

ARE ASIANS THE NEW BLACKS?

Affirmative Action, Anti-Blackness, and the ‘Sociometry’ of Race

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Abstract

This article sheds light on the pending affirmative action lawsuit filed by Asian American plaintiffs against Harvard University by providing a brief history of how Asian Americans have been figured (and have figured themselves) in U.S. Supreme Court jurisprudence on race-conscious admissions in higher education. It shows that the figuration of Asian Americans has played a critical role in the legal-ideological project of despecifying Black subjection and disavowing racial positionality in the U.S. social order, from *Bakke* to the present, and argues that a new ‘sociometry’ of race is necessary to help us understand and challenge persistent structures of racial power.

Keywords: Affirmative Action, Anti-Blackness, Asian Americans

INTRODUCTION

In November 2014, a newly formed organization, Students for Fair Admissions (SFFA), filed suit against Harvard University in federal district court in Massachusetts, alleging that the university discriminated against Asian Americans in undergraduate admissions, in violation of Title VI of the Civil Rights Act of 1964, and asking the court to prohibit Harvard from considering race at all in its admissions process.¹ In response, Harvard denied that it discriminates against Asian American applicants and declared its intention to fully defend its ‘holistic’ admissions program, famously praised by Justice Powell in *Bakke* for using race as just one factor in building a “diverse” student body.² The university also argued that SFFA is a shell organization created to serve as a vehicle for founder and president Ed Blum’s political agenda.³ Blum, an influential White conservative who channels funds from right-wing donors into high-profile legal campaigns aimed at rolling back the race-conscious reforms of the civil rights era, located the Asian American plaintiffs for the Harvard case through a website, *harvardnotfair.org*, which features photos of pensive college-age Asian Americans against a backdrop of bookshelves, with the caption, “Were you denied admission to Harvard? It may be because you’re the wrong race.”

Du Bois Review, 15:2 (2018) 217–244.

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doi:10.1017/S1742058X18000243

Less than a year after the SFFA filing, in May 2015, a “Coalition of Asian American Associations” led by two conservative Chinese American organizations, the Asian American Legal Foundation (AALF) and 80/20, filed a complaint against Harvard with the Office for Civil Rights in the U.S. Department of Education and the Civil Right Division of the U.S. Department of Justice, again alleging discrimination against Asian American applicants.⁴ The complaint, which draws heavily upon the SFFA complaint against Harvard (including quoting long passages from it), failed to elicit a response from Obama’s Department of Justice in 2015. A few years later, however, Trump’s Department of Justice proved more receptive, announcing its own investigation of Harvard, rescinding Obama-era guidelines on affirmative action in education, and urging schools and universities to stop using race in their admissions decisions.

The Asian American Legal Foundation signals the emergence of a phenomenon that has not yet received much scholarly attention: the mobilization of conservative, affluent, first generation Chinese Americans into a formidable anti-affirmative action fighting force on a national scale. Mobilizing through Chinese language apps and social networks, these activists engage the issue of affirmative action (and related issues) via lobbying, demonstrations, and other forms of political behavior.⁵ Their defeat of Senate Constitutional Amendment 5 (SCA 5) in California, which would have re-introduced the consideration of race into college admissions within the state, is perhaps their signal achievement to date. Although they represent only a small minority of Asian Americans, they claim to speak for all of them, and their dramatic, confrontational rhetoric and modes of organizing have mostly drowned out the voices of the majority of Asian Americans who support affirmative action. In addition, their unapologetic “Chinese first” approach clearly departs from the “minority coalition” framework that has guided most liberal Asian American groups for the past half-century. It is the convergence of this nascent, conservative Chinese immigrant nationalism with an older, conservative White nationalism that is driving anti-affirmative action politics today.

Affirmative action has never not been in trouble, of course. First enacted in the late 1960s, it has been on the defensive legally and politically ever since. Conservatives have had it in their crosshairs all along. The U.S. Supreme Court upheld affirmative action in university admissions in *Bakke*, but only in an attenuated form and under a non-remedial rationale, and the Court’s splintered decision in that case raised questions about both the authority of Justice Powell’s opinion and the policy’s longevity. Subsequent Supreme Court rulings in *Grutter* and *Fisher (I and II)*—the latter case(s) also sponsored by Ed Blum—have kept race-conscious admissions in higher education alive, but the 5-4 and 4-3 votes in these rulings, respectively, remind us of its precarious status.⁶

If the Harvard case makes it to the high court—and this is clearly Ed Blum’s intention—it could mean the end of race-conscious admissions. The confirmation of Justice Kavanaugh secures a conservative majority that may well decide to dismantle affirmative action in higher education altogether. Also, the Harvard case is historically unique: it is the first major challenge to affirmative action in higher education that features Asian American rather than White plaintiffs. SFFA’s claim of racial discrimination is potentially more powerful because the alleged victims are themselves “minorities.” *Prima facie*, it seems harder to justify admissions policies that help certain racial minorities if those same policies burden not just Whites but other racial minorities as well. Indeed, SFFA’s complaint analogizes Harvard’s race-conscious admissions program to Jim Crow in the U.S. South, suggesting that Asian Americans have displaced Blacks as the most disadvantaged group in society—that they are, in a phrase, *the new Blacks*. Ed Blum’s wager is that the plaintiffs’ “minority” status will

be the difference that moves the Court to strike down Harvard's program. The future of race-conscious admissions in higher education may depend upon whether he is right.

ASIANS IN *BAKKE*

Perhaps the most surprising thing about the Harvard case is that it took so long to emerge. If we look at *Regents of University of California v. Bakke* (1978) with fresh eyes, the seeds of the Harvard case are fully apparent there. Indeed the Harvard case is the predictable culmination of a particular racial logic initially laid out in *Bakke* and later solidified in *Grutter* and *Fisher (I and II)*. Put simply, this logic denies the specificity of Black subjection—the foundational role it has played in the nation's origins and history and its persistence today as a structural feature of society—and instead proffers a view of society as a noisy competition of comparably situated “ethnic” groups. It throws a pluralistic veil over a Negrophobic social order that both abjects Blackness as a foil to superior Whiteness and defines the status of other groups by their proximity or distance from Whiteness and, especially, Blackness.⁷ At times, it is all “ethnic” groups that are comparably situated, including White “ethnics”; at other times, the emphasis is on the comparable status of all “minority” groups, but in all cases, Black abjection is disappeared in a sea of equivalences. From *Bakke* onwards, the figuration of Asian Americans has been indispensable to this ideological project. Justice Powell's imagining of Asian Americans as a “minority” that succeeds despite its “minority” status facilitates his denial of the structural oppression of Blacks and his fantasy about a society of horizontal differences, which in turn shape his fateful decision in *Bakke* to limit affirmative action and shift its rationale away from remediation. In the Court's jurisprudence on race-conscious admissions in higher education, Asian Americans have been spoilers from the start.

