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### Rejecting Honorary Whiteness: Asian Americans and the Attack on Race-Conscious Admissions

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# REJECTING HONORARY WHITENESS: ASIAN AMERICANS AND THE ATTACK ON RACE-CONSCIOUS ADMISSIONS

*Philip Lee\**

## ABSTRACT

*Since the 1960s, Asian Americans have been labeled by the dominant society as the “model minority.” This status is commonly juxtaposed against so-called “problem” minorities such as African Americans and Latinx Americans. In theory, the model minority narrative serves as living proof that racial barriers to social and economic development no longer exist in America. If Asians can succeed against all odds, the reasoning goes, so can everyone else. Further, if a member of a minority group fails, it is because of their own lack of diligence and ambition, and not some supposed systemic unfairness. However, the model minority narrative serves as nothing more than a legitimizing myth that positions minority groups in opposition to one another and preserves both the benefits and disadvantages of the existing racial hierarchy. Even more, it is an implicit invitation for Asian Americans to assume an “honorary white” status—the dominant society’s conferral of social benefits to nonwhite people who pose little threat to the racial status quo.*

*The recent Harvard affirmative action case brought by Students for Fair Admissions (SFFA) is an apt illustration. SFFA, led by a white conservative crusader against affirmative action, recruited Asian Americans to serve as plaintiffs in a case designed to end race-conscious admissions. However, SFFA’s proposed colorblind remedy will not benefit Asian Americans. Instead, I argue that the interests of Asian Americans converge with other racial minorities in America—a substantive and ongoing convergence of interests to preserve affirmative action in higher education to enhance the learning experience of all students. In doing so, I reveal the critical reasons why Asian Americans should reject the invitation to honorary whiteness, which only serves to hinder America’s ongoing battle against its historic legacy of white supremacy.*

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I. WHITENESS AS AN ACCESS CARD TO EDUCATION DURING AMERICAN SLAVERY AND THROUGHOUT JIM AND JANE CROW

Legal Scholar Cheryl Harris, in a seminal Critical Race Theory article, explains that whiteness in America has taken on the characteristics of property.<sup>1</sup> Harris writes that during the era of slavery, whiteness was a highly valued type of property that served as “a shield from slavery,” while its absence was its devalued counterpart that facilitated the objectification of human beings as property.<sup>2</sup> Whiteness as property continued to exist after slavery. Harris notes, “Even after the period of conquest and colonization of the New World and the abolition of slavery, whiteness was the predicate for attaining a host of societal privileges, in both public and private spheres.”<sup>3</sup> In the realm of access to schools and colleges in America, whiteness has served as an access card to favor educational opportunities for those who have possessed it.

This concept of whiteness as an access card to education can be seen through the evolution of American law. During American chattel slavery, which lasted from 1619 to 1865, almost every Southern state passed laws that prohibited the education of slaves.<sup>4</sup> Indeed, in some of these states, the fine for teaching a slave to read or write was far greater than the reward for killing a runaway slave or the fine for willfully maiming a slave.<sup>5</sup> Thus, the lawmakers in these states deemed the educated slave a greater threat to society than that of the runaway slave or the violent slave master who cut the limbs off their slaves. This is a stark example of how white people had been granted an access card to education and its social and economic benefits, while African Americans, by law, had not.

Even after slavery ended in 1865, whiteness remained a form of valuable property that granted white citizens the right to access the best educational opportunities. After the Civil War, and during a brief period of Reconstruction, many states passed “Separate but Equal” laws instituting Jim and Jane Crow.<sup>6</sup>

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<sup>1</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993).

<sup>2</sup> *Id.* at 1720.

<sup>3</sup> *Id.* at 1745.

<sup>4</sup> ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 106 (1981).

<sup>5</sup> A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 198 (1978).

<sup>6</sup> JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 262 (1994). “Jane Crow” was coined by a pioneering African American woman named Pauli Murray who graduated from Howard Law School and engaged in school desegregation efforts. See ROSALIND ROSENBERG, *JANE CROW: THE LIFE OF PAULI MURRAY* 115 (2017). She brought a feminist perspective to the civil rights struggle and focused on the ways in which both racism and sexism hindered African American women. *Id.* at 123, 132; see also Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233 (1965).

These laws provided for separate spaces for white and nonwhite people. However, while the spaces were separate, nothing was equal about these arrangements.<sup>7</sup> Across the board, nonwhite people received inferior opportunities compared to their white counterparts. Even worse, these inequitable laws received the Supreme Court's imprimatur in 1896 in *Plessy v. Ferguson*.<sup>8</sup>

*Plessy*, decided thirty-one years after the end of slavery, involved Homer Plessy, who appeared white, but was legally classified as African American due to Louisiana's "one-drop rule."<sup>9</sup> Plessy was arrested and jailed for illegally riding in the white section of a railroad car.<sup>10</sup> While seemingly oblivious to the degrading symbolism and inferior conditions of the nonwhite section, the Court did not find an Equal Protection violation because the segregation law reasonably preserved "the public peace and good order" and equally applied to both white and African American passengers alike who sat in seats that were not designated for them.<sup>11</sup> In other words, the highest court in the land upheld Jim and Jane Crow.

*Plessy* justified the legal segregation of white and nonwhite children in elementary and secondary schools (K–12) and adults in higher education. As a result, nonwhite students consistently received inferior educations compared to their white counterparts. The targets of Jim and Jane Crow laws were not limited to people of African descent; instead, these laws had a multiracial dimension that typically applied to all nonwhite peoples. For example, in a 1927 case, a nine-year-old Chinese American third grader named Martha Lum, who lived in Mississippi, wanted to attend the only school in the district where she lived—a

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<sup>7</sup> Historian Richard Kluger notes, "In 1945, the South was spending twice as much to educate each white child as it was per black child. It was investing four times as much in white school plants, paying white teacher salaries 30 percent higher, and virtually ignoring the critical logistics of transporting rural Negroes to their schoolhouses." RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 256–57 (1975).

<sup>8</sup> 163 U.S. 537 (1896).

<sup>9</sup> *Id.* at 538, 552; see also Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 631 (2007) (describing Louisiana's early adherence to the one-drop rule). In 1970, the Louisiana legislature passed a law that provided a mathematical formula to determine blackness (or its absence)—anyone with one-thirty second or less of "Negro blood" would not be designated "black" by state officials. See Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOYOLA L. REV. 255, 257 (1983). This 1970 law was repealed in 1983. See Frances Frank Marcus, *Louisiana Repeals Black Blood Law*, N.Y. TIMES, July 6, 1983, at A1.

<sup>10</sup> *Plessy*, 163 U.S. at 538–39.

<sup>11</sup> *Id.* at 550–51. The Equal Protection Clause of the Fourteenth Amendment states that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

school designated for white children.<sup>12</sup> However, the Mississippi Constitution forbade white and nonwhite children from attending school together.<sup>13</sup> The Supreme Court in *Lum v. Rice*, citing *Plessy* as precedent, held that Mississippi could prohibit Martha Lum from attending the white school without violating the Equal Protection Clause.<sup>14</sup> The Court observed,

Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils; but we cannot think that the question is any different, or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races.<sup>15</sup>

The Court was dividing the world between white people on one hand, and nonwhite people on the other, and this legally constructed dichotomy became the generalized racial guidepost for the effectuation of Jim and Jane Crow.

In 1946, another case would illustrate the segregation that Mexican American school children were experiencing. In that case, Mexican American school children in California sued their school districts alleging that their segregation in the public schools constituted a violation of the Equal Protection Clause.<sup>16</sup> Like African American and Asian American school children in many parts of the country, these Mexican American school children were not allowed to attend schools in California designated for white children. Instead, they were relegated to inferior schools designed for nonwhite children.

In a flicker of hope, the trial court agreed with these plaintiffs, observing that “[a] paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.”<sup>17</sup> The Ninth Circuit upheld the trial court in a narrower opinion that relied solely on the fact that although California law provided for the educational separation of white students from students of other minority groups, including “Indians and certain named Asiatics,” it did not specifically mention Mexican Americans.<sup>18</sup> This case never reached the Supreme Court, so it was only binding

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<sup>12</sup> *Lum v. Rice*, 275 U.S. 78, 79–80 (1927).

<sup>13</sup> *Id.* at 82 (noting “section 207 of the state Constitution of 1890, which provides: ‘Separate schools shall be maintained for children of the white and colored races.’”).

<sup>14</sup> *Id.* at 86–87.

<sup>15</sup> *Id.* at 87.

<sup>16</sup> *Mendez v. Westminster*, 64 F. Supp. 544, 545–46 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774, 781 (9th Cir. 1947).

<sup>17</sup> *Id.* at 549.

<sup>18</sup> *Westminster v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947).

in the Ninth Circuit. Nonetheless, it illustrates how California treated its Mexican American schoolchildren in the mid-twentieth century.

