

RACIAL STEREOTYPES ABOUT ASIAN AMERICANS AND THE CHALLENGE TO RACE-CONSCIOUS ADMISSIONS IN SFFA V. HARVARD

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Abstract

Following the U.S. Supreme Court's 2023 decision in SFFA v. Harvard to upend nearly fifty years of legal precedent for race-conscious admissions, this article summarizes arguments grounded in decades of social science research that sought to dispel the erroneous claims put forth by the plaintiffs. In critiquing the inaccuracies and contradictions embedded within the Court's opinion, we argue that SFFA and the Court relied on inaccurate logics regarding race that were devoid of empirical research on the heterogeneity amongst Asian Americans as a racial category. We put forth evidence that contextualizes the racialized experiences of Asian Americans—influenced by historical immigration patterns of exclusion and hyperselectivity—and how they facilitate harmful stereotypes such as the model minority myth. Thus, it is incumbent upon social scientists to actively counteract misinformation and misrepresentation through the continued production and dissemination of empirical research. While race-conscious admissions may no longer be permissible, we contend that universities and colleges are uniquely positioned to reimagine new avenues for enhancing educational access that is rooted in racial equity.

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INTRODUCTION

In June 2023, the U.S. Supreme Court upended nearly fifty years of precedent by striking down Harvard's and the University of North Carolina, Chapel Hill's race-conscious admissions policies, in *Students for Fair Admissions [SFFA] v. Harvard* and *SFFA v. University of North Carolina [UNC]*. In a consolidated opinion authored by Chief Justice Roberts, the Court held that the consideration of race as one of many factors in admissions violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, in part, because the admissions programs at each institution "lack[ed] sufficiently focused and measurable objectives warranting the use of race, involve[d] racial stereotyping, and lack[ed] meaningful end points."¹ In two separate dissenting opinions, Justice Sotomayor and Justice Jackson, respectively, framed the majority's conclusion as an "unjustified exercise of power"² lacking "any basis in law, history, logic, or justice."³ Their dissents draw from the extensive body of research and the evidence presented in the trial court supporting the constitutionality of the practice. The rationale in each of the dissenting opinions and that of the majority's opinion reflect two wholly different understandings (and use) of the social science evidence informing the legal issues.

In fact, the role of social science, and its absence—as reflected in the outsized role that misinformation about Asian Americans played in the case against Harvard—was particularly concerning for those of us in the social science community who study these issues and who believe that legal developments should be grounded in empirical realities rather than inaccuracies or myths. Thus, as the lawsuit against Harvard made its way through the courts, it became crucial for us, as social scientists, to counter this misinformation and present, at all stages of the deliberations, the comprehensive body of rigorous research that supported the legality of Harvard's policy. At the trial court, 531 social scientists and scholars on college access, Asian American Studies, and race filed an amicus curiae brief in support of Harvard. At the court of appeals, 678 social scientists and scholars joined the amicus brief. And at the Supreme Court, 1241 social scientists joined in an unprecedented collective effort to inform the Court's deliberations with the social science research relevant to the legal issues. Each brief was led by a select group of scholars from institutions across the United States (including four coauthors in this article), with the assistance of a pro bono attorney.

In this article, we draw from the arguments and synthesis of research presented in the amicus brief filed at the Supreme Court by 1241 social scientists and scholars to explain the myths and inaccuracies about Asian Americans that underlie the

1 *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023). [hereinafter *SFFA v. Harvard*]. In a footnote, the Court explained that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." The Court proceeded under the assumption that the same standard of scrutiny applied to each university's admissions policy. *Id.* at 198, n. 2.

2 *Id.* at 384 (Sotomayor, J., dissenting).

3 *Id.* at 385 (Jackson, J., dissenting).

majority and concurring opinions, and the implications of this misuse of social science for the future of race-conscious educational policies. We argue that the majority opinion and concurring opinions reflect inaccurate logics about Asian Americans, including their questioning of the heterogeneity of Asian Americans as a racial category and their paradoxical use of the same category to ascribe discrimination. Additionally, we emphasize the role that race-conscious admissions play in the lives of Asian Americans, and the myths that SFFA advanced in its arguments that were adopted by the Court.

In Part I of this article, we outline the background of the challenge against Harvard and the interest that motivated social scientists to file an amicus brief in the case. In Part II, we present a summary of social science research that describes how immigration patterns—embedded in either federally sanctioned exclusion or through hyperselectivity—have facilitated harmful stereotypes such as the model minority myth, and we dispel the inaccuracies about Asian Americans underlying the majority’s opinion and Justice Thomas’s concurrence in particular. In Part III, we conclude with important implications based upon the Court’s ruling for educational policy and practice, which will require new and renewed commitments to racial equity efforts.

I. BACKGROUND ON THE CASE AND THE INTEREST OF SOCIAL SCIENTISTS

The lawsuits against Harvard and UNC Chapel Hill were led by conservative activist Edward Blum, who established SFFA with the explicit aim to eliminate the use of race-conscious affirmative action in college admissions. Blum is no stranger to the Court and has led other affirmative action cases. Prior to *Harvard* and *UNC*, Blum challenged the University of Texas at Austin’s admissions policy by recruiting Abigail Fisher as his plaintiff in *Fisher v. Texas*, which went up to the Supreme Court twice.⁴ Indeed, Blum maintains a notorious history of utilizing legal challenges to dismantle long-held civil rights policies, including minority voting rights. In 2013, Blum led a successful case that ended federal review of changes to election practices in places that had previously discriminated against minority voters. That case, *Shelby County v. Holder*,⁵ significantly weakened the 1965 Voting Rights Act.⁶

As social scientists specializing in educational matters that focus on Asian Americans, college access, and/or racial dynamics within higher education, we were concerned about the inaccurate and misguided arguments SFFA advanced to challenge Harvard’s race-conscious admissions policy. In light of this concern, we felt compelled as experts to provide the Court with the empirical evidence that substantiated the legality of Harvard’s admissions policy and addressed SFFA’s arguments. We wanted the Court to base its decision on rigorous research informing

4 570 U.S. 297 (2013) [hereinafter *Fisher I*]; *Fisher v. Texas*, 579 U.S. 365 (2016) [hereinafter *Fisher II*].

5 570 U.S. 529 (2013).

6 See, e.g., Pamela Edwards, *One Step Forward, Two Steps Backward: How the Supreme Court’s Decision in Shelby County v. Holder Eviscerated the Voting Rights Act and What Advocates Should Do About It*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 174 (2015).

the educational judgments Harvard considered in designing and implementing its whole-person review process, rather than the disinformation and unverified assertions SFFA presented. For example, we were concerned by SFFA's reliance on racial stereotypes and the myth of an Asian penalty, its excessive focus on limited measures of academic success that research has shown to be unreliable as isolated measures of merit, and specious manipulation of data to present an inaccurate and nonempirical argument about the negative impact of race-conscious admissions on Asian American applicants. Ultimately, amici were concerned that the removal of race-conscious admissions would harm, rather than benefit, Asian American applicants by dismantling long-held civil rights tools that uplift minoritized and communities of color, including Asian Americans. Thus, the brief drew on amici's original research and their review of the literature, including the most extensive and up-to-date body of knowledge about how race-conscious admissions processes benefit Asian Americans.

Over 1200 amici researchers and nationally recognized scholars with doctoral degrees joined the brief. The group consisted of researchers and scholars from 381 colleges, universities, institutions, and organizations throughout the United States, with expertise spanning numerous fields and disciplines, including education, Asian American Studies, sociology, anthropology, psychology, public policy, political science, and history. Many amici members are recipients of national honors and awards in their respective fields. Twenty-seven amici are members of the American Academy of Arts & Sciences, 32 are members of the National Academy of Education, 40 are fellows of the American Educational Research Association, and 70 are past or current presidents of national organizations such as the American Educational Research Association, the Association for the Study of Higher Education, and the Association for Asian American Studies.

II. DISPELLING INACCURACIES ABOUT ASIAN AMERICANS IN THE DECISION

In pending nearly half a century of Court precedent, the majority opinion reflected significant inaccuracies and troubling assumptions concerning the lived experiences of Asian Americans. Specifically, the Court (1) utilized problematic racial stereotypes about Asian Americans, (2) weaponized the diversity of Asian Americans as a racial category, and (3) proliferated the misconception that race-conscious admissions processes harm Asian American applicants. Our amicus brief addressed many of these erroneous claims, and the following sections will explain each of these errors in greater detail.