Justice Powell's *Bakke* decision draws heavily on the “Memorandum for Mr. Justice Powell” (August 29, 1977) authored by Justice Powell's clerk, Bob Comfort.⁸ Powell handwrote “Excellent memo” at the top and affirmed his clerk's arguments in extensive handwritten margin notes throughout, clearly indicating that the memo either shaped or reflected his views on the case. In the memo, Comfort notes that Respondent (Bakke) argues that all racial classifications, even supposedly “benign” ones, must be treated as suspect and trigger strict scrutiny, lest courts be faced with the impossible task of adjudicating innumerable claims of group injury in an effort to determine which classifications are “benign” and which are not. He writes:

Most of the ethnic groups comprised by American society have faced and to some extent still face prejudice and hostility. Courts will be called upon to explain why classifications disadvantaging some groups will trigger strict scrutiny and those dealing with others will not. Principled bases for such racial distinctions, says Respondent, are hard to imagine. Presumably, courts would be required to establish rankings of those groups that have been harmed the most by exclusion from various institutions. Courts have done little of this sociometric analysis in the past (p. 26).

Concurring with Respondent, Comfort opines that the Court should decide matters on an individual basis, rather than attempting to judge relative group desert and “delving into the intractables, catalogued by Respondent and his allies, of deciding whose ox has been gored more often and for how long” (p. 32). The “sociometric analysis” that the

Court has rightly avoided would be beyond its purview in any case, he argues, because there is no “principled” way to make such distinctions, no objective way to ascertain who has been harmed, how much and by whom, and what is owed to them as a result. Moreover, such judgments would inevitably vary according to “political frame of reference” and time period.

Comfort’s rejection of sociometry, it should be noted, is more apparent than real. His refusal to engage in a sociometry that is explicit and transparently argued simply results in his assuming, by default, a covert and unsubstantiated one. The judgment that there are too many comparably situated groups to adjudicate among is, after all, itself a sociometric finding. Comfort, that is, uses a sociometric assertion as a basis for arguing that sociometry is impossible. In any case, Comfort’s covert sociometry has a levelling, equivalencing thrust: there is no persistent structural (dis)advantage or group positionality—no anti-Black foundation undergirding the social order—but only fluidity, variation, and complexity. *Society as a cacophony of competing, self-interested voices*. Since most “ethnic groups” (a designation that Comfort applies to White “ethnics” as well) face discrimination, there is no justification for burdening them via racial classifications designed to help other groups. While the Equal Protection Clause of the Fourteenth Amendment was passed to help Blacks, Comfort notes, “it is too late in the day to restrict that Amendment to some narrow class of historical ‘wards’” (p. 27). Citing *Yick Wo*, he observes that Asians and other groups have long been the beneficiaries of heightened scrutiny as well.

Petitioner (UC Regents), Comfort notes, suggests that courts could simply begin with the obvious—that Blacks have been disadvantaged in society—and go from there, perhaps including a few other groups as well. Comfort responds:

The prejudice faced by every distinct racial and ethnic group entering this country makes each a potential candidate for compensatory legislation. Concensus (sic) as to who needs it and who should bear the burden will be lacking. (Witness the nearly 60 briefs filed in this case.) The attempt to separate competing claims may well confound judicial ingenuity....Benign scrutiny could be reserved, of course, for a few groups said to be harmed more than most—blacks, Puerto Ricans, Indians. But it is not immediately clear how one draws a bright line between those groups and, say, Jews or orientals. Both of those groups faced almost hysterical prejudice for decades after first arrival in this country. Both face a quieter, subtler form of prejudice today. A decision that the prejudice facing blacks has been quantitatively more disabling would amount to a judicial leap of faith, I think, rather than a judicial expression of social concensus (sic) (pp. 36-37).

Comfort brings Asians (“orientals”) into the picture (along with Jews) for the specific purpose of undercutting Petitioner’s suggestion. Asians are spoilers here, a wrench in the works. Because Asians can make a strong case that they, too, have been subject to racial discrimination, Comfort argues, they pose a slippery slope problem for those trying to decide who deserves remedial consideration. Asians are invoked, in other words, to thwart Petitioner’s attempted specification of Black subjection and to render Black suffering legally unrecognizable. A thoughtful sociometry might short circuit this move by demonstrating that the abjection of Blacks is historically unique and distinguishable from the racism that Asian Americans face, but this is precisely the kind of analysis that Comfort has ruled out. Indeed, in the passage above, he doubles down on this refusal, rejecting the idea that there is a “quantitative” difference, let alone a qualitative difference, between the discrimination faced by Blacks and that faced by other groups.

Comfort continues:

There are three objections to [Petitioner's suggestion]. First, it would require the same judicial leap of faith, discussed above, to conclude that the prejudice confronting blacks or chicanos has been more disabling than that initially faced by Jews, orientals, or the Irish. Certainly there is no objective way to prove it. Second, it is not at all clear that the institutional obstacles presently confronting blacks (and other select groups) are significantly more debilitating than those facing Italians, Poles, etc., in certain contexts. Third, and perhaps most important, acceptance of this response would entail the creation of more of what Professor Monaghan calls 'Black Law.' 'Black Law' is law that is inexplicable and probably wrong except in the context of the courts' desire to aid the black drive for social parity....[R]isk inheres in the creation of an 'exclusion remedy' doctrine for blacks alone. Inevitably, other groups, whose perceptions of prejudice are no doubt quite strong, will demand explanations as to why they cannot avail themselves of this unique doctrine...[and] racial and ethnic divisiveness would be perpetuated by the Constitution rather than assuaged (pp. 49-50).

The *status quo ante* is harmonious and egalitarian, and affirmative action represents an alarming tendency to bastardize the law in overzealous pursuit of Black advancement. "Black Law" is what happens when Blackness is allowed to degrade and derange the law, hijacking it for corrupt purposes. Christina Sharpe (2016) writes of "anagrammatical blackness," by which she means the "the ways that meaning slides, signification slips, when words...abut blackness" (p. 80). Put "Black" before "Law" (or any other word), and the latter's integrity and meaning begin to dissolve. *Blackness as a lytic agent*.

With "Black Law," Comfort invokes, ironically and apparently unwittingly, the Black Codes, a set of state laws passed in the postbellum period by southern legislatures in order to recreate the institution of slavery as closely as possible. The Black Codes drew a net around Black life and pulled it tight, cementing the association of Blackness and criminality in the White imagination and launching the convict lease system, which powered the region's agricultural and industrial growth for more than a half-century by reducing many thousands of Black men to "slavery by another name" (Blackmon 2008). The Black Codes remind us that Comfort has gotten it backwards: it is the law that has degraded Blackness, not the other way around. Justice Powell, though, embraces Comfort's view. His handwritten comment on this section of Comfort's memo reads: "[Petitioner's] argument that blacks are different is not logically supportable" (p. 49).

