment of

240. DeFunis v. Odegaard, 507 P.2d 1169, 1184 (Wash. 1973).

241. DiLeo v. Bd. of Regents of Univ. of Colo., 590 P.2d 486, 490 (1978).

242. Symposium, *Rethinking Racial Divides—Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 203 (1998).

243. 438 U.S. 265.

244. *Bakke*, 438 U.S. at 265–66. Prior to *Bakke*, the Court granted certiorari to review the race-conscious admissions program of the University of Washington Law School but dismissed the case as moot because the White plaintiff would complete law school at Washington (having been admitted pursuant to a district court injunction) regardless of any decision on the merits. *See* DeFunis v. Odegaard, 416 U.S. 312, 314, 319–20 (1974).

245. *Defunis*, 416 U.S. at 320.

individual applicants to promote the educational benefits of a diverse student body, along the lines of Harvard's affirmative action program.[246] Thus, *Bakke* is credited with legalizing a regime of limited race-conscious admissions that universities subsequently employed in the ensuing decades.

However, of unrecognized importance in the Court's recent outlawing of the *Bakke* regime of race-conscious admissions is an untold legal history that emerges from the literal margins of *Bakke*: skepticism of the need to include Asian Americans in affirmative action programs, expressed in the footnotes of Justice Powell's controlling opinion and prominent amici briefs such as those of the Solicitor General and Harvard, planted the seeds of *Bakke's* eventual overruling. The Court's portrayal of Asian Americans as a monolithic model minority, one whose growing enrollments at certain institutions obviated the need for further preferences, supplied a common rationale for the categorical exclusion of this highly diverse demographic from affirmative action programs in the decades after *Bakke*. This treatment divided Asian American communities on the desirability of racial preferences in admissions—and set the stage for them to move from the margins to the center of the affirmative action debate, no longer cast as the model minority but as model victims of discrimination in race-conscious admissions.

A. Bakke *and Progeny: Approval of Limited Racial Preferences in Admissions*

In *Bakke*, the Court badly fractured over the legality of race-conscious admissions. Four justices—Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist—were inclined to invalidate any racial preferences in admissions as a violation of Title VI of the Civil Rights Act of 1964, which prohibits the denial of participation in any federally funded program on account of race.[247] Four others—Justices White, Marshall, Brennan, and Blackmun—were inclined to uphold racial quotas and other racial preferences under both Title VI and the

246. *Id.*

247. *Bakke*, 438 U.S. at 421 (Stevens, J., concurring in part and dissenting in part). Because Justice Stevens found Title VI to bar any federally funded program from excluding anyone from participating on account of race, he deemed it unnecessary to decide whether the Constitution does too. *See id.* at 417–18.

Equal Protection Clause of the Fourteenth Amendment.[248] One justice—Powell—split the difference in a concurring opinion that effectively controlled the outcome of the case.[249] Two precepts emerged from his opinion that guided university admissions in the ensuing decades—a familiar chapter of legal history in the commentary and Court opinions.[250]

First, quotas on the basis of race, such as the sixteen out of one hundred admissions spots reserved for minority students by the Medical School of University of California at Davis in *Bakke*, violate Title VI and the Equal Protection Clause.[251] Second, those legal provisions only allow the limited use of race, not as a remedy for historical or societal discrimination, but as a non-dispositive "plus" factor in a holistic assessment of each applicant's qualifications and contributions to educational diversity.[252] Harvard College's admissions program was touted by Justice Powell as a model of this limited race-conscious approach.[253]

In the decades after *Bakke*, many universities modeled their admissions programs after Harvard's approach in light of Justice Powell's endorsement.[254] This safe harbor was reinforced when Justice Powell's principles for limited race-conscious admissions were reaffirmed a quarter century later in 2003 in *Gratz v. Bollinger*[255] and *Grutter v. Bollinger*.[256] In *Gratz*, referring to Justice Powell's opinion, Chief Justice Rehnquist's opinion for the Court invalidated the automatic award of fixed points for minority groups in undergraduate admissions scoring by the University of Michigan, equating it with the

248. *See id.* at 325–26, 326 n.1, 378–79 (Brennan, J., concurring); U.S. CONST. amend. XIV, § 1.

249. *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

250. *See, e.g.*, CHEMERINSKY, *supra* note 144 at § 9.3.5.1; Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 380–88 (2016); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2163–65 (2023).

251. *Bakke*, 438 U.S. at 315–20.

252. *See id.* at 316–20.

253. *See id.* at 316–18.

254. *See Grutter*, 539 U.S. at 323 ("Public and private universities across the Nation have modeled their own admission programs on Justice Powell's views on permissible race-conscious policies."); Emily Bazelon, *Why Is Affirmative Action in Peril? One Man's Decision*, N.Y. TIMES (Mar. 4, 2023), https://www.nytimes.com/2023/02/15/magazine/affirmative-action-supreme-court.html [https://perma.cc/6Z9A-ULB2].

255. 539 U.S. 244, 270–76 (2003).

256. *Grutter*, 539 U.S. at 341.

invalidated UC Davis quota system.[257] On the same day, in *Grutter*, Justice O'Connor's majority opinion upheld the holistic assessment utilized by the University of Michigan Law School, rejecting calls by the plaintiff, amici, and dissenters to overrule *Bakke*'s approval of the limited use of racial preferences.[258] The Court deemed the assessment similar to the Harvard model and "endorsed" Justice Powell's view of its constitutionality.[259]

A decade after *Gratz* and *Grutter*, in 2013, the Court again confronted and rejected calls to overrule *Bakke*.[260] In *Fisher v. University of Texas at Austin* (*Fisher I*),[261] the first of two cases reviewing the legality of the admissions program of the University of Texas at Austin, which employed a race-conscious holistic review of applicants who did not automatically earn admissions by graduating in the top 10 percent of their Texas high school class, Justice Kennedy's majority opinion recited "the precepts stated by Justice Powell" as the governing law and remanded for the Fifth Circuit to apply a less deferential form of strict scrutiny than the lower court had used.[262] In the follow-up case, *Fisher v. University of Texas at Austin* (*Fisher II*),[263] the Court itself applied strict scrutiny after remand and upheld the admissions program as narrowly tailored to promote the university's compelling interest in the educational benefits of a diverse student body.[264]

B. Bakke *and Progeny: Marginalization and Exclusion of Asian Americans from Racial Preferences*

1. Powell's Marginalization and Harvard's Sacrifice in *Bakke*

In addition to its familiar precepts barring mechanical racial preferences such as quotas but allowing race to be a "plus" factor in holistic reviews, Justice Powell's opinion warrants recognition for a lesser known but critical point that contributed to *Bakke*'s overruling nearly half a century later. This is an unwritten chapter of affirmative action case law and Asian American history that is essential to understanding

257. *See Gratz*, 539 U.S. at 271–76.
258. *Grutter*, 539 U.S. at 343–44.
259. *See id.* at 325, 334–41.
260. *See* Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 297–99 (2013).
261. 570 U.S. 297 (2013).
262. *Id.* at 307–15.
263. 579 U.S. 365 (2016).
264. *Id.* at 365, 380–89.

how and why Asian Americans came to play a pivotal role in toppling racial preferences in admissions nearly half a century after *Bakke*.

In the part of Justice Powell's *Bakke* opinion rejecting the remedial justification of helping minority groups that have suffered "societal discrimination" and approving only the diversity rationale as a compelling interest for racial preferences,[265] he dropped a footnote expressing skepticism about the inclusion of Asian Americans in the UC Davis medical school's affirmative action program alongside African Americans, Hispanics, and Native Americans.[266] In his view, their inclusion was "especially curious in light of the substantial numbers of Asians admitted through the regular admissions process."[267]

This point and phrasing mirrored a footnote in the Solicitor General's amicus brief.[268] The United States generally argued in support of the medical school's racial preferences as a remedy for "the lingering effects of past discrimination."[269] However, after acknowledging that "many Asian-American persons have been subjected to discrimination," the Solicitor General remarked that it was "not clear" why they were included in the special admissions program with other minority groups, as they were already admitted in "substantial numbers" outside of it.[270]

In addition, a handful of highly selective universities, including Harvard, submitted an amici brief defending racial preferences in admissions on the basis of the educational benefits of a diverse student body.[271] However, in a footnote, the schools implied that such preferences were no longer needed for Asian Americans because they were "already more than proportionately represented" in college enrollments.[272] This suggestion by the elite universities is especially

265. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310–18 (1978). Justice Powell limited the validity of the remedial justification to situations in which there had been "judicial, legislative, or administrative findings of constitutional or statutory violations," and limited the reach of the remedial action to "the extent of the injury." *Id.* at 307–08.

266. *Id.* at 309 n.45.

267. *Id.* Elsewhere in his opinion, Justice Powell noted that, from 1971 to 1974, UC Davis's affirmative action program admitted twenty-one Black students, thirty Mexican Americans, and twelve Asians, while the regular admissions program admitted one Black, six Mexican Americans, and thirty-seven Asians. *See id.* at 275–76.

268. Brief for the United States as Amicus Curiae at 70, *Bakke*, 438 U.S. 265 (No. 76-811).

269. *Id.* at 38.

270. *Id.* at 70.

271. Brief of Columbia Univ. et al. as Amici Curiae at 11, *Bakke*, 438 U.S. 265 (No. 76-811).

272. *Id.* at 33 n.29. The footnote did not specify its metric of proportional representation, but the citation in support of this point, a 1974 Ford Foundation report, provided nationwide

significant, as Justice Powell's opinion both approved of the diversity rationale espoused by the brief and promoted Harvard's admissions program as a permissible means of achieving diversity.[273] Indeed, his opinion block-quoted with approval the amici brief's description of the holistic review employed by Harvard, which notably did not specify whether Asian Americans were included in the college's special efforts to enroll "blacks and Chicanos and *other* minority students."[274]

The omission of Asian Americans as a specifically sought ethnic group was consonant with the strategic attempt by elite universities such as Harvard to reassure the justices that racial preferences were not needed indefinitely. Asian Americans were offered as a sacrificial model of the temporal limits of affirmative action. Approving the use of racial preferences would "speed the time . . . when applicants from all races and ethnic groups will have overcome the handicaps of previous generations of prejudice" and "special efforts will not be needed in order to acquire sufficiently diverse and representative student bodies."[275] To support this prediction, the brief offered "hopeful signs that the problem may be temporary," pointing to the law school at UC Berkeley eliminating preferences for Japanese Americans and reducing them for Chinese Americans in 1975 due to their growing numbers in the regular admissions process, as well as the proportionate representation of Asian Americans in college enrollments.[276]

This pitching of Asian Americans as a sacrificial success story—a model minority for whom racial preferences were no longer necessary—was prescient. According to the law clerk who worked on *Bakke* with Justice Powell, his boss only wanted to uphold race-conscious affirmative action as a temporary measure ("we're doing this now because we have to do it, but it can't be something that goes on and on"), latched onto the proffered diversity rationale as a way to limit it

demographic figures. *See id.* (citing FRANK BROWN, MINORITY ENROLLMENT AND REPRESENTATION IN INSTITUTIONS OF HIGHER EDUCATION 2 (1974)).

273. *See Bakke*, 438 U.S. at 311–17, 322.

274. *Id.* at 322 (quoting Brief of Columbia Univ. et al. as Amici Curiae, *supra* note 271, app. at 2).

275. Brief of Columbia Univ. et al. as Amici Curiae, *supra* note 271, at 33.

276. *Id.* at 33 n.29. For the Berkeley law school's evolving treatment of Asian American groups, the Harvard brief drew from the amici brief submitted at the certiorari stage by the Deans of the UC law schools, which explained the absence of Asian Americans from some of the admissions tables for their affirmative action programs by noting that the programs were "explicitly transitional," with racial preferences for minority groups "expected to decrease, and eventually disappear" as their enrollments in regular admissions increased. Brief for Sanford H. Kadish et al. as Amici Curiae at 25 n.8, *Bakke*, 438 U.S. 265 (No. 76-811).

temporally, and was "troubled" by the inclusion of Asian Americans in the UC Davis program despite their competitive academic records.[277] Consequently, Justice Powell's opinion in *Bakke* not only encouraged universities to model their affirmative action programs after Harvard's, which omitted specific mention of racial preferences for Asian Americans, mirroring the Harvard brief, but also encouraged universities studying his opinion closely for legal guidance to exclude Asian Americans based on the strength of their overall enrollments.[278]

Furthermore, in Justice Powell's only other mention of Asian Americans, again in the margins, he rejected the remedial justification for preferring them based on the long history of societal discrimination.[279] Though acknowledging that grievous history in citing cases such as *Yick Wo v. Hopkins*[280] and *Korematsu*, he invoked the slippery slope and false equivalence that "then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints."[281] Thus, Justice Powell's *Bakke* opinion not only foreclosed the remedial basis for preferring Asian Americans (along with every other racial group) but *also* invited the foreclosure of the diversity basis for preferring Asian Americans.

2. The Court's Invisibilizing and Tacit Approval of Exclusion in *Gratz*, *Grutter*, and *Fisher*

In the decades after *Bakke*, many schools took up Justice Powell's invitation.[282] Joining law schools that were among the first to drop Asian Americans from racial preferences in admissions, some universities also moved to exclude Asian Americans from undergraduate admissions preferences.[283] For example, when the *Gratz* Court reviewed affirmative action programs in 2003, it found that the University of

277. Bazelon, *supra* note 254.

278. *Bakke*, 438 U.S. at 309 n.45.