A. Racial Stereotypes About Asian Americans

The Court relied on problematic racial stereotypes about Asian Americans in its majority opinion. The entire framing of the case by SFFA suggested that Asian Americans as a whole faced a penalty in admissions. This assertion fundamentally rests on a harmful racial stereotype that frames Asian Americans as a so-called "model minority"—where they are viewed as unparalleled in their academic achievements and occupational successes, due to their inherent values about

education and hard work, more so than other racial minorities.⁷ The model minority myth relies on multiple erroneous characteristics about Asian Americans, including: (1) all group members are the same; (2) members are not really racial and ethnic minorities; (3) they do not encounter challenges due to their race; (4) they do not seek or require resources or sources of support; and (5) their college degree attainment is equated to achieving success.⁸ Consequently, the model minority myth stereotype has remained contested: on one hand, “opponents of equal opportunity programs or policies” have weaponized the stereotype for policy-dismantling agendas; on the other hand, social scientists have sought to dispel the stereotype and to highlight complex educational experiences of Asian Americans that are intersected with intraracial diversity, immigration, and socioeconomic status.⁹ In this section, we outline the social and historical factors that further propel the model minority myth stereotype and that SFFA and Justice Thomas disregard. Specifically, we outline exclusion-oriented and hyperselective immigration policies enacted by the United States that drive academic achievement for some Asian Americans, while reinforcing negative stereotypes about other students of color, and related arguments about the academic achievement of Asian Americans that leverage the model minority myth stereotype.

1. *Immigration Policies and Effects on Asian Americans*

Much of the Court’s reasoning citing negative discrimination as a basis for banning race-conscious admissions reproduced negative stereotypes against Asians and Asian Americans. Asians and Asian Americans are too often characterized as a hardworking, meritorious racial monolith—without considering the unique experiences of ethnic groups that fall within the Asian diaspora. In addition to cultural, heritage, or linguistic diversity, these experiences include differences regarding immigration or refugee backgrounds and income level. Research and data provided in our brief highlighted Asian Americans having the largest in-group economic disparity—with “Asians in the top 10% of the income distribution earning 10.7 times more than Asians in the bottom 10th percentile between 1970 and 2016.”¹⁰ Research demonstrates that income inequalities are linked to immigration and migration patterns—with the Immigration and Nationality Act of 1965 allowing educated, professionally skilled Asian migrants into the United States. On the other hand, refugees from countries, such as Vietnam, Laos, and Cambodia, arrived and resettled into the United States under completely different circumstances and, as a result, face a multitude of challenges that exacerbate socioeconomic disparities.¹¹

7 OiYan Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. EDUC. RSCH. 469, 473–76 (2016).

8 Samuel D. Museus & Peter N. Kiang, *Deconstructing the Model Minority Myth and How It Contributes to the Invisible Minority Reality in Higher Education Research*, 142 NEW DIR. FOR INSTT. RSCH. 5 (2009).

9 *Id.*

10 Rakesh Kochhar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America’s Racial and Ethnic Groups*, PEW RSCH. CTR. (2018), <https://www.pewresearch.org/short-reads/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups/>.

11 SE. ASIAN RES. ACTION CTR., *SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES* (2020).

Contrary to how the Court's majority opinion,¹² and Justice Gorsuch's¹³ and Justice Thomas's¹⁴ concurring opinions, paradoxically criticize race and racial categories, as well as how Justice Thomas specifically utilizes anecdotal stereotypes derived from the model minority myth,¹⁴ key historical and policy mechanisms—not innate ability or inherent cultural attitudes—account for differences in GPA and test scores between Asian Americans and other racial groups. Building on decades of scholarship in Asian American Studies to illuminate the historical and social origins of the Asian American educational achievement advantage, sociologists Jennifer Lee and Min Zhou provide strong evidence from quantitative and other sources of empirical data that Asian American academic achievement “cannot be explained by superior traits intrinsic to Asian culture or by the greater value that Asians place on education or success.”¹⁵

Instead, a strong body of research shows that Asian Americans' notable educational success (on average) is due to contextual factors, including immigration policies. Although previous immigration policies in the eighteenth, nineteenth, and twentieth centuries, such as the Chinese Exclusion Act of 1882, Immigration Act of 1917, and Immigration Act of 1924 placed racial quota systems and other restrictions on specific Asian countries,¹⁶ throughout much of the Exclusion Era, there were limited exceptions granted to allow for the migration of Chinese and other Asian international students¹⁷ to the United States. Moreover, the Immigration and Nationality Act of 1965 included amendments that highlighted two immigration priorities: highly valued skills and family reunification.¹⁸

Despite previous restrictive and exclusionary policies, the Immigration and Nationality Act of 1965 facilitated a hyperselective process that encouraged the migration of educated or skilled Asian immigrants into the United States. Thus, the “hyper select[ion] of immigrants from certain Asian countries explains why the typical immigrant admitted to the United States from China is more likely to have a college degree than both the average US resident and the average resident in China.”¹⁹ In contrast, the typical Mexican immigrant admitted to the United States is less likely than the typical Mexican resident to hold a college degree.

12 *SFFA v. Harvard*, 600 U.S. 181, 216 (2023).

13 *Id.* at 291 (Gorsuch, J., concurring).

14 *Id.* at 282 (Thomas, J., concurring).

15 JENNIFER LEE & MIN ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* 29 (2015).

16 Jane Junn, *From Coolie to Model Minority: U.S. Immigration Policy and the Construction of Racial Identity*, *DU BOIS REV.* 355, 362–65, 368 (2007).

17 See MADELINE Y. HSU, *THE GOOD IMMIGRANTS: HOW THE YELLOW PERIL BECAME THE MODEL MINORITY* 47–48 (2015).

18 Pub. L. No. 89-236, 79 Stat. 911 (1965); Madeline Y. Hsu & Ellen D. Wu, “Smoke and Mirrors”: *Conditional Inclusion, Model Minorities, and the Pre-1965 Dismantling of Asian Exclusion*, *J. AM. ETHNIC HIST.* 43, 53–54 (2015); Jennifer Lee & Min Zhou, *From Unassimilable to Exceptional: The Rise of Asian Americans and “Stereotype Promise,”* 16 *NEW DIVERSITIES*, 7, 10–13 (2014), https://newdiversities.mmg.de/wp-content/uploads/2014/11/2014_16-01_02_Lee.pdf.

19 Raquel Rosenbloom & Jeanne Batalova, *Chinese Immigrants in the United States*, *MIGRATION INFORMATION SOURCE* (2023), <https://www.migrationpolicy.org/article/chinese-immigrants-united-states>.

Overall, the lasting impact of the Immigration and Nationality Act of 1965 allowed an influx of highly educated Asian immigrants to enter the United States through employment-based preferences.²⁰

These two immigration priorities—the selection of highly educated immigrants and family-reunification—continue to shape immigration into the twenty-first century. The majority of Asian American adults (71%) are foreign-born²¹ and the vast majority of current Asian immigrants (of all legal statuses) that arrived after 1990²² more likely benefited from the increased number of visas granted due to occupational skills and education.²³ In 2020, immigrants from China and India accounted for more than 85% of all H1-B visa grantees,²⁴ and immigrants from Asia were more likely to be granted permanent residency due to employment-based preferences.²⁵ Further, international student visas are more likely to go toward students from Asia.²⁶ While occupational skills and education have benefited Asian immigrants, family reunification remains a main pathway for all immigrants to enter the United States. Still, there appears to be advantages associated with Asian immigrants who were recruited based on their educational attainment. These same immigrants have been able to sponsor relatives—more likely who share similar educational backgrounds—through family reunification.

Regardless, the United States's hyperselective recruitment of Asian immigrants has notably facilitated the entry of Chinese and Indians—the two largest groups within the Asian racial category. Consequently, this challenges the stereotypical notion that the success of Asian American immigrants in the United States is based on innate intellect or ingrained cultural characteristics. If that were true, we would expect to see the same levels of educational achievement in Asia as in the United States. However, research indicates that more than 50% of Chinese immigrants in the United States held a bachelor's degree, but only 4% of adults in China did in 2015.²⁷ Similarly, approximately 70% of Indian immigrants in the United States earned a bachelor's degree, but only 15% of college-aged adults enroll in college

20 Arun Peter Lobo & Joseph J. Salvo, *Changing U.S. Immigration Law and the Occupational Selectivity of Asian Immigrants*, 32 INT'L MIGRATION REV. 737, 757–58 (1998).