In the U.S. government's amicus brief in support of Petitioner (UC Regents), Asian Americans are again figured as a potential problem for race-conscious admissions. Declaring that "properly designed minority-sensitive programs" are necessary "to overcome the effects of years of discrimination" (p. 3), the brief lays out statistical evidence of discrimination against Blacks and those of "Spanish heritage," including higher poverty and unemployment rates, lower rates of educational attainment, and concentration in low paying and low status jobs. In footnote 39, it then states obliquely, "The figures for Asian-Americans (Japanese, Chinese, and Filipino only) are somewhat different" (p. 42). Various figures are provided—indicating that Asian Americans look more similar to Whites than to other "minority" groups—with no accompanying explanation. Later, during a discussion of the paucity of Black and other non-White students in medical schools, footnote 51 states: "There is no apparent under representation of Asian-American persons" (p. 46), and then:

At the same time, no one can doubt that this racial group has been the subject of discrimination in this country...Nor is it clear that discrimination against Asian-American persons is a thing of the past...Discrimination may take subtle forms, and the admission of large numbers of Asian-American students does not preclude the possibility of discrimination (p. 47).

If Asian Americans are a “minority” and thus discriminated against, the brief seems to ask, how are they able to gain admission in “large numbers” without special consideration?⁹ The subtextual tension built through these footnote commentaries then breaks into the main text. Listing the issues left unresolved by the trial court, the brief notes:

It is not clear from the record why Asian-American persons are included in the special program. There is no doubt that many Asian-American persons have been subjected to discrimination. But although we do not know the application rates for Asian-Americans at Davis, the available evidence suggests that Asian-American applicants are admitted in substantial numbers even without taking special admissions into account...Although it may well be that disadvantaged Asian-American persons continue to be in need of the special program to overcome past discrimination, the record is silent on that question (pp. 70-71).

Here footnote 82 reiterates: “The record contains no information with respect to the reason for including Asian-Americans in the special admissions program, and the University’s brief does not discuss Asian-American applicants” (p. 71). In the U.S. government’s full-throated defense of race-conscious admissions as remedial action for discrimination, then, Asian Americans appear as a discomfiting asterisk.

Note that those of “Spanish heritage” are, like Blacks, considered underrepresented minorities in the UC Davis Medical School’s admissions program. Like many of the briefs examined in this article, this one focuses primarily on Blacks, with Latinos brought in as a secondary example. Blacks are understood to be the paradigmatic beneficiaries of race-conscious admissions. Where Latinos stand in an anti-Black social order—how they are positioned in this order relative to Blacks, Whites, and Asians and what this means for their status as beneficiaries of race-conscious admissions—is a matter that remains largely submerged in this legal discourse, only briefly and partially rising to the surface in the *Fisher* case (to be discussed below). What kind of covert sociometric view underlies the assignment of Latinos to the category of proper beneficiaries of race-conscious admissions? In what ways does it make sense to place Blacks and Latinos in one category and Asians and Whites in the other? In what ways does it not? Are there alternative categorizations that might be more compelling? These are questions about power and positionality that a thoughtful and transparent sociometry could productively explore.

Justice Powell’s opinion in *Bakke* flags Asian Americans no fewer than three times as a potentially fatal problem for affirmative action—and does so exclusively in the footnotes.¹⁰ First, Powell responds to Petitioner’s argument that discrimination against the White majority is not suspect if it has a benign purpose:

[T]he difficulties entailed in varying the level of judicial review according to a perceived ‘preferred’ status of a particular racial or ethnic minority are intractable. The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments. As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of

prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences begin to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable (pp. 2751–2752).

Drawing heavily upon the spirit and wording of Comfort’s memo, Powell argues that an objective sociometry is impossible because there are no persistent patterns of racial injury, no structures of racial domination. *There is nothing to measure.* Indeed, the very terms “minority” and “majority” have little purchase, as the White “majority” is but a composite of White “minorities” that have each faced discrimination, and once we subtract them, the remainder, WASPs, become, lo and behold, a “new minority.” *We are all minorities now.* (Note the sleight of hand here, shifting from a racial-political definition of “minority” to a numerical one.) Since practically every group has been discriminated against, the courts would be flooded with injury claims, with no “principled” way to sort through them. Powell hints at a dystopian scenario where courts would arrogate to themselves the right to choose arbitrarily which groups to favor and then be compelled to adjust their rankings over and over again to respond to the changes wrought by their own favoritism. If courts attempt to measure racial positionality, Powell suggests, they will actually *create* it.

Justice Powell’s vision of intergroup relations—his sociometry-that-refuses-to-be-called-sociometry—is highly impactful: it directly underwrites his momentous finding that the “societal discrimination” Petitioner claims to be redressing through race-conscious admissions is an excessively “amorphous concept of injury” (p. 2757) that does not justify the use of racial classifications (as a finding of a specific constitutional or statutory violation, by contrast, would). It paves the way, that is, for Powell to substantially delink affirmative action from its original remedial rationale. Powell then offers an alternative rationale for race-conscious admissions: diversity. Under the First Amendment, he argues, universities have wide latitude to use race-conscious measures to create diversity in the student body in order to secure the educational benefits that flow therefrom, including, among other things, a “robust exchange of ideas” (p. 2760).¹¹ With this, race-conscious admissions survives in *Bakke*, but the hope of using it to address enduring patterns of racial domination on a significant scale does not.¹²

Justice Powell invokes Asian Americans repeatedly in his effort to discredit the “societal discrimination” rationale. That this occurs in the footnotes reinforces the sense that Asian Americans are secret spoilers, the repressed truth of affirmative action waiting to be exposed. First, in footnote 36, Powell observes that the opinion of Justices Brennan, White, Marshall, and Blackmun (concurring in part and dissenting in part) argues that Blacks would have gotten better test scores absent “societal discrimination,” but “nothing is said about Asians.” Powell then writes:

Not one word in the record supports this conclusion [about better test scores], and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since, if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered 'societal discrimination' cannot also claim it in any area of social intercourse (p. 2751).

Black abjection disappeared in a sea of equivalences. Powell demands proof that discrimination has lowered Black applicants' test scores, but his reference to Asians (who earn high test scores overall despite discrimination) suggests that he is dubious such proof exists.

In footnote 37, Justice Powell again expresses his concern that the "societal discrimination" rationale will lead to "first the schools, and then the courts...[being] buffeted with competing claims." Here he mentions the University of Washington, which includes Filipinos but excludes the Chinese and Japanese from positive racial consideration in admissions:

But what standards is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group?...[T]he Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard, the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner (p. 2752).

Once again, Powell suggests, Asian Americans disrupt the link between discrimination and injury/need, functioning as a wrench in the works of a "societal discrimination" argument.¹³

Finally, in a passage where Justice Powell argues that a finding of specific constitutional or statutory violations is necessary to justify, in a narrow remedial way, racial classifications that burden innocent Whites, he notes in footnote 45: "[T]he University [UC Davis] is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process" (p. 2758). Asian Americans, simply put, confound any attempt to explain or justify race-conscious admissions on the basis of "societal discrimination."