279. *Id.* at 265.

280. 118 U.S. 356 (1886).

281. *Bakke*, 438 U.S. at 297–98 n.37 (quoting DeFunis v. Odegaard, 416 U.S. 312, 340 (1974) (Douglas, J., dissenting)).

282. Bazelon, *supra* note 254 ("In the wake of the decision, universities stopped using quotas or separate tracks for white students and students of color. Instead, they treated being an underrepresented minority—which meant, over time, being Black, Latino or Native American, but not Asian Americans—as a factor that could boost one applicant with strong qualifications above another to achieve a broad goal of representation.").

283. See Section I.B.6 for more information about the exclusion of Asian Americans by law schools.

Michigan, as early as 1995, limited its racial preferences to "underrepresented" minority groups that expressly included African Americans, Hispanics, and Native Americans,[284] but not Asian Americans.[285] Similarly, when the Court reviewed affirmative action programs in 2013 and 2016, it observed that the University of Texas (UT) included African Americans and Hispanics as underrepresented minorities, but not Asian Americans, based on a comparison between their percentage enrollments at UT and their percentage of the population statewide.[286] And the University of North Carolina's (UNC) racial preferences, invalidated by the Court in 2023, included African Americans, Native Americans, and Hispanics as underrepresented minorities, but not Asian Americans, again based on percentages within the student population compared to percentages within the general population of the state.[287] At oral argument, counsel for UNC explained that the university "took our cues from the *Bakke* decision . . . and from the *Grutter* decision."[288]

Notably, the opinions for the Court in *Gratz*, *Grutter*, and *Fisher* neither examined nor questioned the exclusion of Asian Americans as beneficiaries of the affirmative action programs at issue. In the Michigan cases, there was only a passing reference in Justice O'Connor's majority opinion to trial testimony explaining the law school's diversity rationale for preferring underrepresented minorities but omitting Asian Americans because of their higher admissions numbers.[289] In the UT cases, the sole mentions by the Court were indirect and parenthetical references in the second case.[290] In *Fisher I*, Justice Kennedy's majority opinion did not include a single mention of Asian Americans, their status and treatment entirely invisible in his narrative of the UT program, the Court's affirmative action precedents from *Bakke* to

284. Gratz v. Bollinger, 539 U.S. 244, 253–54 (2003); Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

285. *Gratz*, 539 U.S. at 253–54. In *Grutter*, the admissions program at the University of Michigan School of Law was challenged. The program's racial preferences also did not include Asian Americans because, according to the law school's witness, they were already admitted in significant numbers. *Grutter*, 539 U.S. at 319.

286. Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 397, 406 (2016) (Alito, J., dissenting).

287. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 591 n.7 (M.D. N.C. 2021).

288. Transcript of Oral Argument at 77, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (No. 21-707).

289. *Grutter*, 539 U.S. at 319.

290. *Fisher II*, 579 U.S. at 375.

Grutter, and its legal analysis.[291] In *Fisher II*, Justice Kennedy's majority opinion did not directly address the exclusion of Asian Americans from UT's affirmative action program. Instead, apparently in response to the dissent's criticism of the treatment of Asian Americans, Justice Kennedy characterized the program as one that "does not operate as a mechanical plus factor for underrepresented minorities," and parenthetically quoted the district court's observation that the holistic review process "may be beneficial to any UT Austin applicant—including whites and Asian-Americans," and the amicus brief of the Asian American Legal Defense and Education Fund that any alleged discrimination against Asian Americans was "entirely unsupported by evidence."[292]

In contrast, for the first time in four decades, justices writing separately in the UT cases commented on the exclusion of Asian Americans from racial preferences. In his concurrence in *Fisher I*, Justice Thomas reiterated a long-standing conservative objection that affirmative action programs "stamp [Blacks and Hispanics] with a badge of inferiority."[293] But he went further, characterizing the treatment of Asian Americans, along with White applicants, as "discrimination" that "no doubt . . . injures" them.[294] He did not elaborate, other than noting the higher grades and test scores of White and Asian American admittees.[295]

In *Fisher II*, Justice Alito did elaborate. Joined by Chief Justice Roberts and Justice Thomas, he devoted six paragraphs to arguing that the affirmative action program "discriminates against Asian-American students."[296] In a zero-sum analysis, he wrote, the program "inevitably harms" them by "providing a boost" to the admissions odds of benefitted minorities, thereby "decreasing the odds" for non-beneficiaries "given the limited number of spaces."[297] He also criticized the lumping of students from "enormously diverse" backgrounds into five "crude, overly simplistic racial and ethnic categories."[298] With respect to the category of Asian Americans, he quoted the amici brief by the

291. *Fisher I*, 570 U.S. at 297.
292. *Fisher II*, 579 U.S. at 375.
293. *Fisher I*, 570 U.S. at 333 (Thomas, J., concurring).
294. *Id.* at 331.
295. *Id.*
296. *Fisher II*, 579 U.S. at 410 (Alito, J., dissenting) (emphasis and internal quotations omitted).
297. *Id.* at 410 n.4.
298. *Id.* at 414. The categories were "African-American," "Hispanic," "Asian American," "Native American," and "White." *Id.*

Asian American Legal Foundation, which opposed affirmative action, for the observation that the broad designation "seemingly include[s] Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds."[299] Furthermore, he criticized the majority for relying on a classroom study by the university, which showed that there were less Asian Americans than Hispanics in classrooms, to support racial preferences for including the latter but not the former, "act[ing] almost as if Asian American students do not exist."[300] Again quoting the Asian American Legal Foundation, Alito characterized "the Court's willingness to allow this 'discrimination against individuals of Asian descent in UT admissions [as] particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.'"[301]

C. Asian Americans as Amici Curiae: From the Margins to the Model Victims

In the legal fight to defend or dismantle race-conscious admissions in higher education, from the first case to uphold them (*Bakke*) to the last case to reaffirm them (*Fisher*), Asian American participation as amici curiae grew, starting with a single amicus group in *Bakke* and swelling to more than two dozen groups in *Grutter* and hundreds in *Fisher*, in coalitions on both sides. Though the justices in the majorities largely ignored them, as chronicled in Section II.B, opponents of affirmative action took notice. After all, Asian Americans brought to the debate something that the losing White plaintiffs in *Bakke*, *Gratz*, *Grutter*, and *Fisher* lacked: the legal hazard and moral resonance of alleged discrimination against a minority group that experienced longstanding discrimination, including in higher education. Accordingly, the debate within Asian American communities over racial preferences in admissions would move from the margins to the spotlight, with Asian American applicants taking on the lead role as model victims of discrimination in the lawsuit against Harvard itself, the model for race-conscious admissions.

The first Asian American amicus brief on affirmative action in admission—filed in *Bakke* by the Asian American Bar Association of the Greater Bay Area—supported the program at UC Davis, which

299. *Id.* at 414.

300. *Id.* at 411.

301. *Id.* at 412 (quoting Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ. in Support of Petitioner at 6, *Fisher II*, 579 U.S. 365 (No. 14-981)).

included Asian Americans as beneficiaries. The brief argued that racial preferences were legal and necessary to remedy the lingering effects of the "long history of invidious discrimination" against Asian Americans with respect to "[v]irtually every civil right," including a century of segregation in education and denial of employment in the professions.[302] The brief highlighted that Asian Americans continued to face systemic inequality in employment and pay and that educational and economic disparities "will likely increase for Asian Americans in the foreseeable future" due to increased immigration after the elimination of the discriminatory quotas based on national origin.[303] The brief was not cited in any of the *Bakke* opinions.

Decades later, given the growing exclusion of Asian Americans from racial preferences following *Bakke* with the Court's tacit approval,[304] Asian Americans split over whether to support affirmative action in the litigation against the University of Michigan in 2003. On one side, over two dozen Asian American groups argued in *Grutter* that "Asian Pacific Americans will receive fair treatment even if not expressly included in affirmative action programs," as the holistic evaluation by Michigan Law School "takes into account the unique backgrounds and distinctive experiences" of Asian Americans as well as every other applicant.[305] Furthermore, "Asian Pacific American students [like all students] benefit from a diverse student body."[306]

On the opposing side, the Asian American Legal Foundation submitted the sole amicus brief on behalf of an Asian American group.[307] Its brief in *Grutter* highlighted that Asian Americans "have

302. Brief of Amicus Curiae Asian Am. Bar Ass'n of the Greater Bay Area in Support of Petitioners at 5–6, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

303. *Id*. at 13–14.

304. *See supra* Section II.B.2.

305. Brief of Amici Curiae Nat'l Asian Pac. Am. Legal Consortium et. al., in Support of Respondents at 24, Grutter v. Bollinger, 539 U.S. 306 (2001) (No. 02-241). However, the groups argued that Asian Americans should be included in racial preferences in contexts other than education, such as employment and public contracting, where they remain "under-represented minorities'' and the effects of discrimination against them are "sufficiently egregious that Asian Pacific Americans should be specifically included in affirmative action programs to ensure diversity." *Id.* at 17, 23.

306. *Id.* at 5.

307. *See* Brief of the Asian Am. Legal Found. as Amicus Curiae in Support of Petitioners, *Grutter*, 539 U.S. 297 (No. 02-241). In addition, the University of Michigan Asian Pacific American Law Students Association submitted an amici brief with the University of Michigan Black Law Students' Alliance, the University of Michigan Latino Law Students Association, and the University of Michigan Native American Law Students Association. *See* Brief of Univ. of Mich. Asian Pac. Am. L. Students Ass'n et al. as Amici Curiae in Support of Respondents at 1, *Grutter*, 539 U.S. 306 (No. 02-241).

historically experienced—and continue to experience—overt racial and ethnic prejudice" and contended that "diversity-based admissions schemes" perpetuate this discrimination, as they are "almost always used to exclude Asian Americans from educational institutions."[308] Based in San Francisco, the group detailed the long history of discrimination against Chinese American schoolchildren in California, who were forced to attend separate Chinese schools well into the twentieth century and who recently challenged quotas on their admissions to the city's most desirable public schools.[309] The brief further argued that the University of Michigan's justifications for racial preferences "eerily" paralleled Harvard's use of the diversity rationale to limit the admissions of Jewish students from the 1920s to 1950s based on their purported "over-representation," as well as the claim by Harvard President Lowell that such a "benign" cap would help the university "get beyond race."[310] Neither this opposition brief nor the supporting brief was cited in any opinions in *Grutter* or *Gratz*.

Ten years after *Grutter*, in *Fisher I* in 2013, the number of Asian American amici groups swelled. Two briefs submitted by Asian American coalitions supported UT's affirmative action program. In one, over seventy Asian American organizations, led by the Asian American Center for Advancing Justice, reasserted the main arguments by Asian American proponents in *Grutter*: "Asian Americans directly benefit from the diversity achieved by race-conscious programs and suffer no harm" under holistic review that considers their "personal and background characteristics," even though they are not included in racial preferences.[311] The brief further contended that White opponents of affirmative action were "seek[ing] to use Asian Americans as a wedge group to curtail opportunities for minorities."[312]

In the second brief supporting UT, an alliance of Asian American organizations, faculty, and higher education officials, headed by the Asian American Legal Defense and Education Fund, argued that "individualized review" of Asian American applicants counteracts the

308. Brief of the Asian Am. Legal Found. as Amicus Curiae, *supra* note 307 at 2.

309. *Id.* at 4–6.

310. *Id.* at 18 (quoting 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, 36 (1996)) (internal quotations omitted).

311. Brief of Amici Curiae Members of Asian Am. Ctr. for Advancing Just. et al. in Support of Respondents at 7, 10, Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297 (2013) (No. 11-345).

312. *Id.* at 7.

"model minority myth" that "masks tremendous diversity within the Asian American and Pacific Islander community."[313] They explained that "different immigration histories of Asian American and Pacific Islander subgroups have shaped their socioeconomic experiences" and led to "substantial economic and educational disparities."[314] Finally, they contended that holistic review would especially benefit more recently immigrated applicants from Southeast Asia who are generally more economically disadvantaged.[315]

On the anti–affirmative action side in *Fisher I*, the Asian American Legal Foundation reiterated its position from *Grutter*, arguing that "racial diversity programs" like that of UT discriminate against Asian Americans "by deeming them overrepresented relative to their demographics in the population and thus less worthy of admission than applicants of underrepresented races."[316] The group again connected the exclusion of Asian Americans from the university's racial preferences with the long history of discrimination against them, particularly in education, where "Asian American schoolchildren were some of the first victims of the separate-but-equal doctrine."[317] And while agreeing that Asian Americans "are in fact highly heterogeneous with extremely varied experiences and viewpoints," the brief contended that classifying applicants on the basis of broad racial categories not only promotes stereotypes, but also encourages universities to "hide the use of race and their goal of proportional racial representation behind a façade of 'holistic' evaluation."[318] Accordingly, the brief urged overruling *Grutter* and applying "highly skeptical" strict scrutiny to all racial classifications in education.[319]

In their *Fisher I* opinions, none of the justices acknowledged the briefs of Asian American amici on either side.