Another type of segregation occurred with Native American school children; however, it took a different form. From the late nineteenth century to the mid-twentieth century, many Native American children were forcibly removed from their homes and placed in segregated boarding schools in an attempt to erase their cultures.<sup>19</sup> Historian David Wallace Adams writes,

For tribal elders who had witnessed the catastrophic developments of the nineteenth century—the bloody warfare, the near-extinction of the bison, the scourge of disease and starvation, the shrinking of the tribal land base, the indignities of reservation life, the invasion of missionaries and white settlers—there seemed to be no end to the cruelties perpetrated by whites. And after all this, the schools. After all this, the white man had concluded that the only way to save Indians was to destroy them, that the last great Indian war should be waged against children.<sup>20</sup>

For Native American schoolchildren in boarding schools, unlike other people of color in public schools, segregated education was achieved by direct coercion in an attempt to “[k]ill the Indian and save the man.”<sup>21</sup> The common linkage that these children had with other minority children in America is that their educational experiences were racially segregated and the educational policies that applied to them were designed to maintain white supremacy.

In summary, inferior segregated education in public schools was mandated not just for African American children, but for all nonwhite children generally.

Racial segregation also applied to American higher education. The underlying disputes in two Supreme Court cases illustrate this fact. First, in *Sweatt v. Painter*, African American student Heman Sweatt sought to pursue a legal education at the University of Texas at Austin (UT Austin), which was designated for white students.<sup>22</sup> However, Texas state law forbade white

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<sup>19</sup> Alia Wong, *The Schools That Tried—but Failed—to Make Native Americans Obsolete*, ATLANTIC (Mar. 5, 2019), <https://www.theatlantic.com/education/archive/2019/03/failed-assimilation-native-american-boarding-schools/584017/>.

<sup>20</sup> DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at 336–37 (1995).

<sup>21</sup> Richard Henry Pratt, the founder of Carlisle Indian Industrial School in Pennsylvania, had a well-known motto that encapsulated the educational philosophy of his school: “Kill the Indian and save the man.” See ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 151 (2014).

<sup>22</sup> *Sweatt v. Painter*, 339 U.S. 629, 631 n.1 (1950) (“It appears that the University has been restricted to white students, in accordance with the State law.” (citing TEX CONST. Art. VII, §§ 7, 14; TEX. REV. CIV. STAT.

students from going to school with African American students, so Sweatt was rejected for this reason alone.<sup>23</sup> While the case was pending, the State of Texas opened a separate law school for African Americans that the Court referred to as “a law school for Negroes.”<sup>24</sup> This newly established school was nowhere close to equal in terms of resources. For example, while UT Austin at that time reported 16 full-time professors and 3 part-time faculty members, 850 students, and a law library containing over 65,000 books, the “law school for Negroes” had no independent faculty or law library upon opening, and subsequently only obtained a faculty of 5 full-time professors, 23 students, and a library of 16,500 books.<sup>25</sup> The Court held that the two law schools were not equal. In terms of the tangible resources, the school designated for white students was found to be superior.<sup>26</sup> However, the Court also compared the intangible resources between the two schools noting:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.<sup>27</sup>

Furthermore, the Court noted, “The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.”<sup>28</sup> In other words, the Court was recognizing that an effective legal education was impossible without the opportunity to engage with people whom the student will later interact with as a member of the legal profession. Thus, the Court ordered that Heman Sweatt be admitted to UT Austin.<sup>29</sup>

Second, in *McLaurin v. Oklahoma State Regents*, George McLaurin, an African American applicant, sought admission to the University of Oklahoma School of Education’s doctoral program.<sup>30</sup> He was denied admission solely on

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Arts. 2643b, 2719, 2900)).

<sup>23</sup> *Id.* at 631.

<sup>24</sup> *Id.* at 632.

<sup>25</sup> *Id.* at 632–33.

<sup>26</sup> *Id.* at 633–34.

<sup>27</sup> *Id.* at 634.

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

<sup>29</sup> *Id.* at 636.

<sup>30</sup> *McLaurin v. Okla. St. Regents*, 339 U.S. 637, 638 (1950).



the basis of his race.<sup>31</sup> While the case was pending, the University of Oklahoma admitted McLaurin to its only education school on a segregated basis, forcing him to sit apart from the white students at a desk in an “anteroom adjoining the classroom.”<sup>32</sup> He was given a designated desk in the library and was not allowed to sit with the white students in the regular reading room, and he was provided with a designated table in the cafeteria and was made to eat at a different time than the white students.<sup>33</sup> The Court ruled for McLaurin because he was not being given an education equal to the white students. Again, the intangible factors of what makes for an effective learning experience played a major role in the court’s decision. The Court wrote that McLaurin’s segregation caused him to be “handicapped in his pursuit of effective graduate instruction.”<sup>34</sup> It noted, “Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>35</sup> The Court, therefore, held that McLaurin “must receive the same treatment at the hands of the state as students of other races.”<sup>36</sup>

The NAACP’s legal strategy in both cases was to cripple Jim and Jane Crow by forcing states to establish two completely separate, but truly equal, educational systems—a cost prohibitive outcome that the states would not be able to achieve.<sup>37</sup> The strategy worked and set the stage for a more direct attack on *Plessy*.

*Sweatt* and *McLaurin* served as two cases that would provide the foundational argument in the case that ended Separate but Equal in 1954. In that year, the Supreme Court decided *Brown v. Board of Education*.<sup>38</sup> *Brown* was a set of consolidated cases that assessed whether the separation of children on the basis of race, notwithstanding the equality or ongoing equalization of material resources, is a violation of the Equal Protection Clause.<sup>39</sup> The Supreme Court,

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<sup>31</sup> *Id.* (“The school authorities were required to exclude him by the Oklahoma statutes[,] which made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught.” (citations omitted)).

<sup>32</sup> *Id.* at 640.

<sup>33</sup> *Id.* The conditions slightly improved during appeal. *Id.* (“For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, ‘Reserved For Colored,’ but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.”).

<sup>34</sup> *Id.* at 641.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 642.

<sup>37</sup> KLUGER, *supra* note 7, at 259.

<sup>38</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>39</sup> *Id.* at 486–88.

relying on the rulings in both *Sweatt* and *McLaurin* that focused on the intangible factors of school quality that were only abundant at white institutions, overruled *Plessy* and held that “[s]eparate educational facilities are inherently unequal.”<sup>40</sup>

## II. WHITENESS AS RACIALIZED EDUCATIONAL ADVANTAGE AFTER *BROWN*

While *Brown* overruled *Plessy*, it did not fully dismantle whiteness as property. Cheryl Harris critiques the ruling in *Brown* for not going far enough in this regard. Harris contends:

White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed. In failing to clearly expose the real inequities produced by segregation, the status quo of substantive disadvantage was ratified as an accepted and acceptable base line — a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so. In accepting substantial inequality as a neutral base line, a new form of whiteness as property was condoned.<sup>41</sup>

Thus, whiteness as an access card to education was not eliminated by *Brown*, it was merely transformed into a de facto—i.e., by fact, not law—racialized advantage. Whiteness could no longer be used as the legal basis for white students to gain access to certain educational institutions, but it would continue to afford holders of the card access to the best educational opportunities. This becomes evident in the struggle for nonwhite students to access higher education.

Twenty-four years after *Brown v. Board of Education*, a challenge to race-conscious admissions in higher education was decided by the Supreme Court. In *Regents of the University of California v. Bakke*, the Court considered the case of Alan Bakke, a white male who had sought admission to the University of California Davis School of Medicine (UC Davis).<sup>42</sup>

During the years that Bakke applied, UC Davis had a “special admissions program,” in which 16 of 100 admitted student slots were reserved for targeted racial groups including “Blacks,” “Chicanos,” “Asians,” and “American Indians.”<sup>43</sup> This program was the medical school’s attempt to increase its racial diversity—something that was almost nonexistent in the early years of the

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<sup>40</sup> *Id.* at 495.

<sup>41</sup> Harris, *supra* note 1, at 1753.

<sup>42</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276–77 (1978).

<sup>43</sup> *Id.* at 272, 274–75.

school.<sup>44</sup> In particular, the special admissions committee sought out indicators of educational or economic disadvantage within these groups.<sup>45</sup> The applicants in the special admissions program received separate consideration from the applicants in the regular admissions pool and did not compete with students in the regular admissions process.<sup>46</sup> Bakke, who was not considered an applicant under the special admissions program, was rejected for both the entering classes of 1973 and 1974.<sup>47</sup>

After years of racially coded educational access and exclusion, the differences in grades and test scores between the admitted students from the regular admissions program and the special admissions students were large. For the class entering in 1973, the average science grade point average (GPA) of the regular admits was 3.51, while the average GPA for the special admits was 2.62.<sup>48</sup> Further, the average percentile score for the Medical College Admission Test (MCAT) for the regular admits in the verbal, quantitative, and science sections were 81%, 76%, and 83%, respectively, as compared to 46%, 24%, and 35%, respectively, for the special admits.<sup>49</sup> For the class entering in 1974, the average science GPA of the regular admits was 3.36, while for the special admits it was 2.42.<sup>50</sup> On the MCAT verbal, quantitative, and science sections, the score percentile averages for regular admits were 69%, 67%, and 82%, respectively, as compared to 34%, 30% and 37%, respectively, for the special admits.<sup>51</sup>

Bakke argued that he was being subjected to reverse discrimination in violation of the Equal Protection Clause because he had been rejected from the program, despite having higher grades and standardized test scores than the average of the minority students admitted from the special admissions program.<sup>52</sup>

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<sup>44</sup> The Court noted, “No admissions program for disadvantaged or minority students existed when the school opened [in 1968], and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians [out of an initial class of fifty]. Over the next two years, the faculty devised a special admissions program to increase the representation of ‘disadvantaged’ students in each Medical School class.” *Id.* at 272.