Justice Powell concludes in the governing opinion in *Bakke* that diversity is a compelling state interest that justifies race-conscious admissions in higher education, but that race can only be considered as one factor among many. Harvard's "holistic" review, Powell intones, is an exemplary program that uses race as a plus factor only, but UC Davis Medical School's special admissions program, which sets aside 16 out of 100 slots for "minorities," generates a racial "quota" in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI. The highly fractured set of opinions in *Bakke*—one bloc of four Justices joined parts of Powell's decision; another bloc of four joined other parts; the nine Justices issued a total of six different opinions—raised questions about the precedential weight of Powell's ruling for many years thereafter.

Race-conscious admissions was saved, then, but only after it was effectively delinked from slavery, segregation, and the general contours of an anti-Black society. Blacks could be admitted in higher numbers to higher education, as long as this was framed not in terms of what was owed to them as a matter of justice, but rather in terms of what would enhance (White) students' abilities to thrive in a multicultural world. Moreover, Powell expresses concern for Whites supposedly harmed by race-conscious admissions, writing: "[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making" (p. 2752).¹⁴ He does not seem similarly concerned about the Black "innocent persons" who bear the burdens of centuries of Negrophobia; indeed he has already denied that these burdens exist. For Powell, race-conscious admissions are not a modest effort to rectify centuries of Black subjection (Carbado et al., 2016), then, but an intrinsically problematic imposition on Whites who bear no responsibility for discrimination that occurred in the unspecified past. Even as it gave race-conscious admissions a partial reprieve, in other words, Powell's ruling set the stage for its future instability by reframing it as a justice problem for Whites.

And, potentially, for Asians. What should we make of the consistent figuration of Asian Americans as spoilers in *Bakke*? We could argue that the now-discredited "model minority myth" is at work in this case—that is, that the blanket presumption of group success exaggerates Asians' socioeconomic status,¹⁵ disguises Asian poverty rates, and misses the fact that Asian success varies markedly by subgroup (Southeast Asians who arrived in the U.S. as war refugees, for example, have statistical profiles that look very different from those of many East Asians and South Asians) (Kim 1999). Asians aren't doing *that* well, and not *all* Asians are doing well. This is a fair point, and yet even when we keep in mind statistical overstatement and subgroup variation, there is still something here that appears to need explaining—namely, why many Asian Americans fare better than Blacks (and Latinos, and, by some measures, Whites), despite being subject to past and present discrimination. Why were Asian Americans the only "minority" that was admitted to UC Davis Medical School in significant numbers through the general admissions program (i.e., without affirmative action)? How is it that many Asians are succeeding despite discrimination? Why does the discrimination-injury/need link seem to break down with Asians? Even if we accept that Asians are not doing *that* well, and that not *all* Asians are doing well, why, as a group, are they doing as well as they are, particularly in comparison with Blacks?

Critics of the "model minority myth" have paid much more attention to the question of whether Asian Americans are a "model" than to the question of whether they are in fact a "minority"—or whether the latter concept is even coherent. Is the world divided into a majority, on the one hand, and a set of minorities, on the other? Is the critical racial divide that between Whites and non-Whites? Jared Sexton (2010) identifies a phenomenon he calls "people-of-color-blindness," which he defines as "a form of colorblindness inherent to the concept of 'people of color' to the precise extent that it misunderstands the specificity of anti-Blackness and presumes or insists upon the monolithic character of victimization under white supremacy" (p. 48). In a Negrophobic society, Sexton argues, the fundamental divide is not between Whites and non-Whites, but rather between Blacks and non-Blacks, or between those who are abjected and those whose coherence and well-being are grounded upon that abjection. Like "people of color," "minority" is, inescapably, an equivalencing concept that elides group differentials in power and de-specifies anti-Blackness and its foundational role in anchoring the social order.¹⁶ As "minorities," Asian Americans and Blacks are presumed to be comparably situated, at least in relation to "discrimination," which is presumed to be substantially the same thing applied in substantially the same way to all "minorities."

The “Asian spoilers” narrative, it should be noted, can only operate if these presumptions are in place.

Yet neither of these presumptions is tenable. As I argue in *Asian Americans in an Antiracist World* (forthcoming), White supremacy is a powerful force, but one that is circumscribed by anti-Blackness. Historically, the White/non-White binary, for all of its influence, has been contingent upon the non-Black/Black binary, which structures the terms within which it plays out. This is what I take Lewis Gordon to mean when he identifies the two principles shaping the U.S. racial order as “(1) be white, but above all, (2) don’t be black” (1997, p. 63). White is best, but the most important thing is not-Blackness. Blackness is “the point *from which* the greatest distance must be forged” (Gordon 1997, p. 53). In this context, I suggest, Asian Americans are uniquely positioned at the juncture of White supremacy and anti-Blackness.¹⁷ From the arrival of the first Chinese immigrants during the Gold Rush to the present, Asians have been figured as *not White* but also, and primarily, as *not Black*. They have been subjected to discriminatory exclusions but also immunized from Negrophobia. White supremacy has pushed them down, and anti-Blackness has provided the floor beneath which they cannot fall. Which is to say, even the worst-off Asians—those burdened by refugee status, lack of citizenship, poverty, language barriers, and more—enjoy the boon of being not Black in an anti-Black society. “Minority” discourse disables us from understanding these complex dynamics. It is not that Asian Americans disrupt the discrimination-injury/need link—that they make it despite discrimination—but that the unitary concept of “discrimination” obscures the differentiated positioning of non-White groups and its impact on group outcomes.

In light of all of this, the question of how Asian Americans are succeeding despite discrimination—“How do they start out in the same place as Blacks and end up farther ahead?”—is not on point. A better question is “How are Asian Americans positioned differently from Blacks in the social order such that the specific advantages, immunities, and burdens that emerge from this position shape their group outcomes relative to Blacks?” A sociology that explored this question would undercut the “Asians as spoilers” narrative by exposing the logical fallacies upon which it rests. It would create space to re-specify the status of Blacks (and, by extension, other groups) and bring back the very issues of compensatory justice that Justice Powell banished in *Bakke*.

On this point, it is worth pausing for a moment to consider Justice Thurgood Marshall’s separate opinion in *Bakke*, in which he dissents from Powell’s finding that the UC Davis Medical School’s special admissions program violates the Equal Protection Clause of the Fourteenth Amendment. After briefly touching on various historical events (including slavery, *Dred Scott*, Black Codes, Reconstruction, and Jim Crow) and present-day statistics (concerning, among other things, Black maternal death rates, infant mortality, poverty, and unemployment), Justice Marshall writes: “At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro” (p. 2802). Even in the absence of a finding of a constitutional violation or specific harm to an individual, he avers, racial classifications are necessary and permissible when a group is in need of remedy because of past discrimination. Responding to Powell’s rejection of the “societal discrimination” argument, he writes:

[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes

demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. *The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups.* It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot (italics added) (p. 2804).