21 Rosenbloom & Batalova, *Chinese Immigrants in the United States*, *supra*, note 19.

22 Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/>.

23 Mary Hanna & Jeanne Batalova, *Immigrants from Asia to the United States*, MIGRATION POL'Y INST. MIGRATION INFO. SOURCE (Mar. 10, 2021), <https://www.migrationpolicy.org/article/immigrants-asia-united-states-2020>.

24 Muzaffar Chishti & Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, 2 (2016), MIGRATION POL'Y INST., <https://www.migrationpolicy.org/research/immigration-act-1990-still-unfinished-business-quarter-century-later>.

25 Hanna & Batalova, *Immigrants from Asia to the United States*, *supra* note 23, at 29.

26 Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations* (Aug. 2014), GLOB. CITIES INITIATIVE, https://www.brookings.edu/wp-content/uploads/2014/08/foreign_students_final.pdf.

27 Jennifer Lee, *From Undesirable to Marriageable: Hyper-Selectivity and the Racial Mobility of Asian Americans*, 662 ANNALS AM. ACAD. POL. & SOC. SCI., 79, 82 (2015).

in India.²⁸

While several Asian American groups willingly chose to immigrate to the United States, it is important to recognize that Southeast Asian Americans experienced forced migration from their home countries, fleeing war, violence, and genocide.²⁹ The mass exodus of refugees from Southeast Asia in the 1970s and 1980s can be attributed to a combination of factors, including the legacies and repercussions of colonization and war.³⁰ The involuntary nature of Southeast Asians' arrival in the United States, driven by circumstances beyond their control, carries significant implications for their markedly differing levels of educational attainment.³¹ For example, in 2016, 29% of Vietnamese, 18% of Hmong, 18% of Laotian, and 16% of Cambodians earned a bachelor's degree, compared to 54% of Asians, overall.³² Thus, Asian Americans' educational achievements trace to intentional U.S. immigration policies and other contextual factors, not allegedly inherent cultural traits that are tied to race.

2. Asian American Academic Achievement

A related dimension of the model minority myth that permeated throughout the case focused on Harvard and UNC's evaluations of Asian American students' academic performance. Notably, SFFA narrowly framed them as "substantially stronger" than other demographic groups "on nearly every measure of academic achievement, including SAT scores" and "GPA."³³ Indeed, the majority opinion relied on these academic measures to argue that Asian American applicants with higher standardized test scores and GPAs were less likely to be accepted to Harvard and UNC than non-Asian American applicants with lower test scores and GPAs. The Court wrote that "over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted" and "an African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the top decile (12.7%)."³⁴

28 U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers* 8 (2021), https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2020.pdf; <https://timesofindia.indiatimes.com/home/education/news/only-10-of-students-have-access-to-higher-education-in-country/articleshow/28420175.cms>.

29 Jason Chan, et al., *Forced Migration and Forged Memories: Acts of Remembrance and Identity Development Among Southeast Asian American College Students*, in *SQUARE PEGS AND ROUND HOLES: ALTERNATIVE APPROACHES TO DIVERSE STUDENT DEVELOPMENT THEORY* 114 (Fred A. Bonner II et al. eds., 2021).

30 SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991); KHATHARYA UM, *FROM THE LAND OF SHADOWS: WAR, REVOLUTION, AND THE MAKING OF THE CAMBODIAN DIASPORA* (2015).

31 SE. ASIAN RES. ACTION CTR., *SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES* (2020).

32 NAT'L CTR. FOR EDUC. STAT., *INDICATOR 27 SNAPSHOT: ATTAINMENT OF A BACHELOR'S OR HIGHER DEGREE FOR RACIAL/ETHNIC SUBGROUPS. [DATA SET]* INSTITUTE OF EDUCATION SCIENCES (2019), https://nces.ed.gov/programs/raceindicators/indicator_rfas.asp.

33 *SFFA v. Harvard*, Pet. Br. at 72-73 (2022).

34 *SFFA v. Harvard*, 600 U.S. 181, 197. (2023). In a footnote on page 5, the Court challenged Justice Jackson's dissenting opinion in *Students for Fair Admissions v. University of North Carolina et al.*,

However, decades of social science research have demonstrated that the academic metrics that the Court relied on are not the objective measures that they claim them to be. While the model minority stereotype has serious documented downsides, the presumed academic competence it ascribes to Asian Americans may artificially boost the academic performance of many Asian American students, while doing the opposite for members of other racial minorities.³⁵ Although all stereotypes are harmful, some Asian Americans are able to leverage the model minority stereotype into “symbolic capital” when it comes to education: “The positive perceptions of Asian American students by their teachers, guidance counselors, and school administrators manifest as a form of symbolic capital that positively affects the grades they receive, the extra help they are offered with their coursework, and the encouragement they receive when they apply to college.”³⁶ Asian Americans are more likely to be placed in AP classes and special programs for the gifted, which are “invaluable institutional resources that are not equally available to all students,” especially to Latinx and Black students.³⁷ In addition, “stereotype promise” born of the model minority myth can spur Asian American students to perform at higher levels than they would without the positive views and support of parents, relatives, and teachers.³⁸ Focusing only on test scores and grades, as both SFFA and the majority do, papers over these social and historical forces, disguising positive bias attributed to race as individual effort and merit.

Furthermore, while grades and standardized test scores may appear more objective, a large body of research shows that neither is a fair and impartial measure of academic talent. Data from the organizations that sponsor standardized admissions tests show that scores are in large part a reflection of parental education and family income.³⁹ Asian Americans as a group do well on these measures because on average they are the racial group with the highest levels of educational access, parental education, and income.⁴⁰ Although it is not true of all Asian American subgroups or all applicants within advantaged groups, Asian American applicant files, including teacher recommendations, may emphasize these students’ academic strengths and especially STEM (science, technology, engineering, and mathematics) intellectual interests, more so than for other applicants.⁴¹

U.S. 600 181 (2023). The Court proceeded to claim that race played a factor with both UNC Chapel Hill’s and Harvard’s admissions process.

35 Lee & Zhou, *From Unassimilable to Exceptional*, *supra* note 18, 16–19.

36 LEE & ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX*, *supra* note 15, at 118.

37 *Id.* at 116.

38 *Id.*

39 COLL. BD., 2017 SAT SUITE OF ASSESSMENTS ANNUAL REPORT, TOTAL GROUP 3 (2017); Krista Mattern et al., *ACT Composite Score by Family Income 1* (2016), ACT, INC., <https://www.act.org/content/dam/act/unsecured/documents/R1604-ACT-Composite-Score-by-Family-Income.pdf>; see also Greg J. Duncan & Richard J. Murnane, *Growing Income Inequality Threatens American Education*, KAPPAN MAG., Mar. 2014, at 8, 10.

40 Lee & Zhou, *From Unassimilable to Exceptional*, *supra* note 18. *Supra* note 18 at 5.

41 See Brian Heseung Kim, *Applying Data Science Techniques to Promote Equity and Mobility in Education and Public Policy* (May 2022) (Ph.D. dissertation, University of Virginia) (on file with author).

Perhaps, colleges like Harvard and UNC, should acknowledge the flaws of tests like the SAT and ACT, as they have questionable strength in identifying students who would be academically successful in college.⁴² In order to expand diversity in admissions, colleges should decrease their reliance on these questionable metrics. There has been movement in this direction, as more than one thousand accredited institutions of higher education announced that they would not require standardized tests as part of their admissions practices, even before the height of the COVID-19 pandemic.⁴³ That number has nearly doubled since.⁴⁴ This trend recognizes the limitations of such tests as measures of academic potential among prospective students.⁴⁵ Furthermore, colleges that have opted to either remove standardized testing requirements or go test-optional send a “strong message” to students that “test scores have been a major barrier of access to generations of students, particularly those of underrepresented backgrounds.”⁴⁶ Moreover, the move toward “test free”⁴⁷ compels colleges to shift priorities away from competitive college rankings and toward evaluating applicants as a whole, rather than reducing students to the sum of their scores.