In 2016, in *Fisher II*, Asian American amici grew even more numerous and divided. The three amici groups in *Fisher I* were joined by two new ones. Asian Americans Advancing Justice, which counted over 150 organizations in its coalition, filed an amici brief in support

313. Brief of Asian Am. Legal Def. & Educ. Fund et al. in Support of Respondents at 3, 4, Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365 (2016) (No.14-981).

314. *Id.* at 28–34.

315. *Id.* at 30–34.

316. Brief for the Asian Am. Legal Found. & Jud. Educ. Project as Amici Curiae in Support of Petitioner at i, 2, *Fisher I*, 570 U.S. 297 (No. 11-345).

317. *Id.* at 3.

318. *Id.* at 4, 5.

319. *Id.* at 5.

of racial preferences in admissions.[320] On the other side, the Asian American Coalition for Education, which represented over 100 Asian American organizations, joined the brief of the Asian American Legal Foundation.[321]

While the two Asian American groups that supported affirmative action in *Fisher I* (the Asian American Center for Advancing Justice and the Asian American Legal Defense and Education Fund) submitted essentially the same arguments in their respective amici briefs,[322] the new group, Asian Americans Advancing Justice, ratcheted up the rhetoric. Its brief accused "Petitioner and her amici," including Asian Americans on the opposing side, of advocating a "color-blindness" that amounted to "reality-blindness" in forcing universities to "willfully ignore" how race contextualizes "past disadvantage and future potential."[323] Furthermore, echoing the Asian American Legal Defense and Education Fund, the brief observed that disadvantaged subgroups from Southeast Asia and the Pacific Islands suffer significant "intraracial disparity in educational access and attainment" relative to other Asian Americans.[324] It noted that these disadvantaged subgroups were underrepresented in higher education in both California and Texas but did not explicitly call for their inclusion in preferences for underrepresented minorities.[325] Instead, the brief argued that the "flexible consideration of race" in holistic admissions review improves educational opportunity, racial diversity, and the racial climate for all persons of color.[326]

On the anti–affirmative side in *Fisher II*, the Asian American Legal Foundation (now joined by the Asian American Coalition for Education) advanced many of the same arguments that it made in *Grutter*

320. Brief of Amici Curiae Members of Asian Ams. Advancing Just. et al. in Support of Respondents at 1–2, *Fisher II*, 579 U.S. 365 (No. 14-981).

321. Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ., *supra* note 301, at 2. The Judicial Education Project, which had joined the brief of the Asian American Legal Foundation in *Fisher I*, filed its own amicus brief on the side of the plaintiff. *See* Brief for Jud. Educ. Project as Amicus Curiae in Support of Petitioner, *Fisher II*, 579 U.S. 365 (No. 14-981).

322. *See* Brief of Amici Curiae Members of Asian Am. Ctr. for Advancing Just. et al., *supra* note 311, at i–ii; Brief of Asian Am. Legal Def. & Educ. Fund et al., *supra* note 313, at i–ii.

323. Brief of Amici Curiae Members of Asian Ams. Advancing Just. et al., *supra* note 320, at 4.

324. *Id.* at 11–12.

325. *Id.* at 12.

326. *Id.* at 3, 13.

and *Fisher I* but adopted a more aggressive posture.[327] For example, it had asserted in *Grutter* that discrimination against Asian Americans in admissions was "foreshadowed" by Harvard's informal quotas on Jewish students in the first half of the twentieth century.[328] Now it outright contended that Asian Americans were "the New Jews" and that "the historical and modern-day racial balancing schemes" were "virtually identical."[329] Previously, in *Fisher I*, the group had called for the overruling of *Grutter* and a return to "highly skeptical" strict scrutiny of "racial classifications in education."[330] Now, its brief in *Fisher II* urged the Court to categorically outlaw the use of race "in college admissions or any other setting."[331] And while the group had asserted in *Fisher I* that the treatment of Asian Americans by UT "illustrates" the harms of race-conscious admissions,[332] it now contended that the central issue was not "white versus minority," but "in fact, it is Asian American students, the members of a historically oppressed minority, who comprise the group most harmed by the program."[333]

Perhaps given the repeated failure of White plaintiffs to successfully challenge racial preferences in admissions, from *Bakke* to *Grutter* to *Fisher I*, the dissenting justices finally took notice of the growing opposition from Asian American amici. Indeed, in the next and last case before the Harvard litigation, *Fisher II* in 2016, Justice Alito made the claim of discrimination against Asian Americans a central argument of his dissent, as detailed in Section II.B.2.[334] His extensive reliance on the brief of the Asian American Legal Foundation—not only borrowing from its substance, but also noting that the group was "representing 117 Asian American organizations"—suggested that

327. The legal team also added a new member, John Eastman of the Center for Constitutional Jurisprudence. *See* Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ., *supra* note 301, at 39.

328. Brief of the Asian Am. Legal Found. as Amicus Curiae, *supra* note 307, at 5–6 (quoting Kang, *supra* note 13).

329. Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ., *supra* note 301, at 23, 24 n.6.

330. Brief for the Asian Am. Legal Found. & Jud. Educ. Project as Amici Curiae, *supra* note 316, at 5.

331. Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ., *supra* note 301, at 7. The brief only allowed an exception to this categorical ban for "narrowly tailored programs that provide remedies to specific and proven victims of race-based discrimination." *Id.*

332. Brief for the Asian Am. Legal Found. & Jud. Educ. Project as Amici Curiae, *supra* note 316, at 2.

333. Brief of Amici Curiae Asian Am. Legal Found. & Asian Am. Coal. for Educ., *supra* note 301, at 6.

334. Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 410–14 (Alito, J., dissenting); *see supra* notes 296–301.

Asian American opponents of affirmative action might find a receptive audience and make model plaintiffs as aggrieved minorities in the next challenge to racial preferences in university admissions.[335]

D. Asian Americans Take Center Stage in SFFA

1. Lawsuits, Lower Court Rulings, and Amici Briefs

Three and a half decades after Justice Powell's opinion in *Bakke* touted Harvard's holistic race-conscious admissions, a coalition of applicants, prospective applicants, and their parents brought suit challenging the very program that had been emulated across the country. Unlike *Bakke*, *Grutter*, or *Fisher*, however, the lead plaintiff in a lawsuit against Harvard was not an unsuccessful White applicant claiming reverse discrimination. Rather, the plaintiff Students for Fair Admissions (SFFA), which purported to "promote and protect the right of the public to be free from discrimination on the basis of race in higher education admissions" in its complaint highlighted only one applicant among its members—an Asian American student with top grades, perfect test scores, and extensive extracurriculars, who was denied admission to Harvard.[336] SFFA also noted only one race among its future Harvard applicants: "Some of these Future Applicants are Asian American."[337] Similarly, with respect to the racial makeup of parents in its coalition, SFFA simply recited that "[s]ome of these Parents are Asian Americans."[338]

After decades of losses, it is not hard to understand why affirmative action opponents latched onto the discrimination claims of Asian Americans. Asian Americans provided them with something the White plaintiffs in *Bakke*, *Gratz, Grutter*, and *Fisher* lacked: the legal hazard and moral resonance of alleged discrimination against a racial minority group that had experienced a long history of sweeping discrimination, including in higher education.[339] Edward Blum, the conservative activist who had enlisted a White student to unsuccessfully challenge race-conscious admissions in *Fisher* and helped found SFFA in 2014, recognized the legal and moral value—as well as the

335. *Fisher II*, 579 U.S. at 410 (Alito, J. dissenting).

336. Complaint at ¶¶ 12–23, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 14-CV-14176).

337. *Id.* at ¶ 25.

338. *Id.* at ¶ 27.

339. *See* Chang, *supra* note 6.

political advantage—of adding Asian American plaintiffs to his cause.[340] In December 2014, his organization had filed simultaneous lawsuits challenging the admissions processes at Harvard and the University of North Carolina, but with a membership plateauing at "a few thousand," he hadn't found the popular support that his group needed.[341] In May 2015, he went to the Bay Area and spoke at the Silicon Valley Chinese Association about his legal strategy to challenge affirmative action.[342] After that meeting, SFFA's membership skyrocketed, adding fifteen thousand members in three days.[343]

But it would be inaccurate—and perhaps condescending—to suggest that Blum and SFFA "created" this Asian American opposition to affirmative action. As Asian Americans were being dropped or otherwise excluded as a group from preference programs across U.S. universities, some Asian Americans had already begun to question whether affirmative action programs were harming them in the college admissions process.[344] In 2014, before Blum's strategic meeting, a Florida businessman named Yukong Zhao formed the Asian American Coalition for Education to oppose the consideration of race in K–12 and college admissions decisions.[345] Zhao immigrated to the United States in 1992, and his son had been rejected by prestigious universities, including Princeton University, Cornell University, and Johns Hopkins University, despite what his father described as his "stellar academic and extracurricular credentials."[346] Now, the Coalition has more than three hundred members, including nonprofits, small businesses, and parent associations, across the United States and different Asian communities.[347] And as discussed in Section II.C, Asian American groups joining as amici in opposition to racial preferences from which they were excluded swelled to the hundreds from *Grutter* to *Fisher II*.[348] To dismiss the sincerity, strength, and agency of this

340. *See* Hua Hsu, *supra* note 3.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. Alex Samuels, *How Asian Americans Came to Play a Central Role in the Battle over Affirmative Action*, FIVETHIRTYEIGHT (Mar. 7, 2023, 6:00 AM), https://fivethirtyeight.com/features/supreme-court-affirmative-action/ [https://perma.cc/ZUL7-YXJM].
347. Brief of Amici Curiae Asian Am. Coal. for Educ. & Asian Am. Legal Found. in Support of Petitioner app. at 1a–14a, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (2023) (No. 20-1199).
348. *See* discussion *supra* Section II.C.

decades-long opposition to affirmative action repeats the Asian American problem: the lumping together of diverse Asian Americans that leads to their marginalization or invisibilization in debates over affirmative action.

Indeed, there is great diversity of opinion within Asian American communities on affirmative action.[349] Surveys reflect continuing majority support among Asian Americans for programs "to increase the number of black and minority students on college campuses," but in 2016, that support dropped to 53 percent because of a steep decline in support from Chinese Americans (41 percent support).[350] In fact, the most active supporters of the lawsuits challenging affirmative action tend to be recent, highly skilled immigrants from mainland China, who benefited from work visas issued in the 1990s and early 2000s.[351] Because of their recent immigration history, high levels of education, and familiarity with a Chinese college admissions system that is largely based on national exam scores,[352] these Chinese Americans may place more value on admissions to a "prestigious" university and may relate less to the historical and current discrimination experienced by other racial minorities in the United States.[353]

The convergence of interests between conservative opponents of affirmative action and allied Asian Americans proved fruitful. SFFA's complaint alleged that, just as Harvard's holistic review was devised in the 1920s to cap the growing number of Jewish students admitted under its prior entrance exam system, the process was being used to limit admissions of "another high-achieving racial and ethnic minority group"—that is, "to hide intentional discrimination against Asian Americans."[354]

Though the district court rejected the claim of *intentional* discrimination, the court made this significant finding: while Asian American applicants received the highest academic and extracurricular rankings by admissions officers, the admissions data showed "a statistically

349. Karthick Ramakrisnan & Janelle Wong, *Survey Roundup: Asian American Attitudes on Affirmative Action*, AAPI DATA (June 18, 2018), https://aapidata.com/blog/asianam-affirmative-action-surveys/ [https://perma.cc/3NG2-8VFG].

350. *Id.*

351. Mak, *supra* note 14.

352. *See* Yiqin Fu, *China's Unfair College Admissions System*, ATLANTIC (June 19, 2013), https://www.theatlantic.com/china/archive/2013/06/chinas-unfair-college-admissions-system/276995/ [https://perma.cc/CDE9-8AFQ].

353. *See* Mak, *supra* note 14.

354. Complaint, *supra* note 336, at ¶ 3.

significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers"—the lowest of all races—that "likely" resulted in a lower admit rate.[355] That personal rating assessed qualities such as "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit."[356] The district court, while acknowledging that admissions officers had described Asian American applicants in stereotypical ways, such as "quiet/shy," "science/math oriented," "hard worker," "bright" but "bland," "flat," or "not exciting," and further acknowledging "it is possible that implicit biases had a slight negative effect," nonetheless credited the testimony of Harvard admissions officers that no discrimination against Asian American applicants ever occurred as "consistent, unambiguous, and convincing."[357] The court concluded instead that the disparity was "more likely caused by race-affected inputs to the admissions process (e.g. recommendations or high school accomplishments)" or "underlying differences in the attributes" of individual applicants—that is, that Asian American applicants *actually* reflected the stereotypes.[358]

On appeal, Harvard's treatment of Asian American applicants remained central. The first question SFFA presented to the First Circuit was, "Does Harvard impose a racial penalty on Asian-American applicants?"[359] The court of appeals answered in the negative.[360] In response to the evidence of possible implicit bias in the personality ratings, which SFFA contended were "highly subjective" and

355. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 169 (D. Mass. 2019).

356. *Id.* at 141.

357. *Id.* at 155–56, 171, 203*; see also id.* at 202 ("The reason for these lower [personal rating] scores is unclear, but they are not the result of intentional discrimination. They might be the result of qualitative factors that are harder to quantify, . . . or they may reflect some implicit biases.").