<sup>45</sup> *Id.* at 275.

<sup>46</sup> *Id.* at 274.

<sup>47</sup> *Id.* at 276–77.

<sup>48</sup> *Id.* at 277.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 278.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 277–78. Bakke’s science GPA was 3.44, and his MCAT score percentiles on the verbal, quantitative, and science sections were 96%, 94%, and 97%, respectively. *Id.* at 278. Goodwin Liu has written about the causation fallacy inherent in Bakke’s argument—i.e., the false presumption that a white applicant denied at a selective institution would have certainly been admitted but for race-conscious admissions. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045,

Under modern constitutional jurisprudence, when a plaintiff, such as Bakke, brings an Equal Protection challenge to state action that makes distinctions based on race, such as the admissions policy implemented by UC Davis, the burden shifts to the university to justify their actions by proving two requirements: (1) a compelling government interest, and (2) narrow tailoring.<sup>53</sup> If the state actor can demonstrate these two requirements, the government action will be upheld as not in violation of the Equal Protection Clause. If not, then the action will be struck down as unconstitutional.<sup>54</sup> This rigorous standard of judicial review is known as “strict scrutiny.”<sup>55</sup>

The Court, in a plurality opinion written by Justice Powell,<sup>56</sup> defined a compelling interest as something that is “both constitutionally permissible and substantial.”<sup>57</sup> UC Davis set forth the following four reasons that it believed were substantial enough to qualify as compelling government interests: “(i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.’”<sup>58</sup> The Court rejected all but the fourth reason—obtaining the educational benefits of diversity—as a compelling government interest.<sup>59</sup>

After it found a compelling government interest, the Court then addressed the requirement of narrow tailoring by asking “whether the program’s racial classification is necessary to promote this interest.”<sup>60</sup> Here, the Court found that the race-conscious admissions program adopted by UC Davis was not narrowly tailored. The Court explained that the fatal flaw of UC Davis’s special admissions program was that white applicants were “totally excluded from a specific percentage of the seats in an entering class.”<sup>61</sup> The Court observed, “No matter how strong their qualifications, quantitative and extracurricular,

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1046 (2002).

<sup>53</sup> *Bakke*, 438 U.S. at 299.

<sup>54</sup> *See id.* at 279.

<sup>55</sup> *See id.* at 290.

<sup>56</sup> A plurality opinion results when no single opinion is supported by a majority of the justices. When this happens, the Court explains that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>57</sup> *Bakke*, 438 U.S. at 305.

<sup>58</sup> *Id.* at 305–06 (citations omitted).

<sup>59</sup> *Id.* at 307–13.

<sup>60</sup> *Id.* at 314–15.

<sup>61</sup> *Id.* at 319.

including their own potential contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.”<sup>62</sup> In contrast, the Court pointed to the Harvard College admissions policy as an alternative model that would survive constitutional scrutiny.<sup>63</sup> The Court noted, “In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”<sup>64</sup> The Court further observed,

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.<sup>65</sup>

In sum, *Bakke* concluded that the educational benefits of diversity were a compelling government interest, but also found that UC Davis’s use of a sixteen-seat quota alongside a separate admissions process for these seats were not narrowly tailored.<sup>66</sup> *Bakke* created the framework for contemporary race-conscious admissions in higher education that would be affirmed by subsequent cases.<sup>67</sup>

For example, in *Grutter v. Bollinger*, Barbara Grutter, a white woman denied admission to the University of Michigan Law School, sued claiming that the law school’s use of race in its admissions process violated her Equal Protection rights.<sup>68</sup> The Court held that obtaining the educational benefits that flow from a diverse student body remain a compelling state interest.<sup>69</sup> On the question of narrow tailoring, the Court found that it was satisfied because the law school’s use of race was “like the Harvard plan approved by Justice Powell [in *Bakke*].”<sup>70</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 316.

<sup>64</sup> *Id.* at 317.

<sup>65</sup> *Id.* at 318.

<sup>66</sup> *Id.* at 320.

<sup>67</sup> *Grutter v. Bollinger*, 539 U.S. 306, 322–23 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); see also *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 303 (2013).

<sup>68</sup> *Grutter*, 539 U.S. at 306.

<sup>69</sup> *Id.* at 325.

<sup>70</sup> *Id.* at 309.

The Court further noted that the law school’s race-conscious admissions policy was “flexible enough to ensure that each applicant [was] evaluated as an individual and not in a way that [made] race or ethnicity the defining feature of the application” and that it “engage[d] in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>71</sup>

In a companion case, *Gratz v. Bollinger*, Jennifer Gratz and Patrick Hamacher—two white applicants—brought an Equal Protection challenge against the University of Michigan after being rejected to its undergraduate program.<sup>72</sup> In this case, the University of Michigan used a 150-point-based admissions procedure that assigned 20 points to all applicants from underrepresented minority groups.<sup>73</sup> Gratz and Hamacher claimed that this race-based policy in the undergraduate admissions process was not constitutionally permissible.<sup>74</sup> The Court, again, affirmed that obtaining the educational benefits of diversity remained compelling.<sup>75</sup> However, unlike in *Grutter*, the Court ruled, “[w]e find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”<sup>76</sup>

In a more recent case, *Fisher v. University of Texas*, Abigail Fisher, a white Texas resident who was rejected to the University of Texas at Austin, challenged the university’s use of race in its undergraduate admissions policy as a violation of her Equal Protection rights.<sup>77</sup> At the time of Fisher’s challenge, the University of Texas was acting pursuant to the Top Ten Percent Law, which provided automatic admission to any student in the top ten percent of their Texas high school classes.<sup>78</sup> For students not in the top ten percent of their classes, such as Fisher, and all out-of-state applicants, the university employed a holistic review process that used race as a plus factor.<sup>79</sup> Fisher claimed that the use of race in

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<sup>71</sup> *Id.*

<sup>72</sup> *Gratz*, 539 U.S. at 251.

<sup>73</sup> *Id.* at 255. To be admitted to the undergraduate program, a student had to be in the 100-to-150 point range. *Id.*

<sup>74</sup> *Id.* at 252.

<sup>75</sup> *Id.* at 268–71.

<sup>76</sup> *Id.* at 270.

<sup>77</sup> *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 302 (2013).

<sup>78</sup> *Id.* at 305.

<sup>79</sup> *Id.* at 304–306.

the holistic review process was unconstitutional.<sup>80</sup> Just as in *Grutter* and *Gratz*, the Court affirmed *Bakke*'s ruling that the government has a compelling interest in obtaining the educational benefits of diversity.<sup>81</sup> However, on the issue of narrow tailoring, the Court remanded the case back to the Fifth Circuit to conduct a more searching inquiry of whether this requirement was satisfied.<sup>82</sup> On remand, the Fifth Circuit conducted a more searching review and found the university's admissions procedures to be narrowly tailored.<sup>83</sup> The Supreme Court subsequently affirmed this ruling.<sup>84</sup>

In sum, the *Bakke* framework involves two essential components: (1) obtaining the educational benefits of diversity as a compelling government interest, and (2) operating a narrowly tailored admissions process designed to obtain the educational benefits of diversity.<sup>85</sup> The *Bakke* framework has been affirmed in three subsequent Supreme Court cases—*Grutter*, *Gratz*, and *Fisher*. However, it continues to be attacked—most recently by a white conservative activist who is using Asian Americans as the vehicle to dismantle race-conscious admissions. These attacks seek to preserve whiteness as an access card to education, which will only be granted to groups that white decision-makers deem worthy—in the most recent instance, certain high-scoring Asian Americans.<sup>86</sup>

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<sup>80</sup> *Id.* at 302.

<sup>81</sup> *Id.* at 308–309.

<sup>82</sup> *Id.* at 314.

<sup>83</sup> *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014).

<sup>84</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016).