Teachers’ assessments of students, too, are subject to racial biases, which affect GPAs. Scholarship on implicit bias shows that teachers have higher expectations for White and Asian American students than for Black and Latinx students.⁴⁸ A study of more than ten thousand high school sophomores and their teachers found that math and English teachers dramatically underestimated the academic abilities of Black and Latinx students with similar test scores and homework completion relative to their White peers, and that those lower expectations affected student outcomes, including GPA.⁴⁹

Indeed, not every stellar student will receive outstanding test scores or GPAs. In her dissenting opinion, Justice Sotomayor recalled Justice Kennedy’s comments

42 Saul Geiser, *SAT/ACT Scores, High-School GPA, and the Problem of Omitted Variable Bias: Why the UC Taskforce’s Findings Are Spurious*, UC BERKELEY: CTR. FOR STUDIES IN HIGHER EDUC. (2020), <https://cshe.berkeley.edu/publications/satact-scores-high-school-gpa-and-problem-omitted-variable-bias-why-uc-taskforce's>.

43 *More Than 1080 Accredited Colleges and Universities That Do Not Use ACT/SAT Scores to Admit Substantial Numbers of Students into Bachelor-Degree Programs (Current as of Winter 2019–2020)*, FAIRTEST, <https://tinyurl.com/ywcf98mp> (archived link).

44 *1,835+ Accredited, 4-Year Colleges & Universities with ACT/SAT-Optional Testing Policies for Fall, 2022 Admissions (Current as of May 15, 2022)*, FAIRTEST, <https://www.fairtest.org/university/optional>.

45 See, e.g., Kelly Rosinger, *Toppling Testing? COVID-19, Test-Optional College Admissions, and Implications for Equity*, THIRD WAY (Sept. 2, 2020), <https://www.thirdway.org/report/toppling-testing-covid-19-test-optional-college-admissions-and-implications-for-equity#:~:text=With%20physical%20test%20taking%20rendered,shifts%20to%20test%20optional%20admissions..>

46 Julie J. Park & OiYan A. Poon, *Test-free Admissions: Why Wait?* INSIDE HIGHER ED. (Sept. 25, 2023), <https://www.insidehighered.com/opinion/views/2023/09/25/its-time-consider-test-free-admissions-opinion#>.

47 *Id.*

48 See generally Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority Than for European American students? A Meta-Analysis*, 99 J. EDUC. PSYCH. 253 (2007).

49 Hua-Yu Sbastian Cherng, *If They Think I Can: Teacher Bias and Youth of Color Expectations and Achievement*, 66 SOC. SCI. RSCH. 170, 179–80, 179 tbl.6 (2017).

from *Fisher II* that

such a system would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.⁵⁰

B. Diversity Within the Asian American Community

While propelling racial stereotypes about Asian Americans the Court's majority opinion further weaponized the diversity of Asian Americans to eliminate the use of race-conscious admissions. Specifically, the ruling challenged the legitimacy of racial categories and argued that they were an "imprecise"⁵¹ method to fully capture the diversity of Asian Americans. Furthermore, the majority discussed how lower personal rating scores were associated with Asian American applicants, suggesting that racial discrimination occurs when assigning these scores in admissions decisions. In both areas, the Court's majority opinion ignored the empirical research that explains racial and ethnic formation for Asian Americans, and demonstrates the nondiscriminatory reasons associated with the diversity and complexity of the Asian American educational experience, particularly in high school.

1. Racialization and Racial Categories

The Court's majority opinion and Justices Thomas's and Gorsuch's concurring opinions critiqued the Asian American racial category as a mechanism to challenge race altogether. For example, in his concurring opinion, Justice Gorsuch made several blanket statements about the educational experiences of Asian Americans. Notably, the Court's majority believed that racial categories are "overbroad."⁵² Justice Thomas's and Justice Gorsuch's concurring opinions further criticize the utilization of governmental racial categories, particularly as they inaccurately viewed them to be lacking in scientific, anthropological, sociological, and ethnological expertise.⁵³ In his concurring opinion, Justice Gorsuch inaccurately opined:

[t]hese classifications rest on incoherent stereotypes. Take the Asian category. It sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. This agglomeration of so many peoples paves over countless differences in language, culture, and historical experience. It does so even though few would suggest that all such persons share 'similar backgrounds and similar ideas and experiences. Consider, as well, the development of a separate category for Native

50 *Fisher II*, 579 U. S., 365, 386 (2016).

51 *SFFA v. Harvard*, 600 U.S. 181, 216 (2023).

52 *Id.*

53 *Id.* at 291 (Gorsuch, J., concurring).

Hawaiian or Other Pacific Islander. It seems federal officials disaggregated these groups from the Asian category only in the 1990s and only in response to political lobbying. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as Asian rather than Other Pacific Islander.⁵⁴

Here, the Justices advocate for the dismantling of racial categories because of the heterogeneity within racial groups. Interestingly, Justice Alito introduced this similar approach in his dissent in *Fisher II*. This argument, however, illustrates a fundamental flaw with the decision. On the one hand, the decision assumes that Asian Americans, as a racial category, face discrimination. That is, the Court makes the case that Asian Americans, as a whole, face a penalty in admissions. At the same time, the decision attacks the very racial category it relies upon, arguing that diversity within the Asian American category renders the category meaningless.

The Justices' lack of understanding of how racial and ethnic categories are constructed in the United States, and the interplay between the two, is easily explained through social science research. For instance, scholars have long documented the formation of racial and ethnic categories in the United States, and the history of the ever-evolving slipperiness of these categories, especially as they pertain to Asian Americans and Pacific Islanders. Indeed, Asian American and Pacific Islander racial and ethnic categories have been constructed through multiple social and historical forces, including panethnic coalitions due to shared racialized experiences to address common policy concerns, as well as through disaggregated approaches to advance solutions that are unique to specific ethnic communities.⁵⁵ The Court's majority opinion ignores the simple fact that Asian Americans are a racial category with shared experiences that simultaneously are comprised of diverse subgroups with unique differences that can and do occur simultaneously.

Indeed, social science research provides a much more nuanced approach to understanding the category of "Asian American." Yen Le Espiritu writes that construction of the panethnic Asian American category involves the creation of a common heritage through an awareness of their shared "history of exploitation, oppression, and discrimination."⁵⁶ In addressing these shared issues, "Asian American activists found this political label a crucial rallying point for raising political consciousness about social problems, for creating coalitional efforts, and for asserting demands for recognition and resources from state institutions."⁵⁷ Moreover, Janelle Wong and Sono Shah empirically demonstrate the manner in which Asian Americans, who are diverse across national origin, generation,

54 *Id.* at 291-292 (Gorsuch, J., concurring).

55 Omi, Michael, and Howard Winant. *Racial Formation in the United States*, Taylor & Francis Group, (2014); Gogue et al. Inclusions and exclusions: racial categorizations and panethnicities in higher education, *International Journal of Qualitative Studies in Education*, 35:1, 71-89 (2021); M. Omi et al., *Panethnicity and Ethnic Heterogeneity: The Politics of Lumping and Disaggregating Asian Americans and Pacific Islanders in Educational Policy*, in *MEASURING RACE: WHY DISAGGREGATING DATA MATTERS FOR ADDRESSING EDUCATIONAL INEQUALITY* 46-66 (Robert T. Teranishi et al. eds., 2020); Yen Le Espiritu, *Asian American Panethnicity: Bridging Institutions and Identities* (1992).

56 Espiritu, *supra* note 55, at 17.

57 Omi et al., *supra* note 55, at 50.

socioeconomic status, and party identification, shared extraordinary consensus on a wide range of political and social issues.⁵⁸

Ironically, in challenging the racial classification, the majority opinion illustrates how race, particularly the Asian American racial category, can be manipulated for political advantage.⁵⁹ In the end, the remedy proposed by the Court takes aim at social science research that demonstrates that although racial categories are socially constructed, there are real and material consequences to ignoring race, racialization, and racism, such as pathways to citizenship, voting rights, healthcare, employment, property ownership, and wealth accumulation.

2. *Personal Rating*

Although SFFA cited concerns regarding the consideration of race and its effect on an applicant's personal ratings score, there is little factual basis to support SFFA's allegations of discrimination. As a result, the First Circuit correctly affirmed the district court's finding that "when controlling for other factors, race" is correlated with personal ratings, but does not "influence[] the personal rating."⁶⁰ The Court's majority opinion pointed to Asian American applicants scoring lower on the personal rating than other students of color,⁶¹ suggesting that racial discrimination occurs when these scores are assigned and used in admissions decisions. However, there are nondiscriminatory reasons for differences among average personal ratings, which takes into account unique aspects of Asian American educational experiences, as documented in numerous social science research studies.