358. *Id.* at 171. Later in the opinion, the district court judge again appeared to speculate that a contributing factor to Asian American applicants receiving overall the lowest personality scores was qualitative aspects of their underlying personalities. *See id.* at 203 ("In other words, although the statistics perhaps tell 'what,' they do not tell 'why,' and here the 'why' is critically important. Further, by its very nature, the personal score includes, and should include, aspects of an applicant and his or her application that are not easily quantifiable and therefore cannot be fully captured by the statistical data.").

359. Brief of Appellant Students for Fair Admissions, Inc. at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) (No. 19-2005). Its other questions were related to the claim of discrimination against Asian Americans: "Does Harvard engage in racial balancing?"; "Does Harvard use race as more than a mere 'plus' factor to achieve diversity?"; and "Does Harvard have workable race-neutral alternatives?" *Id.*

360. *Students for Fair Admissions*, 980 F.3d at 164.

"susceptible to stereotyping,"[361] the First Circuit deferred to the district court's crediting of the testimony of Harvard's admissions officers.[362] In addition, it pointed to Harvard's requirement that a decision to admit requires a majority vote of the entire forty-member admissions committee, which "mitigates the risk [of] any individual officer's bias or stereotyping."[363] Given this "ample non-statistical evidence suggesting that Harvard's admissions officers did not engage in any racial stereotyping," the First Circuit found that the district court's "speculation" regarding the causes of the racial disparity in personality ratings did not amount to "clear error."[364]

In its petition for certiorari to the Supreme Court, SFFA presented two questions.[365] The first asked generally whether the Court should "overrule *Grutter*" and "hold that institutions of higher education cannot use race as a factor in admissions."[366] The second specifically held up Harvard's program, not as a model to emulate, but as one to invalidate: "Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?"[367] The Court granted both questions.[368]

In merits briefing, SFFA largely focused on discrimination against Asian Americans. It argued that *Grutter*, by reaffirming Justice Powell's approval of the Harvard approach, "sustains admissions programs that intentionally discriminate against historically oppressed minorities," with Jewish students being "the first victims of holistic admissions" and Asian Americans being "the main victims today."[369]

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361. *Id.* at 196.

362. *Id.* at 196–97.

363. *Id.* at 197.

364. This evidence largely consisted of testimony by Harvard admissions officials. *See id.* at 203 (citing Brief of Appellant Students for Fair Admissions, *supra* note 359, at 1); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 203 (D. Mass. 2019).

365. Petition for Writ of Certiorari at i, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199).

366. *Id.*

367. *Id.*

368. *See* Questions Presented, *Students for Fair Admissions*, 143 S. Ct. 2141 (No. 20-1199).

369. *Id.* at 62. The Harvard and UNC cases were consolidated after the latter case was granted, so SFFA's merits briefing for both cases was consolidated into a single opening brief. *See* Docket, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (No. 21-707). However, after Justice Jackson joined the Court, the cases were unconsolidated, as she was a member of the Harvard Board of Overseers and therefore recused from the Harvard case. Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (July 2, 2022), https://www.scotusblog.com/2022/07/court-will-hear-affirmative

Indeed, much of its recitation of facts was devoted to statistics and charts detailing unfavorable disparities between Harvard's treatment of Asian Americans and its treatment of Whites and other minorities, including in its personality ratings, where its "anti-Asian penalty is starkest."[370]

Notably, SFFA did not abandon White claimants. On the same day it sued Harvard, the coalition also filed suit against UNC, alleging that the public school's race-conscious admissions program violated the Equal Protection Clause.[371] Again, SFFA highlighted a single applicant among its members, but this time, the applicant was White.[372] SFFA's lawsuit against UNC thus provided a vehicle for invalidating minority racial preferences entirely, insuring against the possibility of the Court narrowly deciding in the Harvard case that Asian Americans should receive the same preferential treatment as other minority groups.[373]

In its complaint against UNC, SFFA nevertheless also alleged discrimination against Asian Americans, along with White applicants.[374] Its complaint contended that UNC preferred African Americans, Hispanics, and Native Americans as underrepresented minorities to such a "dominant" extent that those preferences "equate[d] to a penalty imposed upon white *and* Asian American applicants."[375] Likewise, in briefing at the Supreme Court, SFFA argued that UNC's program disadvantaged both "Asian American and white students."[376]

As in previous affirmative action cases, Asian American groups on both sides of the Harvard and UNC cases (collectively, *SFFA*) filed amici briefs. On SFFA's side, the Asian American Coalition for Education and the Asian American Legal Foundation again joined forces, arguing that both schools "discriminate severely" against Asian

-action-challenges-separately-allowing-jackson-to-participate-in-unc-case/ [https://perma.cc/Y46U-9GN5].

370. Brief for Petitioner, *supra* note 12, at 25–32.

371. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 586 (M.D. N.C. 2021).

372. Complaint at ¶¶ 13–14, *Students for Fair Admissions*, 567 F. Supp. 3d 580 (No. 21-707).

373. *See id.* at ¶ 196 (pleading that "the Supreme Court should overrule any decision holding that the Fourteenth Amendment or federal civil rights law ever permit the use of racial preferences to achieve "'diversity'").

374. *Id.* ¶ 4.

375. *See id.*

376. Brief for Petitioner, *supra* note 12, at 40–41. There was no court of appeals decision in the UNC case because the Supreme Court took the rare step of granting certiorari before judgment in order to consider its constitutional challenge to racial preferences in university admissions along with the statutory challenge in the Harvard case. *See* Docket, *supra* note 369.

Americans "in the name of diversity," and that "[t]he pernicious 'race conscious' discrimination practiced by Harvard and UNC is copied across the nation."[377] In addition, the Louis D. Brandeis Center for Human Rights Under Law teamed up with the Silicon Valley Chinese Association Foundation to support SFFA's contention that "Harvard uses the diversity interest recognized in *Grutter* to justify its discrimination against Asian Americans in admissions just as it previously used the 'character and [f]itness' rationale to discriminate against Jews."[378]

On the other side, in separate briefs, Asian Americans Advancing Justice and the Asian American Legal Defense and Education Fund again defended racial preferences in admissions. While both organizations largely repeated their prior arguments, Asian Americans Advancing Justice argued that "depriving universities of the ability to consider race only ties their hands from addressing potential implicit bias and taking steps to eradicate it."[379] In addition, the Asian American Legal Defense and Education Fund argued that individualized holistic review "mitigate[s] the fallacy of consolidating all Asian Americans into one 'Asian' category."[380] Finally, with regard to the participation of Asian Americans in SFFA's lawsuits as members and amici, the group leveled the accusation that "SFFA is the project of white anti-affirmative action activists" acting as a "puppeteer" in "manipulat[ing]" and "exploiting the Asian American community as a wedge."[381]

377. Brief of Amici Curiae Asian Am. Coal. for Educ. & Asian Am. Legal Found., *supra* note 33 at 1, 4.

378. Brief Amicus Curiae of Louis D. Brandeis Ctr. for Hum. Rts. Under L. & Silicon Valley Chinese Ass'n Found. in Support of Petitioner at 5, *Students for Fair Admissions*, 143 S. Ct. 2141 (No. 20-1199). The Silicon Valley Chinese Association described itself as "a nonprofit organization that advances better integration of Chinese communities in Silicon Valley and its neighboring areas," including by "encouraging active civic engagement and political participation by Chinese communities." *Id.* at 1.

379. Brief of Asian Ams. Advancing Just. et al. as Amici Curiae, *supra* note 33, at 27.

380. Brief of Amici Curiae Asian Am. Legal Def. & Educ. Fund et al. in Support of Respondents at 12, *Students for Fair Admissions*, 143 S. Ct. 2141 (2023) (No. 20-1199).

381. *Id.* at 30–34. The National Asian Pacific American Bar Association also filed a brief, arguing that affirmative action benefits "diverse and historically disadvantaged communities" such as theirs and that overruling *Grutter* would harm them. Brief of Amici Curiae Nat'l Asian Pac. Am. Bar Ass'n & Nat'l LGBTQ+ Bar Ass'n in Support of Respondents at 4, *Students for Fair Admissions*, 143 S. Ct. 2141 (No. 20-1199).

2. Focus on Asian Americans at Oral Arguments

The framing of both cases drew extended exchanges at their arguments over alleged discriminatory treatment of Asian Americans.[382] Most notably, when former Solicitor General Seth Waxman, representing Harvard, bristled at Chief Justice Robert's sarcasm that the school's own chart showed that it was engaging in "only a little racial discrimination," the Chief Justice retorted, "Mr. Waxman, isn't that what this case is about, the discrimination against Asian Americans?"[383] The Chief Justice then referenced SFFA's many charts depicting the comparative treatment of applicants by race—in which Asian Americans statistically seemed to fare worse—and asked with incredulity, "You don't see a surprising disparity in that?"[384]

Another member of the Court who seemed sympathetic to SFFA was Justice Gorsuch. Bringing up the parallel drawn between Harvard's past treatment of Jewish applicants and its present treatment of Asian Americans, he asked for Harvard's response to the description in briefs on SFFA's side that "an entire industry" of admissions consultants were advising students to appear "less Asian" on applications to elite colleges because of "Asian quotas effectively, if not in name."[385] Mr. Waxman did not deny that description, but instead referenced "the multiple amicus briefs filed by Asian American organizations" arguing that holistic admissions benefits "the multiplicity of ethnicities" that make up the minority group.[386]

Not surprisingly, the longest exchange over Harvard's alleged discrimination against Asian Americans centered on the personality rating. Justice Alito began by asking Harvard's attorney whether Asian American students "really do lack integrity, courage, kindness, and empathy to the same degree as students of other races," or whether there is "something wrong with this personality score."[387] In response, Mr. Waxman referenced the district court's discussion as to why a "full explanation" was not possible, noting that the score reflected qualitative inputs such as teacher, counselor, and interviewer letters,

382. The UNC case was argued before the Harvard case, likely to accommodate Justice Jackson leaving between arguments in light of her recusal from the latter. *See supra* note 369. The order in which exchanges are discussed is based on narrative and legal flow rather than chronology unless otherwise indicated.

383. Transcript of Oral Argument, *supra* note 1, at 63.

384. *Id.* at 64.

385. *Id.* at 51–52.

386. *Id.* at 52.

387. *Id.* at 54.

as well as student essays, which were not in evidence.[388] Not satisfied, Justice Alito pressed several more times, with increasing exasperation, for "any explanation" as to why Asian Americans "rank below whites . . . way below Hispanics and really way below African Americans."[389]

The questioning then turned to whether, even if schools could not give preferences for race "in a box-checking way," as Justice Barrett put it, an applicant's race could be considered if brought up "in an experiential way," as Justice Kagan followed-up.[390] Mr. Strawbridge acknowledged that race "may have some contextual relevance" to an applicant's "character and experience," such as whether they have "overcome some hardship" like racial discrimination, or show "dedication," "extracurricular involvement," or "active interest."[391] For example, he hypothesized that it would be permissible for an Asian American student to write about traveling to their grandmother's "country of origin," which would show "a global interest."[392] Chief Justice Roberts interjected that it would also show "a pretty not very savvy applicant," "[b]ecause the one thing his essay is going to show is that he's Asian American, and those are the people who are discriminated against."[393]

Justice Alito posed additional questions about the treatment of Asian Americans in admissions. To the Solicitor General for North Carolina defending UNC, Ryan Park, he echoed his *Fisher II* dissent that "these racial categories are so broad that any use of them is arbitrary and, therefore, unconstitutional," and asked, "what similarity does a family background to the person from Afghanistan have with somebody whose family's background is in, let's say, Japan?"[394] Mr. Park, the only Asian American attorney in both arguments, minimized the impact of voluntarily checking a racial box by noting that students are evaluated "on an individualized basis."[395] For instance, "a Vietnamese student who immigrated to a remote part of North Carolina and thrived in that setting" was viewed favorably by the admission

388. *Id.* at 55–58.
389. *Id.* at 56–57.
390. Transcript of Oral Argument, *supra* note 288, at 24, 27.
391. *Id.* at 27–28.
392. *Id.* at 28.
393. *Id.* at 29.
394. Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 404 (2016) (Alito, J., dissenting); Transcript of Oral Argument, *supra* note 288, at 94–95.
395. *Id.* at 97.

office.[396] Nevertheless, he conceded that a checked box can "give important information about where that person is coming from and what their experiences have been."[397] And for the attorney representing student intervenors in support of UNC, Justice Alito seemed to have a reprimand ready. He related that he "was struck by the fact that the word 'Asian' does not appear one time" in their brief, even though "Asian Americans have been subjected to de jure segregation" and "many forms of mistreatment and discrimination, including internment."[398]

Justices sympathetic to Harvard and UNC's side also referenced Asian Americans at oral argument. In pushing back against SFFA's arguments, Justice Sotomayor noted that university enrollments for Asian Americans have "grown dramatically over time,"[399] and that top students of "Asian and of black and Hispanic backgrounds" were not all being admitted to Harvard.[400] Other exchanges relating to diversity conspicuously included Asian Americans in the mix. For example, Justice Kagan asked whether a judge "can't think about" hiring a diverse set of clerks, to which the SFFA attorney in the Harvard case responded, "Absolutely can think about it."[401] That answer set up the next question from Justice Kagan, which was whether a judge may want clerks who are "great on any number of criteria," but who are also "a diverse set of clerks," so that "people will look at that and they'll say: There are Asian Americans there, there are Hispanics there, there are African Americans there, as well as there are whites there."[402] SFFA's attorney responded, "I don't think a judge could implement that goal by putting a thumb on the scale against Asian applicants or giving a big preference to black and Hispanic applicants."[403]

The recurring focus at oral argument in both cases on Asian Americans gave the appearance that the place of Asian Americans in the debate over affirmative action was now central rather than marginal among the justices.