<sup>85</sup> *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

<sup>86</sup> Note that racially based standardized test score disparities between white students and nonwhite students continue to persist, with an exception for the aggregate group of Asian Americans. *See, e.g.*, SUSAN P. DALESSANDRO, LISA C. ANTHONY & LYNDIA M. REESE, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2007–2008 THROUGH 2013–2014 TESTING YEARS 26 (2014), <https://www.lsac.org/data-research/research/lSAT-performance-regional-gender-and-racialethnic-breakdowns-2007-2008>; Scott Jaschik, *The Numbers and the Arguments on Asian Americans*, INSIDE HIGHER ED (Aug. 7, 2017), <https://www.insidehighered.com/admissions/article/2017/08/07/look-data-and-arguments-about-asian-americans-and-admissions-elite>; *MCAT Scores and GPAs for Applicants and Matriculants to U.S. Medical Schools by Race/Ethnicity, 2020–21*, AM. ASS'N MED. COLLS. (Oct. 27, 2020), <https://www.aamc.org/media/6066/download>; Richard V. Reeves & Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, BROOKINGS (Feb. 1, 2017), <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/>. However, these statistics do not capture the score ranges of Asian American subgroups underrepresented in higher education.

### III. THE HARVARD ADMISSIONS LAWSUIT: USING THE MODEL MINORITY TO ATTACK RACE-CONSCIOUS ADMISSIONS

Edward Blum is not a lawyer, but a conservative legal strategist who recruits potential plaintiffs and matches them with wealthy conservative donors and high-powered attorneys in cases that involve issues that he holds dear.<sup>87</sup> One of these cases was a successful challenge to a preclearance provision of the Voting Rights Act of 1965.<sup>88</sup> In that case, the Supreme Court issued a 5-4 opinion, holding unconstitutional a provision in the Voting Rights Act that required certain states with virulent histories of racist voting interference to get federal authorization before changing their voting procedures.<sup>89</sup> Blum also recruited Abigail Fisher to be the named plaintiff in an unsuccessful lawsuit against the UT Austin challenging its use of race in its admissions process.<sup>90</sup> After his failure in *Fisher*, Blum searched for Asian American plaintiffs to spearhead his most recent assault on race-conscious admissions.<sup>91</sup> He found at least one and subsequently sued Harvard College.<sup>92</sup>

The plaintiff in this case is an organization that Blum created called “Students for Fair Admissions” (SFFA).<sup>93</sup> Through SFFA, Blum is attacking Harvard College’s admissions policies, claiming that they illegally discriminate against Asian American applicants.<sup>94</sup> This attack is focused on the very Harvard Plan that was acknowledged as being narrowly tailored in *Bakke* and used as a model for admissions by the University of Michigan Law School in *Grutter* and the UT Austin in *Fisher*—two institutions where the Supreme Court has previously upheld the use of race in admissions.<sup>95</sup>

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<sup>87</sup> Anemona Hartocollis, *He Took On the Voting Rights Act and Won. Now He’s Taking On Harvard.*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html>.

<sup>88</sup> *Id.*

<sup>89</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>90</sup> Hartocollis, *supra* note 87.

<sup>91</sup> Jenn Fang, *#IamNotYourWedge Lawsuits Against Harvard & UNC Assert Anti-Asian Discrimination in Admissions*, REAPPROPRIATE (Nov. 19, 2014), <http://reappropriate.co/2014/11/lawsuits-filed-against-harvard-unc-citing-anti-asian-discrimination-in-affirmative-action-admissions-policies/>.

<sup>92</sup> Hartocollis, *supra* note 87; *see* *Students for Fair Admissions v. President and Fellows of Harv. Coll.*, 397 F. Supp. 3d 126, 131 (D. Mass. 2019).

<sup>93</sup> Hartocollis, *supra* note 87.

<sup>94</sup> Because Harvard is a private institution, SFFA is suing under Title VI of the Civil Rights Act of 1964, which prohibits any federally funded program or activity from discriminating on the basis of race. *Id.* at 93–94. The Supreme Court has noted, “[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

<sup>95</sup> *See supra* Part II.



SFFA alleges that Harvard's admissions policy illegally disfavors Asian American applicants by holding them to a higher standard than other applicants and capping their numbers through a race-based quota.<sup>96</sup> It makes this argument even though Asian Americans constitute about 6% of the U.S. population, but roughly 25% of Harvard College's admitted class expected to graduate in 2023 and 2024.<sup>97</sup> Instead of trying to address any purported bias against this particular group in the holistic review process, SFFA is attempting to eradicate race-conscious admissions altogether.<sup>98</sup> SFFA's intentions to impose colorblind admissions policies on Harvard becomes clear in its demand for relief.<sup>99</sup> Specifically, SFFA requests two permanent injunctions: (1) "prohibiting Harvard from using race as a factor in future undergraduate admissions decisions," and (2) "requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission."<sup>100</sup>

SFFA lost at trial.<sup>101</sup> It continues to pursue its lawsuit through the appellate courts.<sup>102</sup>

SFFA's proposed colorblind remedies are problematic for a number of reasons. First, in states where race-conscious admissions were invalidated, the percentages of African American and Latinx students at the most selective schools were dramatically reduced.<sup>103</sup> This reduction is the predictable outcome

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<sup>96</sup> Complaint at 4–6, *Students for Fair Admissions v. President and Fellows of Harv. Coll.*, No. 14-cv-14176-DJC (D. Mass. Nov. 17, 2014).

<sup>97</sup> See *Quick Facts United States*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045218>; *Admissions Statistics*, HARV. COLL., <https://college.harvard.edu/admissions/admissions-statistics> (last visited Aug. 3, 2021).

<sup>98</sup> See Hartocollis, *supra* note 87.

<sup>99</sup> See Complaint, *supra* note 96, at 119.

<sup>100</sup> *Id.*

<sup>101</sup> *Students for Fair Admissions v. President and Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

<sup>102</sup> See *Students for Fair Admissions v. President and Fellows of Harv. Coll.*, 980 F.3d 157 (1st Cir. 2020) (upholding the district court's decision). A Petition for Certiorari is pending before the Supreme Court. See Joan Biskupic, *Supreme Court Effectively Delays Challenge to Harvard Affirmative Action Policies for Several Months*, CNN (June 14, 2021), <https://www.cnn.com/2021/06/14/politics/supreme-court-harvard-admissions-lawsuit/index.html>.

<sup>103</sup> See David R. Colburn, Charles E. Young & Victor M. Yellen, *Admissions and Public Higher Education in California, Texas, and Florida The Post-Affirmative Action Era*, 4 INTERACTIONS: UCLA J. EDUC. & INFO. STUD. (2008), <https://escholarship.org/uc/item/35n755gf>; Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study*, 50 AM. EDUC. RSCH. J. 251, 275 (2013); David Mickey-Pabello & Liliana M. Garces, *Addressing Racial Health Inequities Understanding the Impact of Affirmative Action Bans on Applications and Admissions in Medical Schools*, 125 AM. J. EDUC. 79, 96 (2018); Marta Tienda, Kevin T. Leicht, Teresa Sullivan, Michael Maltese & Kim Lloyd, *Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* 9 (Off. of Population Rsch.,

at Harvard and other institutions if the SFFA is successful in eradicating race-conscious admissions.<sup>104</sup> American colleges, graduate schools, and professional programs with very few African American or Latinx students fail to prepare students to function in our racially diverse and increasingly interconnected society. This omission would constitute a failure of higher education to fulfill one of its major functions—to prepare its students to effectively communicate and interact with people from different backgrounds.<sup>105</sup>

Some scholars argue that underrepresented minorities would be better served if they attended less selective schools.<sup>106</sup> However, I contend that highly selective institutions should adopt admissions policies that include these students for the educational benefits created by diversity that better these institutions. Moreover, studies suggest that students admitted with the benefit of race-conscious policies tend to succeed academically and professionally after they are given access to these institutions.<sup>107</sup> In a longitudinal study published in the *Journal of the American Medical Association*, scholars Robert Davidson and Ernest Lewis tracked the career trajectories of the UC Davis special admits and compared them with the regular admits over a nineteen-year period from 1968 to 1987.<sup>108</sup> Davidson and Lewis found that the graduation rates between the two groups were similar; there were minimal differences among the two groups for completion of residency, evaluation of residency, and selection of primary care disciplines, and their practice characteristics were remarkably similar.<sup>109</sup> This study suggests that race-conscious policies grant access not only to a specific academic program, but access to subsequent professionalization and economic security.

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Princeton Univ., Working Paper No. 2003-01, 2003).

<sup>104</sup> See, e.g., Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 303 (2005) (“[E]liminating affirmative action would reduce acceptance rates for African-American and Hispanic applicants by as much as one-half to two-thirds and have an equivalent impact on the proportion of underrepresented minority students in the admitted class.”).

<sup>105</sup> See, e.g., William Cronon, “*Only Connect . . .*” *The Goals of a Liberal Education*, 67 AM. SCHOLAR 73, 79 (1998); MARTHA NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* 84 (1997).

<sup>106</sup> See, e.g., Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 460 (2004).

<sup>107</sup> See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 211 (2000).

<sup>108</sup> Robert C. Davidson & Ernest L. Lewis, *Affirmative Action and Other Special Consideration Admissions at the University of California, Davis, School of Medicine*, 278 J. AM. MED. ASS’N 1153, 1153 (1997).

<sup>109</sup> *Id.* at 1156–57.