The burden of malignant racial classifications has fallen most heavily on Blacks for hundreds of years, with enduring and “pervasive” effects that are manifestly apparent, and Justice Powell can only judge “societal discrimination” to be too “amorphous” a concept because he “ignores the fact[s].” Moreover, the experience of Blacks is historically unique—it differs “in kind, not just in degree” from that of other ethnic groups. It is interesting that Bob Comfort, commenting to Justice Powell on the first draft of Justice Marshall’s decision, returns to the “Asian spoilers” narrative: “As always, the fact that we have Asians thrown into this case is unexplained.”¹⁸ Of course, Justice Marshall does, in fact, address the issue of Asians, if indirectly, by emphasizing the specificity of anti-Blackness. It is not Marshall who is guilty of fallacious thinking.

ASIANS IN GRUTTER

In the years after *Bakke*, Asian American enrollment in U.S. higher educational institutions rose significantly, surpassing their rapidly growing percentage of the population. As a result, Asian Americans were, in many cases, removed from existing affirmative action programs or not included in the formation of new ones.¹⁹ Yet their role as spoilers continues, albeit with a twist. Instead of being figured as beneficiaries of affirmative action programs who cast doubt on them from the inside, they are now figured as putative “victims” of the programs who cast doubt on them from the outside. As the Court’s jurisprudence on race-conscious admissions develops post-*Bakke*, White and Chinese American conservatives find common cause in attacking race-conscious admissions as illegitimate state action that unfairly favors Blacks at the expense of already discriminated-against Asians.²⁰ The idea of doubly burdened Asian innocents promises to pack an even greater political-legal punch than that of singly burdened White innocents.

In the early to mid-1980s, noting that Asian American college enrollment rates, though rising, were not keeping pace with Asian American application rates, liberal Asian American scholars and advocates formed a task force that charged numerous highly selective universities (Harvard, Brown, Princeton, Stanford, Yale, UC Berkeley, and UCLA) with intentionally discriminating against and/or imposing illegal ceilings on Asian American applicants. University officials denied engaging in discrimination and offered a range of responses, from arguing that Asian Americans were overrepresented (relative to their proportion of the population)²¹ to arguing that they were not as qualified because they were not as well-rounded as other applicants. The Asian American task force challenged both of these claims, arguing that the implied use of proportionality measures as well as the emphasis on supplemental criteria (criteria other than GPAs and test scores) were discriminatory against Asian applicants. Federal and state investigations, in addition to in-house reviews, produced mixed results. Harvard, for example, announced that its internal review showed no bias and that the difference between Asian American and White admissions rates was fully explained by

the fact that White applicants were more likely to be “legacies” and strong on extracurricular activities. The Chancellor of UC Berkeley, on the other hand, publicly apologized to Asian Americans for “disadvantaging” them in the admissions process and promised reform. The Department of Education’s Office of Civil Rights cleared Harvard of wrongdoing, but ordered UCLA to admit five Asian Americans who had been unfairly rejected from the graduate program in mathematics (Takagi 1992).

Jerry Kang (1996) usefully distinguishes what he calls “negative action,” or disadvantaging Asian applicants relative to White applicants, from “affirmative action,” or advantaging applicants from certain non-White groups relative to the general applicant pool.²² There is no necessary connection between trying to boost Black and Latino enrollment and trying to cap Asian enrollment. Furthermore, as Goodwin Liu (2002) (currently a California State Supreme Court Justice) demonstrates, it is a “causation fallacy” to assume that affirmative action has a significant adverse effect on Asian American acceptance rates, or that ending affirmative action would redound primarily to the benefit of Asian Americans, since the number of slots involved in affirmative action programs is too small to affect Asian American admissions rates in any notable way. Liu writes: “In a selection process where there are far more applicants than available opportunities, the likelihood of success for *any* candidate is low, even under race-neutral criteria. Reserving a small number of seats for minority applicants, relative to the total number of seats, will not decrease that low likelihood very much” (2002, p. 1054).²³

Nevertheless, at the height of the Asian American admissions controversy in the 1980s, Attorney General William Reynolds, a member of the Reagan administration, opined in a speech that the ceiling on Asian Americans was the “inevitable result” of a floor for other favored racial groups.²⁴ That is, conservatives quickly grasped the opportunity to weaponize Asian claims of discrimination by suturing the ceiling/quota question to race-conscious admissions. This meant conceding the persistence of racism (against Asians) and potentially raising the Asian-to-White student ratio on college campuses, but this was a reasonable price to pay to weaken affirmative action. *White is best, but the most important thing is not-Blackness.*

Asian American task force members joined with university officials to oppose Reynolds’ gambit and defend race-conscious admissions, but, as Dana Takagi (1992) notes, his speech actually drew upon the task force’s own arguments and data. Was this a case of Reynolds hijacking the task force’s work product for a conservative agenda? Or did the problem go deeper than this? Consider the narrow parameters of the task force’s mission: rather than advancing a critique of how racial inequity, broadly conceived, is baked into multiple levels of university admissions, the task force focused on the question of discrimination against Asian American applicants. This involved challenging the use of supplemental admissions criteria as discriminatory against Asians, but accepting the use of nonsupplemental admissions criteria (GPAs and SAT scores), which have been shown both to measure parents’ education and income more than they do student merit, and to be discriminatory against Blacks.²⁵ The task force did not challenge the pervasive racial segregation and economic inequality that shape K-12 education—systematically skewing educational outcomes against Blacks, Latinos, and the poor—or the “school-to-prison-pipeline” that brings hyperpolicing into schools and funnels Black students in particular into the prison system. Nor was there discussion of the myriad factors Carbado et al. (2016) have identified as disadvantaging Black students in the college admissions process, including explicit racial bias, implicit racial bias, stereotype threat, racial isolation, and negative institutional cultures.²⁶ In other words, the task force probed the power differential between Whites and Asians *but ignored the power differential between Asians and Blacks*. Had they chosen to address the latter, too, they would have undercut Reynolds’ gambit in advance.

By the time of *Grutter v. Bollinger et al.* (2003), the notion that affirmative action victimized Asian Americans was quite familiar, thanks to anti-affirmative action campaigns in California during the 1990s.²⁷ In the first U.S. Supreme Court case dealing with race-conscious admissions since *Bakke*, Barbara Grutter, a White woman who had been rejected by the University of Michigan Law School, filed suit, claiming that the law school's affirmative action program discriminated against her in violation of the Fourteenth Amendment and Title VI.²⁸ The brief for Petitioner directly challenges the coherence of the diversity rationale laid out in Justice Powell's "lone analysis" (29) decades earlier, arguing that only a remedial program narrowly tailored to respond to a specifically identified racial injury should pass strict scrutiny.²⁹ Once again, Asian Americans are mentioned as spoilers: "[D]isadvantage on the basis of race [in race-conscious admissions] works not only against Caucasian Americans, but also against other groups, including minority groups historically discriminated against, especially Asian Americans" (p. 39).