396. *Id.* at 95–96.
397. *Id.* at 97.
398. *Id.* at 132–33.
399. *Id.* at 48.
400. Transcript of Oral Argument, *supra* note 1, at 36.
401. *Id.* at 28.
402. *Id.* at 28–29.
403. *Id.* at 29.

3. The Presence and Absence of Asian Americans in the SFFA Opinions

As expected, the Court's six-member conservative majority ended up siding with SFFA, invalidating the "race-based admissions programs" employed by Harvard and UNC as violative of the Equal Protection Clause and Title VI.[404] According to Chief Justice Roberts's opinion for the Court, those programs and others like them fail strict scrutiny because they "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[405] We leave it to other scholars to offer detailed summaries and critical assessments of the majority, concurring, and dissenting opinions. Here, we chronicle this latest chapter in the Court's attention and treatment of Asian Americans in race-conscious admissions. While the majority opinion of Chief Justice Roberts and the dissents of Justices Sotomayor and Jackson repeated the Court's marginalization of Asian Americans from *Bakke* onward, the concurrences of Justices Thomas and Gorsuch condemned what they regarded as undeniable racial discrimination against them.[406]

a. Chief Justice Roberts's majority opinion

Chief Justice Roberts's opinion for the Court extended its decades-long history of marginalizing Asian Americans in the affirmative action debate by proverbially burying the lead—the claim of discrimination against Asian Americans that headlined the questions presented, briefing, and argument in the Harvard case.[407] Despite chiding Harvard's counsel at argument for failing to acknowledge that "what the case is about" is "the discrimination against Asian Americans," his opinion hardly touched on it.[408] Regarding this jarring absence, the *Harvard Crimson* (the University's student-run newspaper) observed, "When the Supreme Court effectively struck down affirmative action in higher education last month, it made no mention of a claim that

404. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2148 (2023). *See id.* at 2156–57 n.2 (quoting Gratz v. Bollinger, 539 U.S. 244, 276 n.33 (2003)) (evaluating Harvard's program, which was challenged under Title VI, under Equal Protection Standards based on the long-standing premise that a violation of Equal Protection also constitutes a violation of Title VI).

405. *Id.* at 2175.

406. *See id.* at 2208–25 (Thomas, J., concurring); *id*. (Gorsuch, J., concurring).

407. *See supra* Sections II.D.1–2.

408. Transcript of Oral Argument, *supra* note 1, at 63.

Harvard illegally discriminated against Asian American applicants—an allegation that had been at the heart of the case for nearly a decade."[409]

It is illuminating *how* the Chief Justice made the claim of discrimination against Asian Americans less central to the case, as it will suggest *why*. From the start, in the factual and procedural background, Chief Justice Roberts walked through the successive stages of Harvard's admissions process, detailing how the admissions committee "can and does take race into account."[410] At each stage, like a chorus, he notes how various application readers, subcommittees, and the full committee "can and do take an applicant's race into account," without specifying which races or whether preferentially or not.[411] The only specific reference to any racial groups in this section was saved until the end, and it was not a reference to Asian Americans. Instead, the Chief Justice made the pointed observation that "race is a determinative tip for a significant percentage of all admitted African American and Hispanic applicants."[412]

The few times that Chief Justice Roberts *did* mention Asian American applicants, their treatment was almost always paired with White applicants—and the treatment of both groups in turn were contrasted with that of Black and Hispanic applicants. For instance, in the majority opinion's first mention of Asian American applicants, its description of UNC's admissions process after its recital of Harvard's, the Chief Justice related that "underrepresented minority students were more likely to score [highly] on their personal ratings than their *white and Asian American* peers, but were more likely to be rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities, and essays."[413] Then, responding to Justice Jackson's dissenting characterization of the minimal role that race plays in the admissions process, Chief Justice Roberts relegated to the literal margins the "surprising disparity" that he noted at oral argument in the comparative treatment of Asian Americans—and

409. Cam E. Kettles & Claire Yuan, *Did Harvard Intentionally Discriminate? In Admissions Discrimination Suit, the Supreme Court Doesn't Say*, HARV. CRIMSON (July 20, 2023) https://www.thecrimson.com/article/2023/7/20/sffa-decision-asian-american-discrimination/ [https://perma.cc/3WJA-92X3].

410. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2155 (majority opinion).

411. *Id.* at 2154.

412. *Id.* at 2155 (internal quotations omitted).

413. *Id.* (emphasis added; internal quotations omitted).

once again paired their treatment with that of White applicants.[414] Citing statistics on the significantly lower UNC admissions rates of "white and Asian applicants" compared to Black applicants in the top academic deciles, Chief Justice Roberts concluded that it "blinks reality" to contend that "white and Asian applicants" also benefit from UNC's race-conscious admissions program.[415] He added that "[t]he same is true at Harvard."[416]

Similarly, in reference to the provocative allegation that there has been an "Asian quota" on admissions to Harvard and other elite universities,[417] Chief Justice Roberts again subsumed the claim of discrimination against Asian Americans into a broader point about Harvard's use of race in admissions. Referring to the only chart in the majority opinion, which showed the share of students admitted to Harvard by race, he noted the "tight band" of Black applicants admitted over a recent ten-year period (between 10 and 11.7 percent)—but did not note the same narrow range of admitted Asian American applicants (between 18 and 20 percent), which had supported the "Asian quota" allegation—to highlight the "numerical commitment" Harvard appears to have made to having certain percentages of "minority groups" in its admitted pool.[418]

This pattern repeated in the final place where the "negative" racial effect of Harvard's admissions process was noted.[419] The Chief Justice highlighted the lower court finding that the race-conscious process resulted in "fewer Asian American *and* white students being admitted."[420] He then generalized that "*some racial groups* would be admitted in greater numbers" in the absence of racial considerations.[421]

Why did the so-called "Asian penalty" at the heart of the Harvard case from filing in district court through oral argument in the Supreme Court not receive significant or standalone attention, but rather was

414. *Id.* at 2156 n.1.

415. *Id.*

416. *Id.*

417. *See supra* note 13 and accompanying text; *see also* Brief for Petitioner, *supra* note 12, at 27, 63 (referencing a 2012 article by David Brooks published in the New York Times "suggesting that Harvard has an Asian quota" and subjective criteria that "invite admissions officers to rely on anti-Asian stereotypes . . . also conceal ceilings on Asian-American admissions"); *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2168 (noting the First Circuit's finding that "Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard").

418. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2171. The chart was reproduced from SFFA's opening brief. *See* Brief for Petitioner, *supra* note 12, at 23.

419. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2169.

420. *Id.* at 2168–69 (emphasis added).

421. *Id.* at 2169 (emphasis added).

presented by Chief Justice Roberts as a "white *and* Asian" penalty and then generically against "*some* racial groups"? One explanation is legal and political strategy: legally, discrimination against two racial groups is worse than against one, and politically, "reverse discrimination" against White applicants resonates with largely White opponents of affirmative action.[422]

Furthermore, for two decades, Chief Justice Roberts had been playing the long game on eliminating the consideration of race in governmental decision-making. Subsuming the focus of a case "about . . . discrimination against Asian Americans"[423] into a more general narrative about discrimination against "some racial groups" in favor of others reflected his longstanding determination to "stop discrimination on the basis of race" by "stop[ping] discriminating on the basis of race," which he famously proclaimed in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*.[424] In *SFFA*, his majority opinion repeated that sentiment in more absolute terms: "Eliminating racial discrimination means eliminating all of it."[425] Thus, Chief Justice Roberts opportunistically used the case to wage his broader crusade against "discrimination" affecting any racial group, including his own.[426]

Finally, the literal secondary place to which Chief Justice Roberts relegated Asian Americans, notwithstanding their primary place in the litigation against Harvard, tracked what one Asian American commentator decried as a decades-long "racially binary," a Black-versus-White debate in which "both the courts and the media have mostly ignored the Asian American plaintiffs and chosen, instead, to relitigate the same arguments about merit, white supremacy, and privilege."[427] As another Asian American commentator noted, "the court's decision seems stuck in that binary, too."[428] In this light, Chief Justice Roberts's majority opinion largely repeated the marginalization of Asian Americans from *Bakke* to *Grutter* and *Fisher*, unable or unwilling to

422. Witness the prior challenges to affirmative action programs brought by White plaintiffs in *Bakke*, *Grutter*, *Gratz*, and *Fisher*.

423. Transcript of Oral Argument, *supra* note 1, at 63.

424. 551 U.S. 701, 748 (2007).

425. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2150.

426. Kang, *supra* note 13.

427. *Id.*

428. Farhad Manjoo, *How Would Harvard Talk About My Kids?*, N.Y. TIMES (July 7. 2023), https://www.nytimes.com/2023/07/07/opinion/affirmative-action-harvard-unc.html [https://perma.cc/J4KV-HDDB].

abandon the racial binary in condemning Harvard's admissions process for "rest[ing] on the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer.'"[429]

b. The concurrences

By contrast, the concurring opinions of Justices Thomas and Gorsuch both specifically called out what they regarded as clear and unjust discrimination against Asian American applicants. Over several paragraphs, Thomas's concurrence related the long history of widespread anti-Asian discrimination, from the Chinese Exclusion Act in 1882, to school segregation and other racist state and local laws in the nineteenth and twentieth centuries, to the Court-endorsed exclusion and internment of Japanese Americans during World War II.[430] Given this history of discrimination, especially with segregated schools, Justice Thomas concluded that "it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants."[431]

Justice Gorsuch likewise specifically discussed and expressed significant concern with the treatment of Asian American applicants by race-conscious admissions programs. As at oral argument for the *SFFA* cases,[432] he described the "cottage industry" of application consultants that advise high school students to "appear less Asian" when they apply, decrying that colleges "lump[] so many people of so many disparate backgrounds into the 'Asian' category" that they are deemed "overrepresented."[433] Relatedly, he pushed back against the claim that race-conscious admissions actually benefit Asian Americans, referring multiple times to the unrefuted district court findings that "overall Harvard's race-conscious admissions policy results in fewer Asian American[s] being admitted."[434] Finally, he noted SFFA's contention that Harvard uses its "holistic" admissions review to limit the number of Asians admitted, in much the same way that the school used

429. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316).

430. *See id.* at 2194–2200 (Thomas, J., concurring).

431. *Id.* at 2200.

432. *See* Transcript of Oral Argument, *supra* note 1, at 52; Transcript of Oral Argument, *supra* note 288, at 165.

433. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2211 (Gorsuch, J., concurring).

434. *Id.* (internal quotations omitted) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 178 (D. Mass. 2019)); *see also id.* at 2213, 2216 n.6 (Justice Gorsuch pushing back against the dissents' assertion that Asian Americans benefit from race-conscious admissions programs).

"character, fitness, and other subjective criteria" to cap the number of admitted Jewish students decades earlier.[435]

c. The dissents

The principal dissent by Justice Sotomayor, joined by Justices Kagan and Jackson, did not seriously contest the negative effect of race-conscious admissions programs on Asian Americans. Instead, her dissent sought to evade it, at least with respect to Harvard's program, by arguing that any disparate impact against Asian Americans from the personality rating is "facially race-*neutral*" and thus "does not even fall under the strict scrutiny framework of *Grutter* and its progeny."[436] In addition, the principal dissent repeated the point by proponents of affirmative action, including Asian American amici, that holistic review benefits "*some* Asian American applicants" by allowing them—like every other applicant—to "explain the value of their unique background, heritage, and perspective," so that they are not stereotyped.[437] Finally, on the merits, Justice Sotomayor remarkably endorsed the view that such discrimination was "consistent with the impact that this Court's precedents have tolerated,"[438] which prompted the majority to respond, "While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue."[439]

Besides these few responses, Justice Sotomayor's principal dissent largely focused on defending, if not a racially binary system of affirmative action, then one enlarged to include "Latino and Black" applicants.[440] Asian Americans and other minority groups did not feature in that defense.

In Justice Jackson's separate dissent, Asian Americans were even less visible. Once, in a footnote, she cited UNC giving a "plus" to a North Carolina applicant from Vietnam to illustrate the broader point that "[e]very student who chooses to disclose his or her race is eligible

435. *Id.* at 2214 (internal quotations omitted); *see also id.* (Justice Gorsuch noting Harvard's expression of regret for its past discrimination against Jewish applicants and its denial that Asian American applicants have received similar treatment).

436. *Id.* at 2258 (Sotomayor, J., dissenting, with Justice Jackson only joining the dissent with respect to the UNC case); *id.* at 2263.

437. *Id.* at 2258 (internal quotations omitted); *see supra* notes 314–15, 324, 385–86 and accompanying text.

438. *Id.* at 2243 n.28.

439. *Id.* at 2175 (majority opinion).