Within the Harvard application review process, admissions officers rate applicant materials across six categories: academic, extracurricular, athletic, school support, personal, and overall. The overall rating is a composite score of the other five categories previously mentioned. The personal rating accounts for the full range of assets a student may contribute to the campus community. The personal rating prompts admissions officers to review a myriad of applicant materials, such as personal statements, teacher and counselor recommendation letters, and notes from interviews in order to assign a personal rating that encompasses the applicant's perspectives, interests, and talents that may not be reflected in the other categories. Thus, the personal rating reflects a range of qualities an applicant possesses that indicates the applicant's potential to succeed at and contribute to Harvard—all of which may come from the applicant's experience with overcoming adversity, their personal commitment to the community, and future growth. Additionally, the personal rating allows the Harvard admissions committee to consider the diverse range of research and career interests represented amongst the

58 Janelle Wong & Sono Shah, *Convergence Across Difference: Understanding the Political Ties That Bind with the 2016 National Asian American Survey*, 7 RUSSELL SAGE FOUND. J. SOC. SCI. 70 (2021).

59 Jeana E. Morrison et al. *Affirmative Action and Racialization in the United States and Brazil*, in WORLD YEARBOOK OF EDUCATION 2023: RACIALIZATION AND EDUCATIONAL INEQUALITY IN GLOBAL PERSPECTIVE 210 (Janelle Scott & Monisha Bajaj eds., 2023).

60 Petitioner's Appendix, *SFFA v. Harvard*, Appendix A at 87–89 (2021).

61 *SFFA v. Harvard*, 600 U.S. 181, 196 (2023).

pool of applicants.⁶² While race may be “correlated with the applicant’s personal rating, it does not necessarily influence[] the personal rating.”⁶³ UNC follows a similar application review process—admissions readers award a numerical rating for several categories, and admissions readers may attribute a “plus” toward the applicant’s race.

Although personal ratings account for one aspect of the Harvard admissions holistic review process, SFFA utilized the personal ratings as a tool to allege intentional discrimination by the forty-member Harvard admissions committee. Consequently, news media outlets have mischaracterized the personal rating category as a “personality rating,” thereby misinforming the general public that Harvard applicants are assessed on the basis of whether their personality is sparkling or drab.⁶⁴ While the district court found there were limited differences in the personal rating scores amongst applicants and, thus, no evidence of discrimination⁶⁵—which was upheld by the court of appeals—the Supreme Court’s majority opinion ignored both preceding determinations and concluded that race served as a consequential factor in determining an applicant’s personal rating score. Based on the notion that the admissions process is a zero-sum game, the Court’s majority opinion determined that Harvard’s holistic admissions review relied on racially stereotyping applicants⁶⁶ thus, violating the Equal Protection Clause on the grounds that race may never be used as a “negative” or operate as a “stereotype.”⁶⁷ Therefore, the Court’s majority opinion asserts that race serves as a consequential factor in admissions review and decisions.

Notwithstanding this assertion, social science research and data provided two conclusions that can explain the limited differences found amongst the average personal rating scores across racial groups. First, Asian Americans are more likely to attend public high schools, which may have larger student enrollment that affects access to resources. Second, Asian Americans are more likely to apply to selective colleges than other ethnic groups,⁶⁸ which may not reflect the best “fit” for the applicant. Because public high schools are more likely to serve a larger student body, both teachers and guidance counselors experience heavier workloads that affect

62 Petitioner’s Appendix, *SFFA v. Harvard*, Appendix A at 89 (2021). See, e.g., *Id.* at 125, 190–91; JA1419; JA668–70.

63 Petitioner’s Appendix, *SFFA v. Harvard*, Appendix A at 87–89 (2021). See, e.g., *Id.* at 125, 190–91; JA1419; JA668–70.

64 Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES, (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html#:~:text=Harvard%20consistently%20rated%20Asian%2DAmerican,in%20a%20lawsuit%20against%20the>.

65 See *Students for Fair Admissions, Inc., Plaintiff, v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 194 (D. Mass. 2019).

66 *SFFA v. Harvard*, 600 U.S. 181, 220 (2023).

67 *Id.* at 219–20.

68 Brain P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RES. 310, 317 (2010).

their ability to allocate time⁶⁹ toward writing strong letters of recommendation.⁷⁰ This workload is a stark contrast to private high school teachers and guidance counselors—whose workloads may be notably smaller, thus allowing them more time to write in-depth letters of recommendation. Consequently, applicants attending private high schools—who are less likely to be Asian American—have higher chances for consideration due to their higher quality letters. As a result, these applicants are more likely to receive higher school support ratings, which are essential when calculating Harvard’s personal ratings.⁷¹ Such differences in letter quality may point to disparities between private and public schools—rather than race—as an external factor outside of Harvard admissions’ control.

Justice Sotomayor detailed these complex issues in her dissent, writing “under-represented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses. It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.”⁷² Similarly, in her dissenting opinion, Justice Jackson referenced such research examining the relationship between policies, its implications on wealth accumulation, and economic disparities amongst racial groups. While obtaining a college degree can lead to opportunities for professional employment, the legacy of exclusionary policies (e.g., from slavery to property ownership) may not entirely close the economic gap. In her dissenting opinion, Justice Jackson wrote, “in 2019, Black families’ median wealth was approximately \$24,000. For White families, that number was approximately eight times as much (about \$188,000). These wealth disparities ‘exis[t] at every income and education level,’ so, ‘[o]n average, white families with college degrees have over \$300,000 more wealth than black families with college degrees.”⁷³ Still, Justice Jackson argues that pursuing higher education provides opportunities for economic advancement—and the consideration of race as a factor can be a mechanism to acknowledge historical wrongdoings and yields benefits for all applicants alike.

Nonetheless, in his concurring opinion Justice Thomas disagrees with Justice Jackson—claiming the relationship between race and economic disparity reinforces negative stereotypes about racial groups (e.g., poverty is seen as an inherited or cultural trait for particular racial groups). Justice Thomas argues for applicants to be assessed based on their individual abilities to overcome barriers rather than on the color of their skin. Notably, in his concurring opinion, Justice Thomas posits, “how [] would Justice Jackson explain the need for race-based preferences to the

69 ROBERT T. TERANISHI, *ASIANS IN THE IVORY TOWER: DILEMMAS OF RACIAL INEQUALITY IN AMERICAN HIGHER EDUCATION* 78–79 (2010); Ashley B. Clayton, *Helping Students Navigate the College Choice Process: The Experiences and Practices of College Advising Professionals in Public High Schools*, *REV. HIGHER EDUC.* 1401, 1404–09 (2019).

70 Julie J. Park & Sooji Kim, *Harvard’s Personal Rating: The Impact of Private High School Attendance*, *ASIAN AM. POL’Y REV.* 3 (2020), <https://aapr.hkspublications.org/2020/10/04/harvards-personal-rating-the-impact-of-private-high-school-attendance/>.

71 *Id.* See Petitioner’s Appendix, *SFFA v. Harvard*, Appendix B at 173, 189-92 (2021).

72 *SFFA v. Harvard*, 600 U.S. 181, 335 (2023) (Sotomayor, J., dissenting).

73 *Id.* 393–94 (Jackson, J., dissenting).

Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color?"⁷⁴ Despite Justice Thomas's rhetorical question, he does not provide an alternative solution to address the implications of decontextualizing a student experiencing economic disparities by excluding race as a factor. Particularly, for Asian American students who attend public schools and receive less in-depth letters of recommendation, the consideration of race supplements an admissions officer's review process.