Second, denying applicants the freedom to both interpret and express their racial identity in the application process is an affront to their dignity. Legal scholars Martha Minow and Robert Post, writing at the time in their respective roles as deans of Harvard Law School and Yale Law School, argued in an *amicus curiae* brief submitted in support of UT Austin in *Fisher*,

Race is relevant not only because it enables us to hear each applicant's own perspective, but also because it enables us to construct each entering class to be educationally optimal. . . . [t]he dignity of applicants would be offended by a rule that would prohibit consideration of race (and only race) from an otherwise fully individualized, holistic admissions process. . . . We accord dignity to persons when we listen to what they have to say. It belittles applicants to invite their self-presentations and then to deliberately ignore aspects of their personal accounts that they believe to be important. . . . [It is] incompatible with the respect we owe our applicants to demand that they comply with the blanket assumption that race does not matter to them.<sup>110</sup>

Navigating the long moral arc of justice in America amid the ubiquity of white supremacy, the identity of racial minorities has evolved from one confronted with an externally imposed inferiority complex to one imbued with a sense of empowerment based, in significant part, on its very history of struggle against racial oppression. Two of the most revolutionary slogans that evidence this evolution into an empowering minority identity are “Black is Beautiful” in the 1960s and “Black Lives Matter” in more recent times, which were created to resist the externally imposed ideas that Blackness was ugly and that African American lives have little value in our society. This type of resistance has parallels in other minority groups, including Asian Americans.<sup>111</sup> Thus, as a matter of dignity, and more generally, justice, applicants to institutions of higher education should be allowed to express how their racial identity informs their

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<sup>110</sup> Brief of Dean Robert Post and Dean Martha Minow as *Amici Curiae* in Support of Respondents at 21–22, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (No. 11-345).

<sup>111</sup> See, e.g., Caitlin Yoshiko Kandil, *After 50 Years of Asian American, Advocates Say the Term Is More Essential Than Ever*, NBC NEWS (May 31, 2018, 8:34 AM), <https://www.nbcnews.com/news/asian-america/after-50-years-asian-american-advocates-say-term-more-essential-n875601> (“Activists and academics trace the origins of the term [‘Asian American’] back to 1968 and University of California, Berkeley students Yuji Ichioka and Emma Gee, who, inspired by the Black Power Movement and the protests against the Vietnam War, founded the Asian American Political Alliance as way [sic] to unite Japanese, Chinese and Filipino American students on campus.”); WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 9 (1993) (“Asian Americans attributed their individual and group powerlessness, in part, to the dominant society’s control over and manipulation of their identity and culture. Conversely, they believed that a prerequisite for attaining power was the development of an identity and culture they could call their own.”).

sense of who they are and how they perceive and interpret the world around them.

A third reason the requested relief of a colorblind admissions process is problematic is that it presupposes that the lived experiences of racial minorities have no positive value in crafting a university class. However, this assumption ignores the reality that the intentional inclusion and positive weighting of the applicants' lived racial realities in the admissions process can enrich the learning experience of all students. Constitutional scholars Nancy Leong and Erwin Chemerinsky elaborate on this point, offering:

Diverse classrooms promote discussions that would not occur in racially homogeneous learning environments. In our constitutional law classes, for example, we have found no substitute for the firsthand accounts of black and brown men who have been racially profiled, or for the narratives of Japanese American students whose relatives were sent to internment camps during World War II.<sup>112</sup>

Indeed, the Supreme Court has recognized that a critical mass of minority students at a predominantly white institution can create different perspectives in the classroom—a fact that *Bakke* and its progeny recognized as producing educational benefits for the entire campus. Justice O'Connor, in her *Grutter* majority opinion, details these benefits at the University of Michigan Law School by citing various briefs from *amici curiae* and observing,

[T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." . . . In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their]

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<sup>112</sup> Nancy Leong & Erwin Chemerinsky, Opinion, *Don't Use Asian Americans to Justify Anti-Affirmative Action Politics*, WASH. POST (Aug. 3, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-to-justify-anti-affirmative-action-politics/?utm\\_term=.be153d71d83e](https://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-to-justify-anti-affirmative-action-politics/?utm_term=.be153d71d83e).

decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”<sup>113</sup>

In other words, the Supreme Court has acknowledged that racial diversity has numerous benefits both in the classroom and beyond it; these benefits would be eradicated if SFFA succeeded in ending race-conscious admissions.

Although the Court framed the benefits in a general way, diversity in the classroom at a historically white institution such as Harvard also benefits the minority student in specific ways. Namely, the exposure of minority students to white students in such a setting equips minority students with a better understanding of racial hierarchy and equips them to fight systemic oppression in a meaningful way.

In sum, SFFA is advocating for a uniform admissions policy at highly selective institutions that would presumably create classrooms of mostly white students and students from certain Asian American subgroups while drastically reducing the number of all other minority students.<sup>114</sup> Insofar as SFFA is seeking support from the Asian American community to condone such an outcome, this is an invitation for Asian Americans to embrace a model minority status and should be rejected as such.

#### IV. ASIAN AMERICANS, THE MYTH OF THE MODEL MINORITY, AND AN INVITATION TO HONORARY WHITENESS

Since the Civil Rights Movement, Asian Americans have been widely portrayed as America’s model minority. During that time, a number of articles were published in mainstream newspapers and magazines that served as the origin of this socially constructed category.

In 1966, *U.S. News and World Report* published an article comparing the positive qualities of Chinese Americans to the negative qualities of other minority groups. The article began, “At a time when Americans are awash in worry over the plight of racial minorities—One such minority, the nation’s 300,000 Chinese-Americans, is winning wealth and respect by dint of its own

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<sup>113</sup> Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003) (citations omitted).

<sup>114</sup> SFFA has also brought an Equal Protection challenge against another highly selective university, the University of North Carolina at Chapel Hill. See Eric Hoover, *That Other Affirmative Action Case The Battle over UNC’s Admissions Policies Heats Up*, CHRON. HIGHER EDUC. (Jan. 18, 2019), <https://www.chronicle.com/article/that-other-affirmative-action-case-the-battle-over-uncs-admissions-policies-heats-up/>. In this case, the plaintiff is a white male from North Carolina. *Id.*

hard work.”<sup>115</sup> The article touted this “important racial minority pulling itself up from hardship and discrimination to become a model of self-respect and achievement in today’s America.”<sup>116</sup>

The article continued by elevating this minority group as an exemplar that other minorities should follow by observing, “At a time when it is being proposed that hundreds of billions be spent to uplift Negroes and other minorities, the nation’s 300,000 Chinese-Americans are moving ahead on their own—with no help from anyone else.”<sup>117</sup> Importantly, the article acknowledged a history of discrimination against this model minority group and even suggested that it was worse than that suffered by “those now complaining about the hardships endured by today’s Negroes.”<sup>118</sup> Nevertheless, the article claimed that because Chinese Americans are “thrifty, law-abiding and industrious people—ambitious to make progress on their own,” the American model minority has been able to overcome discrimination and succeed.<sup>119</sup> Interestingly, the article quoted a number of Chinese Americans that seemed to support the idea that they are model minorities. For example, one Chinese American tried to explain the success of his group by stating, “Basically, the Chinese are good citizens. The parents always watch out for their children, train them, send them to school and make them stay home after school to study.”<sup>120</sup>

In the same year that the *U.S. News and World Report* article was published, an article appeared in the *New York Times Magazine* that praised the success of Japanese Americans compared to other minorities.<sup>121</sup> It argued, “Like the Negroes, the Japanese have been the object of color prejudice. . . . Generally this kind of treatment, as we all know these days, creates what might be termed ‘problem minorities.’”<sup>122</sup> In contrast, “[b]y any criterion of good citizenship that we choose, the Japanese Americans are better than any other group in our society . . . . They have established this remarkable record, moreover, by their own almost totally unaided effort.”<sup>123</sup> The article further contended, “Every attempt to hamper their progress resulted only in enhancing their determination

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<sup>115</sup> *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REP, Dec. 26, 1966, at 73.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 74.

<sup>120</sup> *Id.*

<sup>121</sup> William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 20.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

to succeed. Even in a country whose patron saint is the Horatio Alger hero, there is no parallel to this success story.”<sup>124</sup>

Over the next three decades, similar articles were published about Asian Americans that explicitly or implicitly, using favorable terms, compared them to other minorities that were deemed problematic.<sup>125</sup> These articles were a continuation of the model minority narrative from the 1960s that focused on Asian Americans overcoming hardship through hard work and academic success. The message was that other minorities should do the same.

A number of common themes run through these articles. First, Asian Americans are lauded for their achievements, but often in manipulative fashion. Indeed, it is the voice of the Asian American that is frequently forged into a legitimizing tool to justify why Asian Americans are more successful than other minorities. Second, while a history of discrimination against Asian Americans is acknowledged, these articles often normalize such discrimination as merely a career hurdle to be overcome with hard work. Moreover, Asian Americans are praised for not engaging in civil rights advocacy and instead focusing on self-determination through educational attainment and financial independence. Third, these articles directly or indirectly criticize other minority groups that engage in civil rights activism. In other words, Asian Americans are held up as white America’s teacher’s pet invited to sit at the front of the classroom because of their “good behavior” so that the “problem minorities” can learn from their example.