The brief for Respondents, which defends the law school's affirmative action program as modelled on the Harvard plan and thus compliant with *Bakke*, deals with Asian Americans by shifting them out of the category of "minority," with little explanation. As a group that appears to delink discrimination and injury/need, Asian Americans confront schools with the awkward choice of either classifying them as "minorities," despite the fact they do not quite fit, or "de-minoritizing" them (Lee 2006). According to Respondents' brief, the law school aims for a "critical mass" of students "from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans" (p. 4). Footnote 5 here simply states: "Members of these groups are referred to as 'minority' students" (p. 4). The three named groups deserve special attention because they are "the groups most isolated by racial barriers in our country" (p. 50). The omission of Asian Americans from this list is not accidental, we learn, as the brief then juxtaposes "minority" students to "White and Asian" students. Footnote 80 in this passage notes that while Asians and Jews also have unique experiences because of their ethnicity, they are already admitted to the law school in significant numbers according to race-neutral criteria. The brief closes by further clarifying this point: "Narrow tailoring does not require the Law School to blindly give the same 'plus' to every ethnic group it can identify, regardless of its salience to the educational mission—and regardless of whether members of that groups would be well represented in the student body anyway" (p. 50).

The most striking brief in the *Grutter* case (for our purposes) is the amicus brief filed in support of Petitioner by the Asian American Legal Foundation (AALF), the same organization that filed the 2015 complaint against Harvard with the U.S. Department of Education and the U.S. Department of Justice. Foreshadowing some of the arguments that would be used more than a decade later in the SFFA lawsuit, the brief attempts to delegitimize race-conscious admissions by refiguring it as a policy that *produces* rather than alleviates racial discrimination. This is accomplished through a number of discursive moves: equivalencing between Asians and Blacks and then displacing Blacks from the center of the picture and replacing them with Asian Americans (or, more specifically, Chinese Americans), emphasizing Chinese Americans' experiences with discrimination by Whites, ignoring Chinese Americans' immunities and advantages relative to Blacks, and repeating the "causation fallacy."

The AALF brief charges the University of Michigan Law School with "plac[ing] barriers before Chinese Americans and other 'non-preferred' individuals that are unjustified by any remedial purpose" (p. 2). Echoing Justice Powell's dystopic ruminations in *Bakke*, it depicts state actors, "freed from the constraints of any remedial purpose," (p. 5) as running amok with their racial schemes, arbitrarily designating certain

groups “preferred” and others “non-preferred.” Negative action and affirmative action are conflated here without explanation: “There is ample reason to look askance at any program that classifies people by ethnicity to achieve some ‘ideal’ racial composition. There is no difference between a policy of admitting some people because there are ‘not enough’ of their race and a policy of excluding others because there are ‘too many’ of theirs” (p. 5). In this context, the brief argues, it is incumbent upon the Court to heed the lesson of the *Brian Ho* case (which successfully challenged race-conscious admissions in San Francisco’s Lowell High School)—namely, the “the modern-day dangers of Kafkaesque social engineering in a multi-racial society” (p. 4).

What makes the university’s program especially repugnant, the brief argues, is the long, ugly history of discrimination against the Chinese, including the so-called “queue ordinance,” the persecution of Chinese laundries that culminated in the *Yick Wo* decision, and school segregation. *Gong Lum v. Rice* and *Lee v. Johnson*, two cases involving Chinese American resistance to state-imposed racial classifications, are among those cited as evidence of Chinese involvement in shaping equal protection jurisprudence in education, and Justice Douglas is quoted from the latter case: “*Brown v. Board of Education* was not written for Blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco” (p. 17). Borrowing the precise phrasing of Justice Marshall’s separate opinion in *Bakke*, the brief states: “[I]t would be ironic indeed were Chinese Americans to find themselves classified as a ‘non-preferred’ ethnicity in the 21st century, when a dominant theme of their history in this country has been one of *de jure* discrimination” (p. 3). The brief closes with the following quote:

It is simplistic to assume that any given African American candidate has suffered adversity and disadvantage, thereby gaining valuable perspective or experience, while assuming that the opposite is true for any given Chinese American candidate....[Given] the example of two random African American and Chinese American candidates, a statement that the person has experienced adversity might be true for both, either, or neither of the two. All that can be known *a priori* is that both individuals deserve to be considered on their own merits, undistorted by the prism of a diversity scheme (p. 29).

It is worth noting that this is a straw man argument, since supporters of race-conscious admissions do not deny that Asian Americans are discriminated against. What is telling is the AALF’s insistence that Chinese Americans and African Americans are comparably situated, and that individual disadvantage occurs randomly rather than being predicted by Blackness or Chineseness.

Asserting “minority” equivalency and despecifying Black subjection sets up the brief’s overall message: the University of Michigan Law School’s program unfairly burdens an already burdened racial group, rendering it the worst-off group of all. With this new and perverse sociometry, the brief inverts reality. Asians are now more disadvantaged than Blacks, Blacks are more advantaged than Asians. Up is down and down is up. Race-conscious admissions—an inclusionary measure that does not produce a significant adverse impact on Asian Americans, who are already immunized from Negrophobia—is a racist policy that doubles down on historical patterns of anti-Asian discrimination. The brief makes no mention of Black subjection, the underrepresentation of Blacks and other groups in higher education, or affirmative action’s historical purpose. The reader could almost be forgiven for concluding that the purpose of the University of Michigan Law School’s program is to persecute the Chinese.

There is a kind of forgetting insisted upon here, a willed suppression of historical truth. Consider the citation of *Gong Lum v. Rice* (1927) and *Lee v. Johnson* (1971) as proof that Chinese Americans have fought educational segregation. In the former case, attorneys for Chinese American Martha Lum argued that she should be allowed to attend White rather than “colored” schools in Jim Crow Mississippi, on the grounds that the Equal Protection Clause protected the Chinese, too, *from the dangers of associating with Black students*.³⁰ In the latter case, attorneys for Chinese American children argued that they should not have to obey a desegregation busing order, on the grounds that busing would disrupt Chinese cultural instruction and community cohesion.³¹ Chinese Americans fought against racial classification in education in both cases, it is true—but *in ways that reinforced the segregation of Black students*. Citing these two cases is symptomatic of how the AALF brackets Blacks out of the picture altogether, the better to focus on the issue of Chinese prerogatives in an anti-Black order. Ironically, in trying to demonstrate Chinese Americans’ anti-segregation bona fides, the AALF reminds us that Chinese resistance in these historical instances came at the expense of Blacks.