A related factor reflected in letters of recommendation for students may include unintentional racial bias affecting how high school guidance counselors and teachers write these letters. While this aspect is in no way intended to be a generalized statement that all high school guidance counselors and teachers are racially biased, research indicates that Asian Americans "are slightly less likely than" otherwise similarly situated White students "to have positive statements about them in letters."⁷⁵ In fact, Asian American students "receive less positive letters than [w]hite students do from *the same teacher*, even conditional on having the same observable characteristics," indicating that "the differences in letter positivity ... observe[d] for Asian students are *primarily* happening at the individual teacher level, rather than the result of sorting to different teachers."⁷⁶ The potential for implicit bias is yet an additional reason why it is critical that admissions officers at Harvard and UNC be able to consider an applicant's race through their respective holistic application review processes.⁷⁷ In contrast to issues with implicit bias in high school letters of recommendation, Harvard and UNC's procedures involve several steps for application review, including an initial reading and scoring of the applicant's materials based on various factors, a multiple-person committee review, and consensus-building following a reexamination of the applicants. For Harvard⁷⁸ and UNC,⁷⁹ race is considered one of many factors during the review (e.g., Harvard's personal rating score) and can also be ascribed a "tip" or a "plus" toward the applicant when considering their potential contributions for the campus. Given the rigor of these processes, the district court correctly found that there was no evidence of bias within Harvard's holistic admissions review process. Yet, even if implicit bias operated within college admissions, removing race-conscious admissions will only make matters worse, as we explain in Part II.C.

Another factor that can explain the marginal differences in personal ratings includes differences in application patterns across racial and ethnic groups. First, Asian American students, in comparison to other racial and ethnic groups, are more likely to apply to highly selective universities.⁸⁰ Second, Asian American students, particularly those from high- and middle-income families, are more likely

74 *Id.* at 286 (Thomas, J., concurring).

75 Kim, *Applying Data Science Techniques*, *supra* note 41, at 139.

76 *Id.* at 140.

77 Lee and Zhou, *From Unassimilable to Exceptional*, *supra* note 18.

78 *SFFA v. Harvard*, 600 U.S. at 194–96.

79 *Id.* at 196–98.

80 An, *supra* note 68, at 310, 317; see See Brian P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RSCH. 310, 317 (2010).

to apply to more colleges than the national population.⁸¹ Finally, Asian Americans may also be more likely than other students to fill out an application to Harvard, even if Harvard may not be the best fit. As a consequence, the cross-section of Asian American students who apply to Harvard is likely to be materially different from the cross-section of applicants of other ethnicities.⁸² Because a materially disproportionate number of Asian American students apply to Harvard every year, it is no surprise that many of them—like many high achieving students of all races and ethnicities—do not receive the highest possible personal rating at Harvard, which rejects more than 95% of applicants every year.

C. Harm and Benefits

Justice Gorsuch's concurring opinion reiterates the sentiments of the majority opinion, further arguing that race influenced the admissions officers to "award a 'tip' or 'plus' to applicants from certain racial groups, but not others."⁸³ Justice Gorsuch asserts that the consideration of race—as a factor—delineates "winners" and "losers" on the basis of their skin color. Notably, he deems Asian Americans as losers in contrast to Black and Latinx students, who are the presumptive winners. Aligning with Justice Thomas's concurring opinion—which categorically opposed the utilization of race—Justice Gorsuch asserts that Harvard's reliance on race reproduced negative stereotypes against Asians, without regard to the cultural, language, and historical differences amongst ethnic groups who fall within the scope of the "Asian" category. As Justice Thomas's and Justice Gorsuch's concurring opinions state, Harvard's utilization of race fell into danger of employing a stereotype where all Asian Americans are the same and think alike.

But these conclusions belie the evidence presented at trial and considered in the district court's and the court of appeals' decisions. For example, trial testimony showcased how Asian American applicants actually benefit from Harvard's approach to the personal rating, which allows them to counter harmful racial stereotypes by displaying their full selves. Harvard students Thang Diep and Sally Chen both testified and placed their Harvard applications into evidence.⁸⁴ Each application demonstrated the students' academic qualifications and highlighted their diverse Asian American identities.⁸⁵ Thang's personal statement included positive declarations concerning his racial and ethnic identity, stating that he was "no longer ashamed of [his] Vietnamese identity" because his high school "program allowed [him] to embrace" it.⁸⁶ Thang's identity, experiences, and leadership in confronting racism as a low-income Vietnamese American immigrant were central to his successful application, even though his SAT score was "on the lower end

81 Mitchell J. Chang et al., *Beyond Myths: The Growth and Diversity of Asian American College Freshman, 1971–2005* 16, HIGHER EDUC. RSCH. INST. UNIV. OF CALIF. L.A. (2007), <https://www.heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/BeyondMyths-AsianTrends.pdf>.

82 JULIE J. PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 90–91 (2018).

83 *SFFA v. Harvard*, 600 U.S. at 294 (Gorsuch, J., concurring).

84 *SFFA v. Harvard*, 2 Joint Appendix. 947-58, 967-72 (Court of Appeals 2022).

85 *Id.*

86 *Id.* at 947-958.

of the Harvard average.”⁸⁷ Sally Chen similarly did not have test scores stellar enough for her high school counselor to encourage her to apply to Harvard—but her admissions file noted that her Chinese American cultural background and engagements *contributed* to her sense of “responsibility to advoca[te]” and “speak[] up,” and bolstered her “Personal Qualities Rating.”⁸⁸ She testified that she “appreciated the ways in which [her] admissions reader saw what [she] was trying to say when [she] was talking about the significance of growing up in a culturally Chinese home.”⁸⁹

Contrary to Justice Gorsuch’s concurring opinion, Thang and Sally benefited from Harvard admissions officers’ consideration of their diverse racial and ethnic experiences when reviewing application materials and awarding personal scores. In fact, Thang and Sally’s testimonies demonstrated qualities such as persistence with overcoming adversity, personal commitment, and future growth—all of which admissions officers considered when assessing the applicant’s potential to succeed and contribute to Harvard and beyond. Arguably, these are also qualities that the Court’s majority opinion expressed admissions officers can consider if applicants write, in essays, about how their experiences, in relation to race, are directly connected to “courage and determination.”⁹⁰ However, this language places a burden on students to connect their experiences (e.g., embracing a Vietnamese identity) with the qualities that admissions officers can deem relevant (e.g., motivation, leadership, courage). The language also assumes that admissions officers will feel free to connect the two, which is particularly challenging with a decision that also tells them race cannot be part of their consideration. By disconnecting a student’s racial background/experience from the knowledge, skills, or values that background/experience may represent and prohibiting a consideration of the first (racial background and experience), the Court’s majority decision ultimately deprives future students of the benefit of having the totality of their racialized experiences considered by admissions officers.

The Court’s majority opinion relies on inaccurate assumptions about Asian Americans to construct a false argument. In his concurring opinion, Justice Thomas furthers this assertion by stating, “Asian Americans can hardly be described as the beneficiaries of historical racial advantages.”⁹¹ Justice Thomas continues on to recount various racist and discriminatory policies—from nineteenth-century Chinese exclusion⁹² and its contemporary, twentieth-century Japanese internment⁹³ and immigration quotas, to segregation—some of which have been sanctioned by the Supreme Court. While Justice Thomas concedes that several civil rights violations, like segregation, have later been overturned by the Supreme Court,

87 *Id.*

88 *Id.* at 967-972.

89 *Id.*

90 *SFFA v. Harvard*, 600 U.S. 181, 231 (2023).

91 *Id.* at 272 (Thomas, J., concurring).

92 See 1882 Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (May 6, 1882).

93 See *Korematsu v. United States*, 323 U.S. 214 (1944).

“remedies” like affirmative action occur at the “expense of Asian American college applicants.”⁹⁴

However, the empirical evidence suggests that the opposite is true. Failing to consider race as one of many factors in admissions would instead harm Asian American applicants. As previously discussed, Southeast Asian Americans arrived as refugees and under completely different circumstances compared to East and South Asian immigrants. These vividly contrasting migration patterns resulted in differing education attainment rates, lower rates of attending highly selective universities, and lower rates of college degree attainment. Additionally, Southeast Asian Americans are overrepresented at the community colleges—with some intending to complete introductory coursework to transfer into four-year universities, hopeful to potentially benefit from race-conscious admissions programs. Indeed, race has a complex history with higher education and also has increased access for underrepresented groups, including Southeast Asian Americans.