440. *See id.* at 2234, 2236 & n.15 (Sotomayor, J., dissenting).

for such a race-linked plus."[441] Later, she referenced a district court finding—that "a higher percentage of the most academically excellent in-state Black applicants . . . were denied admissions than similarly qualified White and Asian American applicants"—as evidence that race in UNC's "genuinely holistic" process did not "fully" determine admissions.[442] Overall, even more than the principal dissent, Justice Jackson defended affirmative action in racially binary terms, including with her leading example of "two college applicants from North Carolina," one who "is White," and another who "is Black," and her recounting of the "[m]any chapters of America's history" of discrimination against "Black Americans," but not any chapters on discrimination against Asian Americans or other minority groups.[443] This omission led Justice Thomas to chide her dissent for articulating a "black and white world (literally)."[444]

In the end, the wide differences in attention and concern among the justices regarding the treatment of Asian Americans in race-conscious university admissions represented both the culmination and the continuation of decades of struggle for Asian Americans to move from the margins to a place of relevance in the affirmative action debate and more broadly of the often-binary conversation over race in America.

*E. Two Guiding Equality Principles on the Consideration of Race Post-*SFFA

By largely marginalizing the claim of discrimination against Asian Americans at the heart of the Harvard litigation, Chief Justice Roberts's opinion in *SFFA* turned the case more broadly into a vehicle for outlawing *any* discrimination on the basis of race, whether against White or Asian American applicants or for Black or Hispanic ones. Crucially, while *discrimination* on the basis of "race in itself" is barred,[445] considerations *related* to race may still be taken into account if they meet the twin conditions of equality—equal opportunity and

441. *Id.* at 2272 & n.83 (Jackson, J., dissenting).

442. *Id.* at 2274.

443. *Id.* at 2264, 2279; *see id.* at 2264–68, 2270–71.

444. *Id.* at 2205 (Thomas, J., concurring). Similarly, the progressive Asian American commentator (who agreed that "society should make decisions with a clear eye toward history") criticized Justice Jackson's failure to acknowledge "the history of racism against Asians in America, whether the lynching of Chinese immigrants in the nineteenth century, the Chinese Exclusion Act, or Japanese internment," especially in cases contending that the treatment of Asian Americans in admissions is a continuation of that history. Kang, *supra* note 13.

445. *Id.* at 2186 (Thomas, J., concurring).

equal consideration—that emerge from the majority opinion, informed by presaging exchanges at oral argument.[446]

First, universities may no longer employ "race-based admissions systems," which trigger and fail strict scrutiny as racial classifications.[447] To be clear, universities may still pursue diversity writ large for its educational benefits, as "[u]niversities may define their mission as they see fit," so long as they do not contravene the Court's new limits on the use of race as ends or means.[448]

As to those new limits, universities may not pursue racial diversity as an *end*, for such a goal "cannot be subjected to meaningful judicial review."[449] Nor may universities consider the race of applicants as a *means* to achieving overall educational diversity. In the majority's view, using "race in itself" as a proxy for diversity—that is, assuming that "race *qua* race . . . says [something] about who you are"—violates the Equal Protection command that race "may not operate as a stereotype."[450] Furthermore, given the "zero-sum" nature of university admissions, "[a] benefit provided to some applicants" on the basis of race "but not to others necessarily advantages the former group at the expense of the latter" and therefore violates another Equal Protection command: "race may never be used as a 'negative.'"[451] Moreover, it does not matter whether race is only used as a "plus," a "tip," or is "determinative" of admissions.[452] It is clear from Chief Justice Roberts's opinion—calling to mind his hostility at oral argument toward even "a little racial discrimination" in Harvard's admissions process[453]—that "[e]liminating racial discrimination means eliminating *all of it*," regardless of degree.[454]

Second, to quote the key qualification at the end of the majority opinion, "nothing in [it] should be construed as prohibiting universities from considering an applicant's discussion of how race affected

446. Guidance from the Biden Administration is typical in mirroring the concluding part of Chief Justice Roberts's opinion, that universities may "assess how applicants' individual backgrounds and attributes—including those related to their race," such as "experiences of racial discrimination," may "position them to contribute to campus in unique ways." *See* U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 26, at 2. But such guidance has not clearly set forth the twin equality principles that we infer from the opinion and arguments.

447. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2168 (majority opinion); *id.* at 2166–75.

448. *Id.* at 2168.

449. *Id.* at 2166.

450. *Id.* at 2168, 2170 (internal quotations omitted).

451. *Id.* at 2169.

452. *Id.* at 2155, 2164.

453. Transcript of Oral Argument, *supra* note 1, at 63; *see supra* note 383.

454. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2161 (emphasis added).

his or her life, be it through discrimination, inspiration, or otherwise."[455] As Chief Justice Roberts elaborated:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[456]

This qualification tracked exchanges at argument over the extent to which race may be considered "in an experiential way," if brought up in an applicant essay or teacher recommendation.[457] Chief Justice Roberts had suggested that it "would be allowed" for an applicant to "indicate experiences they have had because of their race," such as "having to confront discrimination growing up."[458] To that suggestion, SFFA's attorney had responded, "I think that is—is correct."[459] Relatedly, the Chief Justice had asked SFFA's attorney whether he would object to a school considering an applicant's essay on "having to confront discrimination growing up" or a recommender discussing how a particular student would bring the experience of "deal[ing] with racial discrimination" as a member of "a very small minority."[460] Without hesitation, the attorney had replied, "Absolutely not, Mr. Chief Justice."[461] In his view, "overcoming discrimination" is a topic about which "a black student" and "an Asian student" could get "equal credit," so considering the experience would not amount to preferring a student based on "race itself."[462]

Along similar lines, Justice Barrett had asked whether universities could consider essays on "culture, tradition, and heritage," including "cultural attributes of the racial heritage."[463] In response, SFFA had conceded that such essays "[a]bsolutely" could be considered to the

455. *Id.* at 2176.
456. *Id.* (emphasis omitted).
457. Transcript of Oral Argument, *supra* note 288, at 24, 27.
458. *Id.* at 43; Transcript of Oral Argument, *supra* note 1, at 7.
459. Transcript of Oral Argument, *supra* note 288, at 43.
460. Transcript of Oral Argument, *supra* note 1, at 7.
461. *Id.*
462. *Id.* at 7–9.
463. *Id.* at 9–10.

extent they reflect "character and experience," "active interest," or "extracurricular involvement."[464] The underlying principle was that such race-related subjects were "open to all" to discuss and to receive "equal credit,"[465] so there would be no preference based on "race itself."[466]

The above-quoted passages from the majority opinion can be read to have adopted this principle of equal treatment in the admissions process, including *equality of opportunity on the front end* to discuss race-related experiences, interests, and involvements, and *equality of consideration on the back end* for how they impact a "student's unique ability to contribute to the university."[467] Indeed, Chief Justice Roberts's opinion is replete with consonant pronouncements that "the central command" of the Equal Protection Clause is "the doctrine of equality" that "requires equality of treatment before the law for all persons without regard to race or color," enshrines "absolute equality of all," is a "pledge of racial equality," mandates "the law . . . [should] operate *equally* upon all," and adopts "this principle of equal justice" and the "norm of equal treatment."[468]

Of course, this mandate of "absolute equality" in the operation of laws generally and affirmative action programs specifically is vulnerable to criticism for failing to acknowledge and perpetuating "the well-documented intergenerational transmission of inequality that still plagues our citizenry" from "the lengthy history of state-sponsored race-based preferences in America."[469] We reiterate our position that affirmative action programs were both legally and socially justified in principle but leave to others to develop the criticism of this "absolute equality" principle. Here, we add that the "intergenerational transmission of inequality" also embraces Asian Americans, Native Americans, and other demographics that the dissents largely neglected to acknowledge in their racially binary (Black versus White) or trinary (Black and Latino versus White) discussions of the legacy of racism and defenses of affirmative action.

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464. Transcript of Oral Argument, *supra* note 288, at 27–28; Transcript of Oral Argument, *supra* note 1, at 7.

465. Transcript of Oral Argument, *supra* note 288, at 10; Transcript of Oral Argument, *supra* note 1, at 9.

466. Transcript of Oral Argument, *supra* note 1, at 9.

467. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023).

468. *Id.* at 2174, 2150, 2160–61, 2159, 2165 (internal quotations omitted).

469. *Id.* at 2264 (Jackson, J., dissenting) (internal quotations omitted).

With the Court's principles of equality in mind, we turn to giving universities guidance on attaining diversity in admissions in a post-*SFFA* world.

III. IMMIGRATION HISTORIES AND DIVERSITY

In the aftermath of the *SFFA* decision, university admissions programs are at a crossroads. The Court's prohibition of race-based admissions has left proponents of affirmative action scrambling to find alternative criteria or procedures to recapture the racial diversity that they fear will be lost in a post-*SFFA* era.[470] Opponents, meanwhile, are on high alert to challenge admissions practices that they suspect are end runs around the Court's prohibition.[471]

Against this backdrop, we offer our prescription: the consideration of an applicant's immigration history volunteered in an optional essay. Broadly defined, immigration history is relevant to many individuals, including beyond the first generation and any specific race or nationality. The consideration of immigration history offers distinct advantages. Most critically, immigration history can help universities attain meaningful and nuanced diversity. Drawing on the wide-ranging Asian American immigration histories recounted in Part I, we show in this part that their varied stories—from those whose families arrived generations ago and faced unprecedented hostility to those who recently made the journey—have manifested in unique present circumstances and experiences that can enrich the campus learning environment. Moreover, to the extent immigration histories are race-related, their consideration abides by the twin equality principles articulated in *SFFA*—equality of opportunity and equality of consideration.

Furthermore, immigration histories avoid the problems with overbroad racial categories—lumping together individuals with richly differing backgrounds, cultures, and experiences into a single monolith—that marred past affirmative action programs and propelled some

470. *See* Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your 'Identity*,*'* N.Y. TIMES, (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html [https://perma.cc/L4GL-N76P]. Proponents fear that Black and Hispanic enrollment will decrease nationwide, as happened in California after the state in 1996 prohibited racial preferences in university admissions. Brief of Massachusetts et al. as Amici Curiae in Support of Respondents at 26-27, 32, *Students for Fair Admissions*, 143 S. Ct. 2141 (No. 20-1199).

471. *See* Anemona Hartocollis & Amy Harmon, *Affirmative Action Ruling Shakes Universities over More Than Race*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html[https://perma.cc/E575-5UCA].

Asian Americans to help topple racial preferences from which they were excluded by universities across the country, as related in Part II.

To be sure, exclusion has been justified by universities and proponents of affirmative action by the increasingly sizable enrollments of Asian Americans, both due to early affirmative action programs when they were included in preferences[472] and subsequent time periods when they were excluded.[473] But that justification obscures the underlying disparate demographics in which some subgroups (such as recently immigrated and affluent Chinese Americans) attained more success than others (such as impoverished multi-generational and recent immigrants from different parts of Asia).[474] In a pre-*SFFA* world, using these broad racial categories as the basis of admissions preferences was problematic,[475] and in a post-*SFFA* world, the use of broad racial categories is prohibited.

Accordingly, drawing on prior chapters of Asian American history, we suggest that the thoughtful consideration of immigration history as one illuminating factor in the admissions process can counter overbroad generalizations about the successes of any demographic group—such as the model minority myth—and help universities lawfully attain meaningfully diverse student bodies across all demographics in a post-*SFFA* world. In essence then, our prescription uses the holistic review that some proponents of affirmative action have claimed obviates the need for racial preferences—at least for Asian Americans—but replaces the now prohibited factor of race with the more nuanced and experiential consideration of immigration history. In this way, affirmative action's Asian American "problem" can contribute to its solution.

472. *See supra* notes 276–77 and accompanying text.

473. *See* Brian P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RSCH. 310, 312–14, 319–20 (2010) (finding that Asian Americans are proportionally overrepresented at selective colleges and universities).

474. *See supra* notes 236–39 and accompanying text; *infra* notes 519-21 and accompanying text.

475. Hypothetically, if enrollments of Black students recently immigrated from Africa were to rise in substantial numbers, this same justification could be used to exclude all Black applicants (including the Black descendants of enslaved persons) from racial preferences, a result that few proponents of affirmative action would find palatable. Indeed, some progressives criticized affirmative action programs for admitting more Black immigrants or children of immigrants than Black descendants of enslaved persons. *See infra* note 528 and accompanying text.

A. Defining and Asking About Immigration History

We define immigration history broadly to include not only the personal experiences of applicants but also those of their families in present or prior generations—how they arrived, how they have fared since, including any special challenges or opportunities, and how that immigration story has helped shape who they are, what they have done, and what they believe. With first- and second-generation immigrants accounting for about a quarter of the current U.S. population, many applicants will have experienced their own immigration journey or lived with the direct effects of the journeys undertaken by their parents.[476] But immigration journeys more distant in time may also have continuing intergenerational impacts.

To make our proposal more concrete, we include examples of immigration history below. Our purpose is not to be comprehensive but to illustrate the diversity that considering immigration history could bring to university campuses. Building on our earlier discussion of Asian American immigration histories, we start with vignettes of applicants whose different experiences and perspectives would enrich learning on campus.

For example, a Japanese American applicant could reflect on growing up in a largely White community in Oklahoma City, an hour's drive from where her grandparents from California were interned at Fort Sill during World War II—including, perhaps, her protest of the planned detention of migrant children there.[477] Or a Chinese-born applicant who lives in New York City's Chinatown, without lawful immigration status and below the federal poverty line, could offer an illuminating perspective on being Chinese American today.[478] And an applicant born in Afghanistan, whose parents were studying for their PhDs in Minnesota, and whose family now lives in limbo under Temporary Protected Status, would have a unique immigration journey to

476. *See* Budiman et al., *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/ [https://perma.cc/UCR8-RQRU].