Led by the National Asian Pacific American Legal Consortium (NAPALC), liberal Asian American advocacy groups submitted an amicus brief in *Grutter* for the specific purpose of countering the argument that race-conscious admissions harms Asian Americans.³² The NAPALC lays out two arguments: first, Asian Pacific Americans (APAs)³³ are not harmed by the University of Michigan’s affirmative action programs, and they benefit, as all students do, from a diverse student body; and second, Asian Pacific Americans should be treated by affirmative action programs as underrepresented minorities where appropriate, especially in employment and public contracting. Concerned that the model minority myth disguises APA disadvantage relative to Whites, the brief attempts to set the record straight by describing APA poverty rates, limited returns on education, employment barriers, stereotypes, and more.

The NAPALC brief is written in a solidaristic spirit—arguing that Asians should support affirmative action even in those instances when they are not the direct beneficiaries—but, like the 1980s task force, it dodges the vexing question of Asians’ anomalous status as a “minority” that does not seem to require special consideration in university admissions. Asking that Asians be given special consideration in some areas, even though they do not need it in others, makes sense, but it also continues to beg the question of how racialized groups are differentially positioned in the social order and how this shapes the privileges, burdens, and immunities they bear, respectively. Further, by insisting that Asian Americans are a bona fide “minority” and focusing exclusively on their disadvantage relative to Whites (while neglecting to discuss their advantage relative to Blacks), the brief ends up actually reinforcing the AALF’s equivocating logic.

It is understandable why NAPALC adopts this stance: to defend race-conscious admissions, it must speak in terms the Supreme Court will hear; it does not have the luxury of defining these parameters. Legal discourse is essentially conservative in this way. Recognizing this bind, it is nonetheless clear that the AALF’s tools cannot be used to dismantle the AALF’s argument. Insisting that Asian Americans “are minorities, too” is a non-response to the AALF’s claims. The only way to debunk the “Asian spoilers” narrative in a definitive way is to debunk the logical fallacies upon which it rests, and this requires moving beyond the obfuscations of “minority” discourse and articulating a thoughtful and transparent sociometry of race that explores Asian Americans’ distinctive positionality at the juncture of White supremacy and foundational anti-Blackness. This is work that scholars and other commentators can do, in the hope of eventually redefining the terms of judicial legibility.

ASIANS IN *FISHER (I AND II)*

In *Grutter*, the Court ruled (5-4) that diversity is indeed a compelling state interest and that the University of Michigan Law School's program is justified in using race as one factor in a holistic review of individual applicants. Trying to achieve a "critical mass" of "underrepresented" students in the name of diversity, the majority held, does not constitute illegitimate "racial balancing" involving specific numerical quotas.³⁴ A decade later, with funding from right-wing donors, conservative activist Ed Blum launched another major challenge to race-conscious admissions in higher education. Under Blum's tutelage, Abigail Fisher, a White woman applicant who had been rejected by University of Texas, Austin, sued the university, charging that its affirmative action program discriminated against her in violation of the Fourteenth Amendment. In *Fisher v. University of Texas at Austin et al. (I and II)*, the most recent U.S. Supreme Court case(s) on this issue, the "Asian spoilers" narrative reaches a new level of prominence, setting the stage for the Harvard case to emerge.³⁵

In the brief for Petitioner in *Fisher I*, Asian Americans occupy center stage. First, the brief hints at Asian Americans' anomalous status as a "minority" that is not quite a "minority":

[A]lthough UT includes Asian Americans as minorities in its diversity statistics, marketing materials, and classroom analysis, it employs race in admissions decisions to the detriment of Asian Americans, thus subjecting them to the same inequality as White applicants (p. 7).

Next it argues that UT Austin's program is not pursuing a "critical mass" of underrepresented minority students in the name of diversity, but rather pursuing unconstitutional "racial balancing" with an eye to the state's demographics. Why does UT Austin consider Asians "overrepresented" and Hispanics "underrepresented," when there are fewer of the former than the latter enrolled? Because "UT uses state racial demographics as its baseline for determining which minority groups should benefit from its use of race" (p. 7) and,

[t]his differing treatment of racial minorities based solely on demographics provides clear evidence that UT's conception of critical mass is not tethered to the 'educational benefits of a diverse student body'....UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity (p. 28).

UT Austin should admit a roughly equal number of Asians and Hispanics, the brief suggests, since both are "minorities" who contribute to "diversity." It is rare for Latinos to be raised on their own (rather than as an appendage to Blacks) in legal discourse on affirmative action, and we may surmise that Petitioner does so here, while ignoring Blacks, for the simple reason that there are many fewer Blacks than Asians or Hispanics attending UT Austin. (In 2008, Asian Americans were 19% of the UT Austin freshman class and 3.4% of the state population; Hispanics were less than 20% of the class and 36% of the state population; and African Americans were 6% of the class and 12% of the state population. That is, Asian American enrollment that year was more than 5 times their percentage of the population, Hispanic enrollment was less than two-thirds of their percentage of the population, and African American enrollment was half of their percentage of the population.)³⁶ "Minority" equivalencing, in any case, proceeds without Blacks here:

Petitioner implies that Asians and Hispanics are comparably situated and thus concludes that the favoring of Hispanic applicants is unfair, leaving Asian Americans the worst-off “minority.”

The brief for Respondents in *Fisher I* explains that “critical mass” is a concept properly applied only to “underrepresented” minorities like Blacks and Hispanics, and that UT Austin follows the *Grutter* Court’s reasoning on why these groups deserve special consideration. Whereas the University of Michigan Law School avers that Asian Americans are not a “minority,” then, UT Austin avers that they are a “minority”—just not an underrepresented one (p. 45). (We might think of these as alternative semantic strategies for dealing with Asian anomalousness.) The brief emphasizes that Asian Americans were fully 18% of the UT Austin freshmen class (as compared with only 3% of the population of Texas) in 2004 (p. 45). That is, they were admitted at six times their proportion of the state population that year. And Asian American enrollment numbers in fact increased after UT Austin implemented its race-conscious admissions program in 2005. Moreover, the brief points out, holistic admissions means that there are no automatic demerits for belonging to any particular group, and that any applicant can potentially benefit from the individualized consideration of race.

The AALF’s amicus brief in support of Petitioner in *Fisher I* reprises the central themes of their *Grutter* brief.³⁷ Condemning “racial balancing” and the diversity rationale as discriminatory against an already burdened group, it states:

Efforts to manipulate the racial composition of schools necessarily come with a steep cost—borne in the first instance by individuals on the wrong side of the racial balancing act because their racial groups lack political or social clout. Schools in general, and highly competitive universities in particular, have a limited number of slots. Every slot allocated to someone who would not have been admitted but for their race is a slot *denied* to someone else who would have been admitted but for their race. The costs of such racial gerrymandering fall not merely on members of a supposedly privileged racial majority, but on individuals belonging to *any* non-preferred or ‘overrepresented’ race that must be displaced in order to increase the numbers of a preferred or ‘underrepresented’ race or ethnicity (p. 6).