Prior to the Court’s ruling, Southeast Asian Americans were already underrepresented at highly selective universities like Harvard and UNC. Thus, given the Court’s decision, at best we can expect this underrepresentation to remain or at worst observe this disparity to further widen. Still, the Court’s majority opinion and Justices Thomas’s and Gorsuch’s concurring opinions punish Southeast Asian American students and is a disservice to the heterogeneous experiences of Asian Americans. Indeed, “[r]emoving considerations of race and ethnicity from Harvard’s admissions process entirely,” the district court found, “would deprive applicants, including Asian American applicants, of their right to advocate for the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.”⁹⁵ And such a restriction would limit the ability of colleges and universities to build a truly diverse class of students and “to pursue the educational benefits that flow from student body diversity.”⁹⁶

The Court’s majority opinion’s contention that the *only* way to mitigate such biases is to remove race as a consideration from Harvard’s admissions process defies logic. Eliminating any awareness of race in admissions would only *perpetuate* biases,⁹⁷ and would limit and/or deny Harvard’s ability to account for structural racial biases, such as disparities in K–12 schooling where research indicates that few aspects of any child’s educational journey remain untouched by racial biases, which are all too common and can have devastating effects. We can see an example

94 *SFFA v. Harvard*, 600 U.S. at 273 (2023) (Thomas, J., concurring).

95 *SFFA v. Harvard*, Petition Appendix. 246 (Court of Appeals. 2020).

96 *Fisher II*, 579 U.S. 365, 376 (2016) (quotation marks omitted).

97 Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-level Administrators Understand a Prohibition on Race-conscious Postsecondary Admissions Policies*, 52 AM. EDUC. RSCH. J. 828, 849–55 (2015); Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781, 781–83, 790–803 (2015); Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective* iv (2005), AM. ASSN. COLLS. & UNIVS., https://web.stanford.edu/group/siher/AntonioMilemChang_makingdiversitywork.pdf.

of this in teachers' letters of recommendation which can contain more positive sentences when written for White applicants than for Black and Asian American applicants. Those content differences are largely influenced by students' access to, and involvement in, specific activities, coursework, and opportunities from other parts of the educational pipeline. Supposedly "neutral" recommendation letters seem to reify other disparities in education, which are themselves affected by racial biases and race-linked opportunities from preschool onward.⁹⁸ Unless admissions officers are aware of this and thus able to effectively account for it in reviewing applicant files, the file materials are poised to magnify the effects of race-based disparities that affect an applicant's submissions.

Indeed, removing any consideration of race would not result in more Asian American students being admitted across the board. Rather, removing any consideration of race would result in displacing some Asian American students who have benefited from race-conscious holistic admissions.⁹⁹ Anthony Carnevale and Michael C. Quinn demonstrate that by practicing admissions using a race-evasive approach,

one in five of the Asian American students attending [highly selective] colleges would not have been admitted under a test-only admissions policy. And, further, the Asian American students who would be displaced by such a policy are almost twice as likely as non-Asian American students to have low test scores (in the bottom quartile of the applicant pool).¹⁰⁰

Contrary to the Court's decision, social science research demonstrates that race-conscious admissions benefit Asian American students, especially given their highly diverse experiences. And even when incorrectly treating Asian Americans as a monolith, as SFFA and the Court's majority opinion did, holistic-review practices can increase the odds of admission for Asian Americans at highly selective universities, while also maintaining high academic metrics of achievement, as well as socioeconomic and racial diversity, within an admitted class.¹⁰¹ Harvard's statistics confirm those social science findings. Even among the subset of applicants that SFFA focused on (nonathletics, lineage, dean / director lists, and children of faculty / staff applicants), for the years under review in this case, Asian American applicants were admitted at a higher rate (5.15%) than White applicants (4.91%).¹⁰² And the proportion of Asian Americans in each admitted class at Harvard increased by 29% in the decade leading up to the years under review.¹⁰³ Petitioner's allegation of intentional discrimination against Asian Americans—who are 6% of the U.S. population, over

98 Kim, *Applying Data Science Techniques*, *supra* note 41, at 137–39.

99 Anthony Carvalae & Michael C. Quinn, *Selective Bias: Asian Americans, Test Scores, and Holistic Admissions* (2021), GEO. UNIV. CTR. ON EDUC. AND THE WORKFORCE, <https://cew.georgetown.edu/cew-reports/selectivebias/>.

100 *Id.*

101 Michael N. Bastedo et al., *Information Dashboards and Selective College Admissions: A Field Experiment* 3 (2017).

102 SFFA v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019), District Court Document. 419-33 ¶¶ 70-71 & Exhibit. 7; Dist. Ct. Doc. 420 ¶ 229; Dist. Ct. Doc. 414-2 ¶ 638.

103 *Id.* at 420 ¶ 113; *see also* SFFA v. Harvard, Petition Appendix at 207-208.

25% of students admitted to Harvard's incoming class, and nearly 30% of enrolled students—lacks a basis in common sense as well as evidentiary support.¹⁰⁴ Those statistics and research indicate that Asian American applicants benefit from Harvard's whole-person review. The fact that Asian American applicants benefit from Harvard's whole-person review is no surprise—because individual Asian American applicants come from a diverse set of backgrounds and experiences.¹⁰⁵

III. THE FUTURE OF RACE CONSCIOUS ADMISSIONS

Since the Court's 1978 decision in *Regents of the University of California v. Bakke*,¹⁰⁶ the U.S. Supreme Court has slowly chipped away at race-conscious tools that permit colleges and universities to build a racially and ethnically diverse student body. The effects of this trend will likely pose significant and adverse consequences for students of color, including Asian Americans, in the realm of college admissions. This final part will outline these consequences and the implications for future racial equity efforts, with a particular focus on the role of Asian Americans in this ever-evolving issue, including considering the impact of race in personal statement prompts and demonstrating new or renewed commitments to racial and ethnic diversity across all programs, offices, and units within the organizational structure of the university.

A. Asian Americans and Affirmative Action

Contrary to the SFFA agenda, multiple surveys of Asian American adults conducted between 2001 and 2020 revealed strong support for race conscious admissions—with support ranging from 61% to 70%.¹⁰⁷ Even Asian American opponents of race-conscious admissions policies support principles of whole-person review.¹⁰⁸ That support likely reflects the benefits that Asian American applicants reap from processes that evaluate them as individuals. Findings show that an overwhelming majority of Asian Americans are greatly benefiting from their college experiences,

104 U.S. Census Bureau, Quick Facts, Population Estimates (2021), <https://www.census.gov/quickfacts/fact/table/US/PST040222>; 25 Harvard Coll., Admissions Statistics, <https://college.harvard.edu/admissions/admissions-statistics>; see also *SFFA v. Harvard*, Petition Appendix. 113, 207-08, 264 (Court of Appeals.2022).

105 See *supra*, 386-390.

106 438 U.S. 265 (1978).

107 Jennifer Lee et al., *Asian American Support for Affirmative Action Increased Since 2016*, DATA BITS BLOG FOR AAPI DATA (Feb. 4, 2021), <https://aapidata.com/blog/affirmative-action-increase/>; AAPI Data, *Inclusion, Not Exclusion: Spring 2016 Asian American Voter Survey A25*; AAPI Data, *An Agenda for Justice: Contours of Public Opinion Among Asian Americans 8–9* (2014), <http://aapidata.com/wp-content/uploads/2014/11/APV-AAJC-issues-nov7.pdf>; Nat'l Asian Am. Survey, *Where Do Asian Americans Stand on Affirmative Action?* (June 24, 2013), <https://naasurvey.com/where-do-asian-americans-stand-on-affirmative-action/>; Pei-te Lien et al., *The Politics of Asian Americans: Diversity and Community* 17, 191 (2004), <https://www.routledge.com/The-Politics-of-Asian-Americans-Diversity-and-Community/Lien-Conway-Wong/p/book/9780415934657>.