477. *See* Molly Hennessy-Fiske, *Japanese Internment Camp Survivors Protest Fort Sill Migrant Detention Center*, L.A. TIMES (June 22, 2019), https://www.latimes.com/nation/la-na-japanese-internment-fort-sill-2019-story.html [https://perma.cc/E4H3-YEZD].

478. Approximately 4 percent of Chinese Americans lack lawful immigration status. Raquel Rosenbloom & Jeanne Batalova, *Chinese Immigrants in the United States*, MIGRATION POL'Y INST. (Jan. 12, 2023) https://www.migrationpolicy.org/article/chinese-immigrants-united-states [https://perma.cc/5ACR-975R].

share with classmates and faculty.[479] Each Asian American example here would bring diverse perspectives and experiences to campus. Notably, their immigration backgrounds and subsequent experiences differ widely, so considering their individual immigration histories would further campus diversity in more personal and nuanced ways than categorically excluding or including them in admissions preferences, simply because they or their families came from the same vast continent.[480]

Beyond Asian Americans, we offer other examples where diversity is advanced by considering immigration history. Take a Guatemalan American applicant from Texas who has birthright U.S. citizenship but whose siblings and parents lack lawful status. Her immigration experiences, including her family's struggles and successes, could contribute to learning at her university in meaningful and unique ways. Universities may also find diversity in applicants whose communities have experienced significant immigration journeys—for example, applicants living in majority-Hispanic towns near the border with Mexico, whose immigration stories may center on borders crossing them, rather than the other way around,[481] or applicants living in German-settled communities along Missouri's Rhineland area west of St. Louis, where vineyards and Maifests continue to be centerpieces of their shared identity.[482]

Considering the immigration stories of African American descendants of slaves would also enrich campus diversity. To be clear, we do not consider Africans who were forcibly brought to America to

479. The Secretary of Homeland Security may designate a foreign country for Temporary Protected Status, individuals who are Temporary Protected Status beneficiaries are not removable from the United States, and although the temporary status does not lead to lawful permanent resident status, it does not prevent the beneficiary from applying for nonimmigrant status or filing for adjustment of status. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/9M3W-9YYR].

480. The Biden Administration's guidance on *SFFA* also offers an Asian American example of generational immigration history that universities can consider—"an applicant's discussion of how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family." U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 26, at 2.

481. Mesilla, New Mexico, for example, was part of Mexico until 1854, when the city's territory was purchased by the United States. *History of Mesilla*, TOWN MESILLA, https://www.mesillanm.gov/history/ [https://perma.cc/93K8-LTBX].

482. Towns like Hermann, Missouri, were settled by Germans who built vineyards and wineries, making the Missouri Rhineland one of the first federally recognized wine growing regions in the United States. *New York Times Highlights Missouri Wine Country*, MO. P'SHIP (June 3, 2022), https://www.missouripartnership.com/new-york-times-highlights-missouri-wine-country/ [https://perma.cc/WC2Q-NNH7].

have immigrated in any ordinary understanding of that term, and we do not draw any historical, human, or moral equivalence between voluntary immigration to America and the horrendous trans-Atlantic slave trade. Yet it would seem perverse to consider voluntary immigration histories, both distant and recent, but not consider the tectonic forced migration that still deeply impacts the lives of many descendants generations later.[483] In our prescription, African American applicants—and universities—would have the option to consider the impact of forced migration histories. Relatedly, universities could also consider how African American applicants may have been affected by the Great Migration from the South to northern, midwestern, and western states to escape the oppression of Jim Crow and pursue opportunities elsewhere.[484]

Additionally, though not immigration history per se, universities might also seek meaningful diversity in how Native American applicants are still impacted by the Trail of Tears, the brutal forced migration of tens of thousands of Native Americans in the 1830s to the 1850s from their historical lands in the southeast to "Indian territory" in present-day Oklahoma.[485] Native American students living in Oklahoma and elsewhere may have unique life experiences and perspectives that can help others on campus reckon with this historic injustice.[486]

To ensure that the consideration of immigration history furthers meaningful diversity, universities should avoid fill-in-the-box type questions, such as "where were you born?" or "where were your parents born?"[487] Though these questions by themselves would not violate *SFFA*'s equality principles, as everyone can disclose facts about national origin without any limitation or preference, these fill-in-the-box questions would not provide any context or narrative for

483. Essays by such descendants understandably may vary in specificity depending on what is known about enslaved ancestors. Nevertheless, even without specific knowledge, applicants would have the freedom to reflect on how their present lives have been shaped by that general history.

484. *The Great Migration (1910–1970)*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/migrations/great-migration [https://perma.cc/85LQ-HLW3].

485. *Trail of Tears*, HISTORY.COM (Sept. 26, 2023) https://www.history.com/topics/native-american-history/trail-of-tears [https://perma.cc/7VAQ-MV42].

486. Though Native American applicants might avail themselves of the opportunity to write about their descent from the first migrants to the Americas, because of the vast distance in time, we imagine that they might have more to discuss regarding personal experiences with their tribal culture, heritage, and circumstances and challenges they have faced as Native Americans.

487. In addition to checking demographic boxes, the Common App currently asks for the birthplace of the applicants. *See* COMMON APP, https://www.commonapp.org/ [https://perma.cc/4NAQ-QCVV].

understanding how applicants have been affected by their individual and familial histories and how their experiences might contribute to campus diversity. Instead, we suggest that universities add an optional, short essay question like the following:

> How has your immigration history shaped who you are today? Immigration history can include how you, your family, or your ancestors migrated to the United States and any subsequent experiences and special circumstances, such as past or present challenges or opportunities. You may discuss any aspects of your culture, heritage, family, or community, as well as interests, endeavors, or perspectives, that relate to your immigration history. Along similar lines, you may also reflect on your family's migration history within the United States. Ultimately, this is an opportunity for you to share how your immigration history may illuminate who you are, what you have done, or what you believe.

We believe that a full explanation of immigration history is particularly important because many students, especially those coming from less privileged backgrounds, will not have counselors, teachers, or parents to advise them about the many aspects of immigration history that they could discuss in the essay.

To be sure, an optional essay question has the downside of lengthening an already time-consuming application process. Many universities have multiple required essays, and an additional "optional" one might be understood as mandatory in today's hyper-competitive application environment. Furthermore, in response to *SFFA*, universities have already added essay questions to increase diversity in permissible ways, such as "How will the life experiences that shape who you are today enable you to contribute to Harvard?" or "Tell us about an aspect of your identity or a life experience that has shaped you?"[488] While these broad essay prompts have the advantage of allowing applicants to highlight any life-shaping experiences—including immediate as well as intergenerational impacts of immigration—they risk leaving applicants unsure of what universities value or even what is allowable to share, such as race-related experiences (which they may understandably shy away from given *SFFA*) or immigration history (which they may also shy away from or fail to appreciate its value without

488. Hartocollis & Edmonds, *supra* note 470.

prompting). Relatedly, Harvard's Dean of Admissions has opined that his university's post-*SFFA* shift from an open-ended essay to five shorter, more direct essay prompts (of which "life experiences" is one) makes the Harvard application more "accessible" for students without application counseling.[489] Similarly, an optional essay on immigration history would clarify that universities value that history and invite potentially illuminating responses that help advance a university's educational diversity interests in a post-*SFFA* world.

B. The Advantages of Considering Immigration History

1. Passing Constitutional Muster

As a threshold matter, immigration history has the advantage of complying with the twin demands of *SFFA* that applicants, regardless of race, enjoy equal opportunities and equal treatment in the admissions process.[490] First, as the saying goes, the United States is a nation of immigrants, so the opportunity to reflect on one's immigration history is "open to all," from the recently immigrated to those whose families arrived generations ago.[491] Second, the consideration of immigration history is consistent with "equality of treatment . . . without regard to race," as immigration history is not limited by race or nationality and does not necessarily favor any particular ones.[492]

Indeed, the U.S. immigrant population is highly diverse, with nearly every nation in the world represented.[493] And underscoring that immigration history is not an improper backdoor for race; applicants whose families immigrated from any particular country might identify as members of a variety of races. Consider applicants whose families immigrated from South Africa, a highly diverse country in a highly diverse continent.[494] They might identify as Black South Africans,

489. *See* Michelle N. Amponsah & Emma H. Haidar, *Harvard Admissions Dean Discussed Changes to Application Process, in First Interview Since SCOTUS Decision*, HARV. CRIMSON (Dec. 16, 2023), https://www.thecrimson.com/article/2023/12/16/harvard-admissions-dean-interview/ [https://perma.cc/EHD7-U65A].

490. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2169–70 (2023).

491. *See* Transcript of Oral Argument, *supra* note 288, at 39. As discussed below, we conceive of immigration history as an inclusive topic of discussion open to Black applicants whose families were forcibly migrated as slaves.

492. *See Students for Fair Admissions*, 143 S. Ct. at 2160–61 (internal quotations omitted) (quoting Browder v. Gayle, 142 F. Supp. 707, 715 (M.D. Ala. 1956)).

493. Budiman, *supra* note 476.

494. *Race and Ethnicity in South Africa*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/article/race-and-ethnicity-south-africa [https://perma.cc/TGX3-FPPB]; *Ethnic Diversity in Africa:*

Coloured, White, or Asian—and Black South Africans in turn might further identify as Bapedi, Basotho, Batswana, Swazi, Tsonga, Venda, Zulu, or as members of other indigenous ethnic groups that are culturally and linguistically distinct.[495] Thus, immigration history opens opportunities for applicants across nationalities and races to receive consideration for unique ways in which they may contribute to peer learning and campus life in light of their background and experiences.

Of course, to say that every applicant has an *equal opportunity* to tell a story about their family's immigration history, or their culture or heritage, is not to say that every story must receive *equal weight* in admissions assessments. For one, giving equal or fixed points would violate *Gratz*, which bars racial set-asides and other automatic preferences.[496] Furthermore, some applicants may present more compelling narratives and stronger characteristics than others, just as some athletes or artists may compare more favorably to others in terms of the athleticism or artistry they could bring to campus.

In Section III.A, we described how applicants who meaningfully reflected on their family's enslaved history could increase campus diversity in positive ways. The constitutionality of considering that history deserves special analysis. At argument, Justice Kavanaugh had asked whether descendants of slaves could receive a "plus" if children of immigrants could, and SFFA's attorneys responded that such preferences would be "so highly correlated with race" as to be an improper "proxy for race."[497] Though none of the *SFFA* opinions directly addressed this hypothetical, SFFA's response conflicts with the majority opinion allowing universities to consider an applicant's racial experiences or related culture or heritage. Simply put, it would violate the principles of equal opportunity and equal treatment to allow all applicants *except* those descended from slavery to discuss how their family's immigration history, subsequent experiences, and lineage has

From Pitfall to Business Opportunity, DIVERSITY ATLAS (Apr. 26, 2023) https://diversityatlas.io/ethnic-diversity-in-africa/ [https://perma.cc/PX6J-BAX3].

495. *Race and Ethnicity in South Africa*, *supra* note 494. Relatedly, at oral argument, Justice Alito asked whether UNC could prefer a student who immigrated from Africa to North Carolina and, in an essay, discussed dealing with "huge cultural differences" in an "overwhelmingly white" area. UNC's attorney responded that it would be permissible because "the preference in that case is not being based upon the race but upon the cultural experiences or the ability to adapt." *See* Transcript of Oral Argument, *supra* note 288, at 33–34.

496. Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003).

497. Transcript of Oral Argument, *supra* note 288, at 44–45; Transcript of Oral Argument, *supra* note 1, at 15–16.

impacted them. That singular exclusion would effectively disadvantage applicants of a particular racial ancestry and immigration history.

A non-slavery example illustrates this point. Without drawing any historical, moral, or social equivalence, it would surely raise equality concerns among those sensitive to "reverse discrimination" against White applicants if everyone *except* applicants descended from immigrants who fled the Great Famine in Ireland could discuss their family's ancestry, culture, or heritage. Such history and inheritance can be deeply impactful on a personal level, even generations later, as President Biden's recent visit to his ancestral home in Ireland illustrated.[498] For similar reasons, it would be discriminatory, arbitrary, and counterproductive to the pursuit of educational diversity to bar the descendants of those who experienced forced immigration from the slave trade from sharing how that family history may have shaped their present-day experiences—including any intergenerational inequality they have had to overcome or any history or culture they have explored.

2. Advancing Diversity

In Section III.A, we offered examples illustrating how the consideration of immigration histories could help universities build student bodies with diverse life experiences, cultures, languages, socioeconomic statuses, and racial backgrounds.[499] In this section, we describe the well-documented mechanisms by which these differences can enhance educational experiences, both inside and outside the classroom.

Studies consistently show that bringing together students from diverse backgrounds has concrete benefits for the students, including greater cognitive development and gains on important measures of interpersonal and psychosocial development, like greater receptiveness to differences and challenges, increased knowledge and understanding across demographics, more positive perceptions about their own academic and social standing, and greater involvement in civic and community service activities.[500] For the minority students, greater diversity in the educational setting has been linked to higher retention

498. *See* Katie Rogers & Michael Shear, *'I'm Comin' Home': Biden Takes a Tour of His Irish Heritage*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/12/world/europe/biden-ireland-heritage.html [https://perma.cc/P98X-A735].