Unfortunately, the model minority narrative is not a relic of the past. Contemporary right-wing commentators have seized it to drive a wedge between Asian Americans and African Americans by touting the success of the former in comparison to the latter. For example, conservative commentator Bill O’Reilly stated,

That is why Asian Americans, who often have to overcome a language barrier, are succeeding far more than African-Americans and even more than white Americans. Their families are intact and education is paramount. American children must learn not only academics but also

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<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., Martin Kasindore, Paula Chin, Diane Weathers, Kim Foltz & Daniel Shapiro, *Asian-Americans A Model Minority*, NEWSWEEK, Dec. 6, 1982, at 39; David A. Bell, *The Triumph of Asian-Americans America’s Greatest Success Story*, NEW REPUBLIC (July 15, 1985), <https://newrepublic.com/article/76218/the-triumph-asian-americans>; David Brand, *Education The New Whiz Kids Why Asian Americans Are Doing So Well, and What It Costs Them*, TIME, Aug. 31, 1987, at 42; Fox Butterfield, *Why They Excel*, PARADE, Jan. 21, 1990, at 4; Anthony Ramirez & Barbara C. Loos, *America’s Super Minority*, FORTUNE, Nov. 24, 1986, at 148; *Success Story Outwhiting the Whites*, NEWSWEEK, June 21, 1971, at 24.

civil behavior, right from wrong, as well as how to speak properly and how to act respectfully in public. If African-American children do not learn those things, they will likely fail as adults. They will be poor. They will be angry, and they often will be looking to blame someone else.<sup>126</sup>

This apparent praise of Asian Americans' success is coming from a man who, just two years after making these comments, introduced and aired a racist segment on his show that was aimed at Chinese Americans.<sup>127</sup> Evidently, O'Reilly's praise of Asian Americans was not sincere or even complimentary. Instead, it was merely a tool used to manipulate popular perceptions of an ever-present racial status quo, enabling white people to retain their race-based privilege while blaming problematic minorities for their own lack of progress.

The practice of deeming a certain minority group as "exceptional" in comparison to other minority groups has an analogue in the *apartheid* system of South Africa. There, the South African government legally assigned East Asians an "honorary white" status to facilitate international trade with Asian countries, while simultaneously attempting to maintain the domestic racial order as much as possible.<sup>128</sup> Honorary whites could occupy certain spaces and enjoy certain privileges that were not available to other nonwhite people. In the South African context, honorary whiteness was a tool to sustain notions of white supremacy, while carving out an exception to the racial caste system for economic and diplomatic purposes.

Similarly, the model minority narrative was a tool created by those in positions of privilege and power who are vested in the unjust racial order of America. Proponents of the model minority narrative are not interested in challenging and transforming the racial hierarchies in American society; instead, their aim is to preserve them. The thrust of their argument is that racism is no longer a major barrier to social and economic progress in American life because there exists a model group that has overcome racism that other minorities should follow. In sum, proponents of the model minority narrative today appear willing to fight for special access cards for Asian Americans, only insofar as it ensures

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<sup>126</sup> Bill O'Reilly, *The Truth About White Privilege*, FOX NEWS (Aug. 26, 2014), <https://www.foxnews.com/transcript/bill-oreilly-the-truth-about-white-privilege>.

<sup>127</sup> Liam Stack, *Protest Against Fox Correspondent Accused of Racism for Chinatown Interviews*, N.Y. TIMES (Oct. 6, 2016), <https://www.nytimes.com/2016/10/07/business/media/fox-reporter-accused-of-racism-for-chinatown-interviews-on-trump-clinton-and-china.html>.

<sup>128</sup> See *South Africa Honorary Whites*, TIME, (Jan. 19, 1962), <http://content.time.com/time/subscriber/article/0,33009,895835,00.html>; Yoon Jung Park, *White, Honorary White, or Non-White Apartheid Era Constructions of Chinese*, 27 AFRO-HISPANIC REV. 123, 129 (2008).



the existence of highly selective educational institutions that primarily enroll white students and their honorary white contemporaries.

## V. ASIAN AMERICANS AND THE REJECTION OF HONORARY WHITENESS

Honorary whiteness is not an honorable status for a number of reasons. First, this status is based on a falsehood—the legitimizing myth of the model minority that serves to increase inequality both within and between racial groups.<sup>129</sup> The model minority narrative is not an accurate description of the reality of most Asian Americans. Specifically, the idea that all Asian Americans have achieved financial and educational success is simply not true.<sup>130</sup> At the national level, while Asian Americans are less likely to live in poverty than the general U.S. population (12% v. 15%), tremendous disparities exist within this category with the highest poverty rates existing among subgroups such as the Hmong (28%), Bhutanese (33%), and Burmese (35%).<sup>131</sup> A similar pattern exists with educational attainment. About half of Asian Americans twenty-five and older have a bachelor's degree or more, compared with 30% of all Americans this age; however, these rates are much lower for Asian American subgroups such as Vietnamese (29%), Cambodians (18%), Hmong (17%), Laotians (16%), and Bhutanese (9%).<sup>132</sup>

In addition to these intragroup differences, intergroup disparities in job opportunities and life outcomes can be found between Asian Americans and

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<sup>129</sup> JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 104 (1999). Sidanius and Pratto define “legitimizing myths” as “values, attitudes, beliefs, causal attributions, and ideologies that provide moral and intellectual justification for social practices that either increase, maintain, or decrease levels of social inequality among social groups.” *Id.*

<sup>130</sup> Insofar as the financial success and educational attainment of certain Asian American subgroups surpass other groups, sociologists Jennifer Lee and Min Zhu explain that these outcomes result from a process of “hyper-selection” in which U.S. immigration laws after 1965 not only removed anti-Asian immigration quotas but also codified strong preferences for highly educated and skilled immigrants. See JENNIFER LEE & MIN ZHU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* 29–30 (2015). As a result, the influx of post-1965 Asian immigrants were more educated and skilled than both those they left behind in their countries of origin and the average American. *Id.* at 30–31. Thus, the success of these Asian subgroups can be explained, in large part, as a result of U.S. immigration policy and not any inherent racial or cultural differences between groups.

<sup>131</sup> Gustavo López, Neil G. Ruiz & Eileen Patten, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Sept. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

<sup>132</sup> *Id.* As one study found, “The differences in educational attainment among origin groups in part reflect the levels of education immigrants bring to the U.S. For example, 72% of U.S. Indians had a bachelor’s degree or higher in 2015. Many of them already had a bachelor’s degree when they arrived in the U.S. with a visa for high-skilled workers, such as an H-1B visa. Half of H-1B visas, which require a bachelor’s degree or equivalent, have gone to Indians since 2001.” Abby Budiman, Anthony Cilluffo & Neil G. Ruiz, *Key Facts About Asian Origin Groups in the U.S.*, PEW RSCH. CTR. (May 22, 2019), <https://www.pewresearch.org/fact-tank/2019/05/22/key-facts-about-asian-origin-groups-in-the-u-s/>.

others. For example, in one study, Asian Americans who “whitened” their resumes—meaning concealed or downplayed racial cues—received far more initial job interviews than those who did not.<sup>133</sup> In this context, markers of whiteness served as an access card for increased employment opportunities. Furthermore, in a different study, professors in various academic disciplines received unsolicited emails from fictional prospective graduate students requesting a ten-minute discussion to learn more about the programs.<sup>134</sup> Almost without exception, the professors responded at a greater rate to emails from white-male-sounding names than those with Asian-sounding names.<sup>135</sup> In this case, whiteness served as an access card to learning about academia directly from a faculty member. Studies have also shown that there exists a “bamboo ceiling” in which Asian American professionals are hindered in reaching the highest levels of leadership within their organizations.<sup>136</sup> Finally, at a time when the former president racialized COVID-19 during the global pandemic by calling it the “China Plague,” hate crimes and incidents against Asian Americans rose dramatically.<sup>137</sup> Thus, America’s so-called model minority is not immune to racial biases, race-based barriers to advancement, or racist attacks across the country.<sup>138</sup> These significant intragroup disparities as well as intergroup

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<sup>133</sup> Sonia K. Kang, Katherine A. DeCelles, András Tilcsik & Sora Jun, *Whitened Résumés Race and Self-Presentation in the Labor Market*, 61 ADMIN. SCI. Q. 469, 491 (2016).

<sup>134</sup> Scott Jaschik, *The Bias for White Men*, INSIDE HIGHER ED (Apr. 24, 2014), <https://www.insidehighered.com/news/2014/04/24/study-finds-faculty-members-are-more-likely-respond-white-males-others> (“The biggest gaps were for several groups with names suggesting that the letter-writers were Asian. There was a 29 percentage point gap at private colleges and universities in the response rate to white men and Chinese women. The next largest gap was a 21 percentage point gap in responses to those with an Indian male name, followed by a 19 percentage point gap for those with an Indian female name.”); see also Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCH. 1678, 1699 (2015).