108 OiYan A. Poon et al., *Asian Americans, Affirmative Action, and the Political Economy of Racism: A Multidimensional Model of Racial Ideologies*, 89 HARV. EDUC. REV. 201, 223 (2019).

even if they were not admitted to their first-choice school.¹⁰⁹ It is therefore no surprise that SFFA was unable to “present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who it contended should have or would have been admitted absent an unfairly deflated personal rating.”¹¹⁰

Scholars have argued that the racialization of and subsequent racial stereotypes associated with Asian Americans strongly led to their varied role in the affirmative action in college admissions debate.¹¹¹ Vinay Harpalani acknowledges this phenomenon, citing that the complex social and political forces facilitating Asian immigration created a nexus of conflict for Asian Americans being perceived as both the model minority and the perpetual foreigner. Simultaneously, Asian Americans are seen as high academic achieving, “exemplary” minorities and also consistently “othered,” due to perceived ties to their homeland countries. As a consequence, these compounding harmful stereotypes have made Asian Americans—as a racial, minoritized group—ideal targets to serve as a wedge between Whites and other racial minorities concerning access to higher education.¹¹² Thus, Harpalani argues that SFFA exploited the notions of negative action against Asian Americans in the 1980s with affirmative action today, conflating the two as “the first major litigation that has made this link the centerpiece of its attack on race-conscious university admissions.”¹¹³ To combat implications from this conflation, there must be a greater commitment to and engagement with Asian Americans to confront misunderstandings—especially those that are deviously deployed by organizations like SFFA—about panethnic heterogeneity and diversity across Asian American ethnic groups. Cross-racial alliances must also be sustained in continuing to advocate for racial justice and to repair the coalitional harm that the Court’s ruling may have—specifically by creating the false appearance that Asian Americans collectively seek to undermine race-conscious policies in education.

B. Reconsidering Race Within Personal Statements

Despite the Court’s decision to end race-conscious admissions, at the end of its majority opinion, the Court acknowledged that “nothing in the opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹¹⁴ This language in the opinion leaves room for important considerations about how an applicant’s experience in relation to race is connected to skills, knowledge, or the values that an applicant brings, and that would advance institutional goals. However, the Court follows this language with an admonition that universities cannot assess a students’ experiences in ways that would otherwise circumvent

109 Mike Hoa Nguyen et al., *Asian Americans, Admissions, and College Choice: An Empirical Test of Claims of Harm Used in Federal Investigations*, 49 EDUC. RESEARCHER 579, 587–88 (2020).

110 *SFFA v. Harvard*, Petition Appendix. 246 (Court of Appeals 2020).

111 Morrison et al., *supra* note 59.

112 Vinay Harpalani, *Asian Americans, Stereotypes, and Admissions*, 102 BU L. REV. 233 (2022).

113 *Id.* at 265.

114 *SFFA v. Harvard*, 600 U.S. 181, 230 (2023).

the ruling. Specifically, the Court stated “universities may not simply establish through application essays or other means the regime we hold unlawful today.”¹¹⁵ This language provides an open door for the ongoing threat of litigation by individuals like Ed Blum, who within weeks of the Court’s decision sent a letter to colleges and universities in an effort to overstate the reach of the decision to areas outside of admissions, such as outreach and recruitment, pipeline and pathway programs, data collection, hiring practices, and scholarships and financial aid.¹¹⁶ As postsecondary education professionals try to make sense of a complicated ruling in a sociopolitical context where actors like Ed Blum continue to stoke fear through threats of litigation and other political actors are engaged in coordinated efforts, via proposed or enacted legislation, to ban diversity, equity, and inclusion initiatives at public institutions throughout the country, it may be tempting for universities to default to a place of caution and overcorrect.¹¹⁷ Administrators may respond by weakening or removing racial-equity-oriented policies and programs—such as diversity, equity, and inclusion-related offices, identity-based programs, and diversity-related trainings or curriculum,¹¹⁸—undermining their ability to conduct thoughtful outreach or retention efforts for racially or ethnically minoritized students. During this critical time, universities must ensure their consequential decisions regarding possible changes to policies and programs are based on empirical evidence rather than the political pressures of the moment.

In particular, as universities consider readjusting the personal statement component of their admissions application, there should also be a reimagination of other factors that are not only valuable to admissions, but also aligned with the important role that higher education plays in sustaining the health of our democracy. If we view admissions as an incentive system that rewards actions we value in a multiracial democratic society, universities’ admissions processes should expand the personal score to assess a candidate’s leadership qualities based on the ability to cooperate across racial differences, to give back to marginalized communities, and to disrupt social inequities. This approach would reward students who demonstrate the potential

115 *Id.*

116 Eric Hoover, *SFFA Urges Colleges to Shield ‘Check Box’ Data About Race from Admissions Officers* (July 12, 2023), *CHRON. HIGHER EDUC.*, https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers?sra=true&cid=gen_sign_in.

117 Liliana M. Garces, *Two Cautions for Educators to Consider in the Aftermath of Affirmative Action Decisions* (June 21, 2023), *EDUC. TR.*, <https://edtrust.org/resource/two-cautions-for-educators-to-consider-in-the-aftermath-of-affirmative-action-decisions/>. See also Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 *J. Col. & Univ. L.* 239, 266 (2023).

118 As of July 2023, twenty-two states have proposed forty bills proposing to remove diversity, equity, and inclusion (DEI) offices, DEI positions, mandatory DEI statements in hiring, mandatory DEI training, identity-based programs, and/or other activities that may discriminate on the basis of race, color, ethnicity, national origin, sex, or gender identity from public colleges and universities. Drawing from boilerplate templates developed by conservative think tanks Manhattan Institute and Goldwater Institute, bill language cited concerns regarding the “inculcation” of ideology (i.e., Critical Race Theory) and imposing guilt on individuals based on race. The bills were introduced, passed through their respective state legislations, and some were approved by their state governors while the public awaited the U.S. Supreme Court decisions on *SFFA v. Harvard* and *SFFA v. University of North Carolina*. (For further reading, see Adrienne Lu et al., *Anti-DEI Legislation Tracker* (July 14, 2023), *CHRON. HIGHER EDUC.*, https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts?cid=gen_sign_in)

to contribute to these values and, ultimately, represent a benefit to their future university community. Universities may also consider placing more emphasis on students' economic backgrounds, as well as their high school contexts, as these factors correlate with students' academic performance and ultimately, their underrepresentation in higher education.¹¹⁹

C. Higher Education's Renewed Commitment to Racial and Ethnic Diversity

Admissions offices must make new and renewed concrete commitments to address the damage that the Court's decision poses for racial equity by upholding their ethical and legal obligations to foster equity, facilitate access, promote opportunities, and ensure success for students of color.¹²⁰ To this end, they must take proactive measures utilizing a comprehensive array of approaches to secure these objectives. As Justice Sotomayor wrote in her dissent, "diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow." Colleges and universities, irrespective of the Court's ruling, have a responsibility to champion research, policies, and practices aimed at broadening educational access and addressing racial disparities within higher education, in order to guarantee that "the pursuit of racial diversity will go on."¹²¹

This responsibility entails prioritizing initiatives that enhance campus climate and cultivate a stronger sense of inclusivity for students from diverse backgrounds. These efforts encompass academic, cocurricular, and research-based endeavors, among other strategies. These campus-centric actions should be thoughtfully designed to encourage students to express their full identities. Furthermore, institutions of higher learning must persist in, and expand upon, their efforts to reach out to underserved communities and collaborate on initiatives that bolster pathways to and readiness for higher education. While the Court's conclusions in these cases do not reflect the myriad lessons from research illuminating the diverse experiences of Asian Americans, as researchers, we must redouble our efforts to conduct rigorous empirical research that centers racially marginalized communities and that can be used to counter misinformation through legal briefs, op-eds, and various media platforms. This collective endeavor serves the purpose of informing the general public and future legal deliberations regarding racial equity, that without a doubt will continue.

119 See generally Richard D. Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J. COL. & UNIV. L. 283 (2023).

120 See Feingold, *supra* note 117 at 279.

121 *Id.*

IV. CONCLUSION

In conclusion, the Supreme Court's decision to eliminate the use of race-conscious admissions, as outlined in this article, raises profound concerns about the future of racial diversity in higher education. The dissenting voices, particularly those of Justices Sotomayor and Jackson, underscore the importance of considering historical and systemic disparities and emphasizing the benefits of a diverse student body. Moreover, this article and our work as amici underscores the crucial role of social science research in informing legal deliberations. Indeed, the significance of social science, and its notable absence—underscored by the disproportionate influence of misinformation surrounding Asian Americans in the *Harvard* case—raises considerable concerns for the social science community. As scholars delving into these matters, it is imperative for us to redouble our efforts in counteracting intentional misinformation and misrepresentation. Otherwise the potential repercussions of this decision extend beyond admissions, influencing broader discussions on racial equity and the role of universities in fostering an inclusive and representative educational environment. As institutions grapple with the aftermath of this decision, the call for continued research, advocacy, and a reevaluation of admissions criteria becomes crucial in preserving the principles of racial diversity, equity, and inclusion in higher education.