499. *See supra* Section III.A.

500. Patrick T. Terenzini et al., *Racial and Ethnic Diversity in the Classroom*, 72 J. HIGHER EDUC. 509, 511 (2001).

rates.[501] Looking specifically at race and using multi-institutional and longitudinal data,[502] Professor Mitchell J. Chang found that socialization across races and frequent discussion of racial issues have positive effects on the social and intellectual self-confidence of students, with positive indirect associations with retention and overall satisfaction with the college experience.[503] And critically, diversity in racial *outcomes* was not outlawed by *SFFA*, so long as the admissions process abides by the constitutional principles of equality articulated earlier.[504] Moreover, as a general principle, diversity in racial outcomes should not be subject to legal challenge, given the decades of (conservative) judicial precedent rejecting claims of discrimination based on disparate racial impact in cases where specific intent to discriminate could not be proven.[505]

What is the mechanism by which these educational benefits accrue? Scholars have posited that students exposed to opinions and situations that differ from their home environments experience "cognitive disequilibrium."[506] They then engage in a more rigorous mental processing to accommodate and assimilate the new information, enhancing their learning and cognitive abilities.[507] The benefits of this learning process are enhanced for undergraduates who typically are at the developmental stage where they possess greater freedom to explore new ideas, relationships, and social roles.[508]

Moreover, there is evidence that immigrants or the children of immigrants can navigate two or more cultural streams in ways that

501. *Id.*

502. For over fifty years, the Cooperative Institutional Research Program has conducted surveys of U.S. first-year college students, asking their opinions on various matters. The survey is administered by the Higher Education Research Institute at the University of California Los Angeles. *CIRP Freshman Survey*, HIGHER EDUC. RSCH. INST., https://heri.ucla.edu/cirp-freshman-survey/ [https://perma.cc/LN56-CSX9].

503. Mitchell J. Chang, *Does Racial Diversity Matter? The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. COLL. STUDENT DEV. 377, 387–90 (1999).

504. *See supra* Section II.E.

505. *See* Guha Krishnamurthi & Peter Salib, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 136–37 (2023). Indeed, SFFA's attorney at argument conceded that "racial diversity" in outcome "is important because it is a good metric to make sure [our] institutions are equally open." Transcript of Oral Argument, *supra* note 1, at 29.

506. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 335 (2002).

507. *Id.* at 330–66.

508. *See* Erik Homburger Erikson, *The Problem of Ego Identity*, 4 AM. PSYCHOANALYTIC ASS'N 56 (1956).

benefit learning.[509] One important characteristic of this demographic is heightened integrative complexity, "the capacity and willingness to acknowledge the legitimacy of competing perspectives" and "forge conceptual links among these perspectives (integration)."[510] In other words, students who have grown up with multiple cultures are better able to understand and accept different worldviews.[511] This characteristic generally leads to better performance on many cognitive metrics, including creativity, team performance, and less susceptibility to prejudice.[512] Regarding creativity in particular, research suggests that the juxtaposition of two or more cultures, with seemingly incompatible perspectives, encourages novel ideas.[513] These educational benefits could extend to the classmates of immigrant students as well, given the high degree of socialization that typically occurs on college campuses.

Since most recent immigrants are generally poorer than similarly situated native-born Americans,[514] there will likely be substantial overlap between proffered immigration histories and the special consideration that many universities already give to applicants with lower socioeconomic status. Thus, the consideration of immigration history would have the additional benefits of increasing socioeconomic diversity in universities and re-emphasizing the role that education has traditionally played as a vehicle for social mobility, particularly for immigrant families. But as our examples in Section III.A show, the consideration of immigration history has diversity benefits beyond socioeconomic status, such that immigrant applicants from other socioeconomic backgrounds could enhance campus diversity as well.

3. Resolving the Race-Based "Asian American Problem"

There is an additional advantage to using the race-neutral immigration history consideration. While we reiterate here our general support for race-conscious admissions to enhance diversity, we note that

509. Carmit T. Tadmor et al., *Acculturation Strategies and Integrative Complexity: The Cognitive Implications of Biculturalism*, 40 J. CROSS-CULTURAL PSYCH. 105, 105 (2009).

510. *Id.* at 106.

511. *Id.*

512. *Id.*

513. *Id.* at 132.

514. JEANNE BATALOVA & MICHAEL FIX, MIGRATION POL'Y INST., UNDERSTANDING POVERTY DECLINES AMONG IMMIGRANTS AND THEIR CHILDREN IN THE UNITED STATES (2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-poverty-declines-immigrants-2023_final.pdf [https://perma.cc/HL5R-GDVC].

overbroad ethnic categories formerly used by universities resulted in admissions policies that oversimplified the great diversity within minority groups to adverse effect at the individual and campus levels.[515] Using Asian Americans as a case study, we demonstrated in Part I that different Asian subgroups immigrated to the United States during different time periods and faced different challenges, manifesting in substantial differences among Asian American groups today (including socioeconomic differences).[516] Yet these differences were largely ignored when many universities decided to exclude Asian Americans from affirmative action preferences.

Consider the case of Cambodian Americans. The initial wave of immigrants had experienced the extreme trauma of a brutal civil war in which the Khmer Rouge killed as many as two million people, before the Vietnamese ousted the regime and occupied the country.[517] In making their escapes, many Cambodians spent years languishing in refugee camps before arriving in the United States.[518] Subsequent generations of Cambodian Americans grew up in the shadow of these traumas and faced the additional challenges of integrating into largely poor communities within big cities.[519] As a result, Cambodian Americans lag behind other Americans generally and behind more established Asian American groups, as measured by integration metrics like education or household income.[520]

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515. *See* Richard Kahlenberg, *Affirmative Action Should Be Based on Class, Not Race*, ECONOMIST (Sept. 4, 2018) https://www.economist.com/open-future/2018/09/04/affirmative-action-should-be-based-on-class-not-race [https://perma.cc/2TKU-HKTC] (arguing that affirmative action's overbroad focus on racial diversity ignores the socioeconomic range within minority students); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2167 (2023) (describing the racial categories employed by universities to pursue student diversity as "imprecise" and "overbroad"). *See generally* Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 ASIAN PAC. AM. L.J. 1 (2006) (stating affirmative action ignores the complexities of multiracial applicants).

516. 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/QN4Q-SJ59].

517. SUCHENG CHAN, CAMBODIANS IN THE UNITED STATES: REFUGEES, IMMIGRANTS, AMERICAN ETHNIC MINORITY 6 (Oxford Rsch. Encyclopedias ed. 2015).

518. *Finding Common Ground: Minnesota's Refugee and Immigration Population: Cambodia*, INT'L INST. MINN., https://iimn.org/publication/finding-common-ground/minnesotas-refugees/asia/cambodians/ [https://perma.cc/A6CP-73MF].

519. CHAN, *supra* note 517.

520. *See* Abby Budiman, *Cambodians in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021) [hereinafter *Cambodians Fact Sheet*], https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-cambodians-in-the-u-s/ [https://perma.cc/EU3N-FELY]; Abby Budiman, *Chinese in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021) [hereinafter *Chinese Fact Sheet*], https://www

Table 2: Income Comparisons of Cambodian Americans with Chinese Americans and Korean Americans[521]

	Cambodians		**Chinese**		**Koreans**	
	U.S. Born	Foreign Born	U.S. Born	Foreign Born	U.S. Born	Foreign Born
Median Annual Household Income	$65,000	$67,300	$100,000	$75,300	$88,100	$68,000
Median Annual Personal Earnings for Full-Time, Year-Round Workers	$38,000	$40,000	$70,000	$62,000	$60,000	$59,000

.pewresearch.org/social-trends/fact-sheet/asian-americans-chinese-in-the-u-s/ [https://perma.cc/WP3A-UW9L]; Abby Budiman, *Koreans in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021) [hereinafter *Koreans Fact Sheet*], https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-koreans-in-the-u-s/ [https://perma.cc/NR3V-CA4B]; *infra* Tables 2–3.

521. *Cambodians Fact Sheet*, *supra* note 520; *Chinese Fact Sheet*, *supra* note 520; *Koreans Fact Sheet*, *supra* note 520.

Table 3: Education Comparisons of Cambodian Americans with Chinese Americans and Korean Americans[522]

	Cambodians		**Chinese**		**Koreans**	
	U.S. Born	Foreign Born	U.S. Born	Foreign Born	U.S. Born	Foreign Born
High School Education	41%	60%	12%	34%	13%	26%
Some College Education	30%	21%	18%	13%	24%	19%
Bachelor's Degree	21%	14%	43%	24%	39%	24%
Postgrad Degree	7%	5%	27%	29%	24%	21%

Despite these differences, Cambodian Americans and other disadvantaged recent immigrants from Asia, like Hmong and Laotians, were excluded from racial preferences when universities excluded Asian Americans categorically from their affirmative action programs.[523] The rationale that Asian Americans were "overrepresented," from lumping together very diverse groups, compounded the model minority myth whereby the educational and economic successes attained by some individuals within some subgroups were attributed to *all* individuals and *all* subgroups simply because they originated from the continent of Asia. As a result, individuals who would have enriched campus with very different experiences and perspectives—arising in large part from disparate immigration histories—were not recognized or sought out for their diversity.[524]

Relatedly, a Hmong American student at Harvard recently observed that, while approximately 20 percent of Harvard College is

522. *Cambodians Fact Sheet*, *supra* note 520; *Chinese Fact Sheet*, *supra* note 520; *Koreans Fact Sheet*, *supra* note 520.

523. Chang, *supra* note 6.

524. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2167 (2023) ("Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other.").

Asian, relatively few are from Southeast Asia.[525] "Although there is certainly a collective Asian American experience," he wrote, "my life as a Hmong individual (specifically the son of Hmong refugee parents) is vastly different from that of a Chinese, Japanese, or Indian person."[526] Accordingly, he opined that "group[ing] the South Asian experience with the Southeast Asian and East Asian experience is an injustice to the rich individuality of each Asian ethnicity."[527]

Similar problems arise in other overbroad racial categories formerly used by universities in affirmative action programs. For example, a third-generation Cuban American applicant would be grouped together with a first-generation Guatemalan American applicant for purposes of "counting" Hispanic admissions, even if their families immigrated under very different circumstances and they had vastly different experiences within the United States. Indeed, one salient critique of affirmative action programs by progressives has been that universities seeking to increase the number of Black students have admitted more Black immigrants or children of immigrants than Black students whose ancestors were enslaved in America.[528]

To be clear, we do not argue that one subgroup of Black, Hispanic, Asian or other minority is more "deserving" of admission than others. Our point is simply that the consideration of volunteered immigration history can help universities attain meaningful and nuanced diversity across races, nationalities, cultures, socioeconomics, and personal interests and achievements.

CONCLUSION

History matters, as demonstrated by the intertwining history of Asian Americans and affirmative action. First, for a century, waves of diverse immigration from Asia—followed by racist exclusionary laws and domestic discrimination, from segregation to internment[529]—set

525. *See* Z. Forest Moua, *Disaggregate Our Demographics*, HARV. CRIMSON (Nov. 29, 2023), https://www.thecrimson.com/article/2023/11/29/moua-disaggregate-asian-demographics [https://perma.cc/4PZD-HPVF].

526. *Id.*

527. *Id.*

528. As African American Studies professor Henry Louis Gates Jr. recently observed in *The Harvard Crimson*, "a large percent of the Black students in the College are descendants of recent Africans as opposed to being descended from African-Americans who were enslaved in North America." Josie F. Abugov, *"Are We in the Minority?,"* HARV. CRIMSON (Oct. 15, 2020), https://www.thecrimson.com/article/2020/10/15/gaasa-scrut/ [https://perma.cc/Z8LF-YHNB].

529. *See generally* LEE, supra note 5.

the stage for the inclusion of Asian Americans in early affirmative action policies during the civil rights era to remedy longstanding discrimination against them.[530] Second, the subsequent success of some Asian Americans in university admissions led to the Supreme Court's tacit approval of their exclusion as a model minority and their marginalization in the Court's affirmative action jurisprudence, from *Bakke* to *Grutter* and *Fisher*.[531] Third, this marginalization and exclusion produced rising Asian American opposition to affirmative action, which in turn led some Asian American plaintiffs and amici to align with previously unsuccessful White opponents and topple racial preferences in admissions in *SFFA*.[532] Consequently, Asian American history matters too, and there is peril in ignoring it.

In recounting this unwritten history, we have revealed how Asian Americans became a "problem" for affirmative action largely because of an overbroad categorization that lumped them together into an overrepresented monolith, which invisibilized their vast diversity and rationalized their exclusion from racial preferences for other minorities. That "problem" is also a solution hiding in plain sight, as their diversity is reflected in their wide-ranging and varied immigration histories. By giving students of all nationalities and races the opportunity to reflect on their own immigration history—how they or their families arrived in America and have fared since, and how that history has shaped their own experiences and perspectives—universities in a post-*SFFA* world can better illuminate and attain the nuanced diversity befitting a nation of immigrants.

530. Chang, *supra* note 6.

531. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978); Grutter v. Bollinger, 539 U.S. 306, 319 (2003); Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 331 (2013) (Thomas, J., concurring).

532. *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (holding Harvard's and UNC's race-based admissions programs as failing to pass strict scrutiny).