<sup>135</sup> Milkman et al., *supra* note 134.

<sup>136</sup> See, e.g., *Bamboo Ceiling*, ASIAN AMERICANS ADVANCING JUST. L.A., <https://www.advancingjustice-la.org/what-we-do/policy-and-research/educational-opportunity-and-empowerment/affirmative-action/bamboo> (last visited Aug. 3, 2021).

<sup>137</sup> Kimmy Yam, *Donald Trump Touts Racial Equality While Referring to COVID-19 as ‘China Plague’*, NBC NEWS (June 5, 2020, 3:55 PM), <https://www.nbcnews.com/news/asian-america/donald-trump-touts-racial-equality-while-referring-covid-19-china-n1226176>; Erin Donaghue, *2,120 Hate Incidents Against Asian Americans Reported During Coronavirus Pandemic*, CBS NEWS (July 2, 2020, 1:57 PM), <https://www.cbsnews.com/news/anti-asian-american-hate-incidents-up-racism/>; Taylor Romine, *NYPD Creates Asian Hate Crime Task Force After Spike in Anti-Asian Attacks During Covid-19 Pandemic*, CNN (Aug. 18, 2020, 10:08 PM), <https://www.cnn.com/2020/08/18/us/nypd-asian-hate-crime-task-force/index.html>.

<sup>138</sup> Natsu Saito explains these contradictory racialized perceptions by writing, “Hardworking, studious, unassuming, thrifty. Inscrutable, sneaky, competitive. Those of Asian descent are sometimes portrayed as the ‘model minority,’ people who are succeeding in America despite their status as minorities by working and studying, saving and sacrificing for the future. However, as the ‘yellow peril,’ Asians and Asian Americans are also depicted as military, cultural or economic enemies and unfair competitors for education and jobs.” Natsu Taylor Saito, *Model Minority, Yellow Peril Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 71–72 (1997).

differences become invisible or ignored if Asian Americans are cast as model minorities who have already achieved success.

Given this continuing experience with racial barriers in society, race-conscious admissions should act as a mechanism for the inclusion of Asian Americans who have struggled to succeed, including lower-income Asian Americans and those members of Asian American subgroups who are underrepresented in American higher education. These are some of the very applicants who should be receiving the *Bakke* plus factor.<sup>139</sup>

Colorblind admissions, however, will not have the same inclusionary effect. Indeed, if all markers of racial identification and experiences are erased from the application process, none of the richness and diversity of the Asian American experience—or other minorities' experiences—can be taken into consideration. Instead, admissions officers and higher education faculty would be asked to pretend that race is irrelevant in deciding whom to admit.

Second, pitting Asian Americans against other minority groups is not in the interests of Asian Americans. Legal scholar Janine Kim argues that Asian Americans have played a “strange and contorted role in the affirmative action debate.”<sup>140</sup> Kim notes, “Those who would eliminate affirmative action use the Asian-American population to exemplify how affirmative action disadvantages non-Whites as well as Whites.”<sup>141</sup> Contrary to this framing, Asian American interests have been and continue to be aligned with other people of color in the civil rights struggle, and not with those who are trying to stall progress.

Legal scholar Derrick Bell developed a highly influential theory to explain the result in *Brown v. Board of Education*, which he called the “interest-convergence dilemma”—the idea that civil rights gains are possible only when the interests of the majority converge with the interest of the minority.<sup>142</sup> SFFA's lawsuit against Harvard presents a situation in which some members of the majority are offering an alignment of their interests with those of the model minority in order to pursue an anti-civil rights agenda—couched in the name of

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<sup>139</sup> Ironically, SFFA's complaint mentions how “[t]he ‘model minority’ stereotype of high-achieving Asian Americans” makes it difficult for socioeconomically disadvantaged Asian Americans to gain access to higher education. Complaint, *supra* note 96, at 65. However, SFFA's goal of eradicating race-conscious admissions would not allow for any targeted efforts to include this group because its members' racial indicators would be erased from their admissions files.

<sup>140</sup> Janine Young Kim, *Are Asians Black? The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 *YALE L.J.* 2385, 2408 (1999).

<sup>141</sup> *Id.*

<sup>142</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 524, 527–28 (1980).

“equality”— of eradicating race-conscious admissions in higher education. However, these interests are misaligned and mostly diverge.<sup>143</sup> Education scholars Julie Park and Amy Liu contend that the interests between Asian Americans and white people only converge “[w]hen narrow conceptions of merit are prioritized.”<sup>144</sup> So if merit is defined solely on grades and test scores, then a limited convergence emerges. However, legal scholar Jerry Kang reminds us that merit is a relational concept that is connected to the stated goals.<sup>145</sup> Indeed, Kang argues that if one goal of a college or university is to reduce racial prejudice, then racial minority status is a form of merit in relation to this goal.<sup>146</sup> If this is not an explicit goal of most universities, then it should be.

Park and Liu further note the interest divergence when Asian Americans object to negative action—advantaging white applicants over Asian American applicants in a holistic race-conscious admissions process.<sup>147</sup> They also note divergence when Asian American students in higher education receive resistance to their demands for “social and academic programs that would support and foster Asian American students’ well-being and identity development, such as cultural resource centers and Asian American studies programs.”<sup>148</sup> Therefore, Asian American interests are more strongly aligned with other people of color in the fight to support race-conscious admissions and the procurement of additional resources for minority students once they arrive on campus as part of the continuing struggle against the legacy of white supremacy that is embedded in America’s laws and institutions.

The overlapping interests between Asian Americans to fight alongside other people of color against white supremacy has deep historical roots. As mentioned, American law has codified whiteness as something that gives people access to certain privileges and benefits, while the absence of whiteness—including Asian-ness—has served as a barrier to these very things.<sup>149</sup>

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<sup>143</sup> Complaint, *supra* note 96, at 3.

<sup>144</sup> Julie J. Park & Amy Liu, *Interest Convergence or Divergence? A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. HIGHER EDUC. 36, 45 (2014).

<sup>145</sup> Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 7 (1996).

<sup>146</sup> *Id.* at 8.

<sup>147</sup> Park & Liu, *supra* note 144, at 45–46. Jerry Kang explains, “In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had that person been White.” Kang, *supra* note 145, at 3.

<sup>148</sup> Park & Liu, *supra* note 144, at 51.

<sup>149</sup> See, e.g., *supra* Part I.

As a telling example, in 1790, Congress passed its first naturalization law, which restricted naturalization to “white people.”<sup>150</sup> Thus, according to this law, whiteness was an explicit legal requirement for obtaining official membership to this society, and those who did not possess whiteness were excluded. The whiteness requirement was not explicitly removed from the law until 1952.<sup>151</sup>

In a series of Supreme Court cases before 1952, Asian people in America lost their legal battle for naturalization because the Court ruled that they were not white.<sup>152</sup> During this time, Asian litigants argued in court that they should be allowed to naturalize despite this law.<sup>153</sup> These cases made it clear that Asian Americans continued to be perceived as perpetual foreigners, so no matter what they did or how they lived their lives, they would never be seen as genuine Americans. Even after 1952, Asians were restricted from moving to the U.S. because of stringent race-based quotas on immigration.<sup>154</sup> These restrictions were not fully repealed until 1965.<sup>155</sup>

The overlapping interest between Asian Americans and other people of color can also be seen in the parallel historical exclusion of Asian Americans from educational opportunities. For example, Chinese Americans in California public schools—particularly in San Francisco—were either given no public schooling options or provided with racially segregated schools for many decades.<sup>156</sup> The educational segregation of Asian American school children in California had parallels in other states, such as Mississippi.<sup>157</sup> Given this overlapping history of

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<sup>150</sup> Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). The law provided, in relevant part, that “any alien, being a free white person . . . may be admitted to become a citizen [of the United States].” *Id.*

<sup>151</sup> See Immigration and Nationality Act of 1952, Pub. L. 82-414, § 301(a), 66 Stat. 163.

<sup>152</sup> See, e.g., *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that Japanese are not eligible for naturalization because they are not white); *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (holding that Punjabis are not eligible for naturalization because they are not white).

<sup>153</sup> See, e.g., *Devon W. Carbado, Yellow by Law*, 97 CALIF. L. REV. 633, 647–53, 659–63 (2009) (showing arguments from *Ozawa*, in which a Japanese petitioner, who sought citizenship in America, contended that he should be deemed white by the Court because he was fully assimilated into American society and he was not Black or Chinese).

<sup>154</sup> See Immigration and Nationality Act of 1952, Pub. L. 82-414, §§ 201, 202(a)(5), 66 Stat. 263. These restrictions were preceded by absolute bans on Asian immigration. See Chinese Exclusion Act of 1882, Pub. L. 47-126, § 1, 22 Stat. 58; Immigration Act of 1924, Pub. L. 68-139, § 26, 43 Stat. 153.

<sup>155</sup> See Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (showing no mention of specific bans on Asian Americans).

<sup>156</sup> Joyce Kuo, *Excluded, Segregated, and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 190 (1998).

<sup>157</sup> See *Lum v. Rice*, 275 U.S. 78 (1927) (holding constitutional the state-imposed segregation of a Chinese American third grader in Mississippi). *But cf.* Antoinette J. Lee, *Asian and Asian American Students in Washington, D.C., Public Schools During the Segregation Era*, 28 WASH. HIST. 34, 46 (2016) (“People of Asian descent in Washington occupy a gray area of place and time, where their small numbers and perceived temporary residency provided them with a measure of protection from the harshest realities of the Jim Crow era.”). I would

educational exclusion, Asian Americans have been the direct beneficiaries of *Brown v. Board of Education*, which overturned prior Supreme Court cases such as *Plessy v. Ferguson* and *Lum v. Rice*, and subsequent affirmative action policies in higher education. As an acknowledgement of this shared history of exclusion, the race-conscious admissions program at issue in *Regents of the University of California v. Bakke* explicitly included Asian American applicants as a disadvantaged group.<sup>158</sup> In the years that Bakke applied (1973 and 1974) to UC Davis, five students out of thirty-two special admits, or 16%, were Asian American.<sup>159</sup>

The benefits of race-conscious admissions for Asian American students are not limited to the past. If done properly, race-conscious admissions should significantly benefit underrepresented Asian American subgroups in the applicant pool.<sup>160</sup> Furthermore, if negative action is remedied in the admissions process, all Asian Americans will directly benefit because they will no longer be subjected to an admissions goal of “preserving the traditional White character of an elite institution.”<sup>161</sup> Finally, as noted above, Asian Americans will benefit from increased racial diversity in the classroom in the same ways that all students benefit from it.<sup>162</sup> Therefore, there is a common interest between all racial minority groups—including Asian Americans—in learning about and disrupting the vicious legacy of white supremacy and advocating for policies that do just this—policies including race-conscious admissions.

Third, lauding Asian Americans for being politically disengaged is consistent with a certain problematic response to racism that African American Studies scholar Evelyn Higginbotham has described as “the politics of respectability,” which encourages minorities to present to the majority population certain positive characteristics that run counter to the negative stereotypes held by the majority.<sup>163</sup> Higginbotham argues, “The politics of respectability emphasized reform of individual behavior and attitudes both as a goal in itself and as a strategy for reform of the entire structural system of

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argue that allowing Asian Americans to attend white schools during the Separate-but-Equal Era is another expression of honorary whiteness.

<sup>158</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

<sup>159</sup> *Id.* at 276.

<sup>160</sup> See Philip Lee, *On Checkbox Diversity*, 27 J. C.R. & ECON. DEV. 203, 215–16 (2013).

<sup>161</sup> William C. Kidder, *Negative Action Versus Affirmative Action Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 610 (2006).

<sup>162</sup> See *supra* notes 112–13 and accompanying text.

<sup>163</sup> EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920*, at 196 (1993).

American race relations.”<sup>164</sup> This strategy “demanded that every individual in the black community assume responsibility for behavioral self-regulation and self-improvement along moral, educational, and economic lines. The goal was to distance oneself as far as possible from images perpetuated by racist stereotypes.”<sup>165</sup>

Higginbotham, in providing a nuanced analysis of this concept, also points out a limitation of adopting it as a strategy to resist racism by observing, “Respectability’s emphasis on individual behavior served inevitably to blame blacks for their victimization.”<sup>166</sup> More broadly speaking, putting the burden on people of color to prove their worthiness to the dominant society removes any obligation for white people to address their role in sustaining racial privilege or perpetuating structural inequality. People of color are not responsible for their racial subordination. However, the politics of respectability implies otherwise.

On a related point, the politics of respectability adopts the assumption that only individuals who have adopted the dominant society’s values are worthy of respect and equal rights.<sup>167</sup> The problem emerges when these values are counter to anti-oppression practices. Scholars Mikaela Pitcan, Alice Marwick, and Danah Boyd emphasize this point by arguing,

Respectability politics reflect neoliberal, white, bourgeois normativity, and provide a frame for understanding subordinated group behavior from a gendered, classed, and racialized perspective. Respectability politics reinforce designations of appropriate or inappropriate behavior rooted in structures of inequality. . . . In other words, by privileging racist, sexist, and classist values, respectability politics leads members of subordinate groups to internalize them.<sup>168</sup>

According to these scholars, by internalizing the dominant society’s values, racial minorities will internalize some of the very things that devalue and degrade them.

Furthermore, the politics of respectability ignores the problem of confirmation bias. Confirmation bias means a tendency to find confirming information relevant and contradictory evidence not relevant.<sup>169</sup> In this way,

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<sup>164</sup> *Id.* at 187.

<sup>165</sup> *Id.* at 196.

<sup>166</sup> *Id.* at 202.

<sup>167</sup> See Mikaela Pitcan, Alice E. Marwick & Danah Boyd, *Performing a Vanilla Self: Respectability Politics, Social Class, and the Digital World*, 23 J. COMPUT.-MEDIATED COMM’N 163, 166 (2018).

<sup>168</sup> *Id.*

<sup>169</sup> SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 233 (1993).

preexisting beliefs become self-perpetuating and stubbornly resistant to change even in the face of counter evidence. Applying this concept to racial prejudice in society, evidence that racial minorities are respectable and assimilated is likely to be disregarded. Furthermore, if racial inequality is analyzed through a structural lens, then changing white people's individual beliefs and attitudes will do little to remedy the structures in place that perpetuate racial inequality.

Finally, framing Asian Americans as not engaged in the Civil Rights Movement because they were too busy studying or making money ignores a rich history of interlinked activism between Asian Americans and other minority groups.<sup>170</sup> Frequently accompanying such an incomplete picture of Asian Americans in the fight for freedom and civil rights is the use of Asian Americans as a wedge between conservative white activists, such as Edward Blum, and other racial minority groups. This attempt to ignore Asian American history should be soundly rejected.

Like the externally imposed category in South African Apartheid, honorary whiteness in America is also externally imposed by the dominant society, but in some situations, the intended beneficiaries are in a position to reject this status. In 1973, African American tennis legend Arthur Ashe was given a choice to assume honorary whiteness when travelling on a sports diplomacy mission to South Africa, which was under the Apartheid system.<sup>171</sup> Ashe refused this designation and insisted to be identified as a Black man who had the right to speak his mind and move freely when he traveled.<sup>172</sup> He succeeded in his racial self-designation.<sup>173</sup> Ashe wanted to send a message about the importance of his racial identity and his solidarity with other oppressed people in the fight against racial injustice.<sup>174</sup> Asian Americans today are facing a similar choice. They

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<sup>170</sup> See, e.g., GRACE LEE BOGGS, *LIVING FOR CHANGE: AN AUTOBIOGRAPHY* 118–19 (2016) (describing how Grace Lee Boggs, an Asian American woman, was heavily involved in the movement for Black civil rights); DIANE C. FUJINO, *HEARTBEAT OF STRUGGLE: THE REVOLUTIONARY LIFE OF YURI KOCHIYAMA* 116–19 (2005) (describing how Yuri Kochiyama, an Asian American woman, became involved in the Civil Rights Movement); MICHAEL LIU, KIM GERON & TRACY LAI, *THE SNAKE DANCE OF ASIAN AMERICAN ACTIVISM: COMMUNITY, VISION, AND POWER* 39 (2008) (describing the intersection of Asian American movements with those of other civil rights movements from the 1960s to the 1990s); DARYL J. MAEDA, *RETHINKING THE ASIAN AMERICAN MOVEMENT* 108 (2011) (describing the Asian American Movement's overlap with the Black Power Movement); RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 401–02 (2008) (describing the interlinked histories of American racial minorities).

<sup>171</sup> See Eric J. Morgan, *Black and White at Center Court Arthur Ashe and the Confrontation of Apartheid in South Africa*, 36 *DIPLOMATIC HIST.* 815, 834 (2012).

<sup>172</sup> *Id.*; see also ARTHUR ASHE & NEIL AMDUR, *OFF THE COURT* 148–49 (1981).

<sup>173</sup> ASHE & AMDUR, *supra* note 172, at 148–49.

<sup>174</sup> *Id.* at 146–47.



should decline the offer of honorary whiteness and embrace their racial minority status as an expression of empowerment and uplift.

#### CONCLUSION

SFFA is inviting Asian Americans to adopt honorary whiteness by helping this anti-civil rights organization dismantle a race-conscious admissions policy that Asian Americans have been the direct beneficiaries of and that continues to enrich higher education. It is trying to narrowly extend the educational access card to a “good” minority that white people have historically bestowed to a chosen few. It is seeking to create a stronger link between the majority and its model minority at the expense of other racial minority groups. Asian Americans should reject the invitation and advocate for race-conscious admissions as America continues to grapple with the vicious legacy of white supremacy that has been embedded in this nation since its founding.