This passage suggests that race-conscious admissions is a spoils system that delivers goods to Blacks (and Latinos), who have “political or social clout,” and burdens Asians, who lack such clout. (It is not explained why the spoils system does not reward Whites, who presumably have the most clout.) Blacks have captured the state and are “gerrymandering” college admissions to benefit themselves. And Asians have replaced Blacks as paradigmatic victims of discrimination. They are “non-preferred,” a term that conjures the capricious exercise of arbitrary power.

And then, the climactic moment of the AALF brief: “*Grutter* will be seen as the *Plessy* of its generation” (p. 36).³⁸ With this pronouncement, Black people are evacuated from their history, and Asians move in to occupy it, all the while trading on the moral currency of the Black struggle.³⁹ *Asians are the new blacks*. Blacks are not just displaced as victims, they are catapulted into the position of world-historical villains. Following the metaphor, Blacks and their allies are malevolent legislators in Jim Crow Louisiana, upholding a system of segregation in which the lynching of thousands of Black men, women, and children was only the most visible marker of the catastrophic and pervasive violence imposed on Black lives. Asian Americans are Homer Plessys courageously defying segregation laws in the name of equality and freedom. And the Court’s ruling in *Grutter* is a crime against humanity. This is a perverse and cynical sociometry that seeks, without apology or pretense, to elevate Asians at the expense of Blacks. Historical truth is another casualty.

Liberal Asian American advocacy groups again responded by arguing that Asians are “minorities” who benefit from and support race-conscious admissions, too. The amicus brief submitted by the Asian American Legal Defense and Education Fund (AALDEF) argues that Asian Americans benefit from affirmative action and are not harmed by it. The amicus brief submitted by the Asian American Center for Advancing Justice (AAAJ) et al.⁴⁰ notes that “[l]ike other minority groups, AAPIs [Asian American Pacific Islanders] have suffered racial prejudice, and race-conscious admissions programs have helped counteract that prejudice” (p. 7). Today, the brief asserts, select Asian subgroups stand to benefit directly from race-conscious admissions, all Asians stand to benefit from diversity, many Asians stand to benefit from affirmative action in other contexts, and Asians as a whole are not demonstrably harmed by UT Austin’s program. As such, “[t]he undersigned *Amici* reject these unfounded claims [by Petitioner and her *amici*] that AAPIs are harmed by such programs, and categorically oppose such efforts to use the AAPI community as a wedge group to curtail opportunities for racial minorities” (p. 4). This is an admonition to stop pitting comparably situated “minority” groups against each other. Notably, the brief does not call out the AALF for advancing a false sociology that distorts our understanding of racial power and recklessly throwing around metaphors of Black suffering to help Asians get ahead. Instead it says, in essence, “Asians are minorities, too.”⁴¹

In *Fisher I*, the U.S. Supreme Court vacated and remanded the Fifth Circuit Court of Appeals’ ruling upholding UT Austin’s program, saying that the lower court had not applied strict scrutiny correctly. Justice Thomas wrote a concurring opinion, in which he declares, without commentary or explanation, “There can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race” (p. 2431). Echoing the AALF brief, Thomas then compares UT Austin’s putatively good intentions to those of slaveholders who said slavery was a “positive good” and segregationists who said segregation protected Black students from White racism.

After the Fifth Circuit Court again upheld the university’s plan, Abigail Fisher appealed, and the Supreme Court, in *Fisher II*, upheld the lower court’s ruling by a 4-3 vote. Justice Kennedy’s majority decision cites the district court’s finding that all groups, including Whites and Asians, can potentially benefit from racial considerations in holistic review, as well as the AALDEF’s argument that UT Austin’s program does not discriminate against Asian Americans (p. 2207). Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented in *Fisher II*. Quoting the AALF’s claim that UT Austin views Asian Americans as less valuable than Hispanics in promoting diversity, Alito criticizes the Court majority and the Fifth Circuit for “act[ing] almost as if Asian-American students do not exist” (p. 2227). In footnote 5 here, he declares that the Fifth Circuit is wrong when it contends that ending race-conscious admissions would produce a nearly “all-white” student body, as this claim ignores the Asian Americans who are admitted without special consideration. The Fifth Circuit, he writes, shows a “willful blindness” to Asians that is “absolutely shameless” (p. 2227). Alito concludes: “The reality of how UT treats Asian-American applicants apparently does not fit into the neat story the Fifth Circuit wanted to tell” (p. 2227). He then cites the AALF brief a second time (that the Court’s tolerance of discrimination against Asians is “particularly troubling” (p. 2228) because of their long struggle with discrimination) and a third time (that UT Austin should pay attention to intraracial diversity among Asian Americans). Nearly forty years after *Bakke*, the “Asian spoilers” narrative is still going strong.

THE HARVARD CASE

The lawsuit brought by Students for Fair Admissions (SFFA) against Harvard is the first lawsuit over race-conscious admissions in higher education to feature Asian American plaintiffs.⁴² Yet, as we have seen, Asians have been figured as a wrench in the works of college race-conscious admissions all along. The Harvard case represents a predictable if not inevitable culmination of the “Asian spoilers” narrative that first emerged out of Justice Powell’s reasoning in *Bakke* and has since become a truism in legal (and popular) discourse.

The SFFA’s initial complaint, filed in November 2014, will sound familiar to us by now.⁴³ It is noteworthy that the complaint’s second author, William Consovoy, clerked for Justice Thomas and was second author on the brief for Petitioner in *Fisher I* and lead author on the brief for Petitioner in *Fisher II*. Also, when the SFFA initially incorporated in July 2014, a few months before filing the suit, its board of directors consisted of three members: Ed Blum (President), Abigail Fisher of *Fisher v. Texas* (Secretary) and Richard Fisher, Abigail’s father (Treasurer).⁴⁴

Arguing that Harvard’s “holistic” admissions plan has always been an “elaborate mechanism for hiding Harvard’s systematic campaign of racial and ethnic discrimination against certain disfavored classes of applicants” (p. 3), the complaint charges it with violating Title VI of the Civil Rights Act of 1964 in four ways: engaging in invidious discrimination against Asian American applicants, pursuing “racial balancing,” using race as a dominant factor rather than just a “plus” factor, and not pursuing available race-neutral alternatives. Like Jews in the past, who were subject to admissions quotas, Asian Americans today are a “disfavored” group. Harvard has a history of discriminating against Asian Americans in particular, the complaint avers: in the 1970s, the university denied Asians “minority” status (on the grounds that they were not underrepresented) and refused to grant them special consideration in race-conscious admissions; in the 1980s, Asian American advocates charged the university with imposing a ceiling on Asian admissions; and recently, “decisive statistical evidence” (p. 43) has emerged to prove that the university is discriminating against Asian applicants again. In support of this last claim, the complaint cites, among other sources, Espenshade and Radford’s study (2009) of admissions data from several elite public and private colleges, which argued that Asian applicants generally suffer an “Asian penalty” of 140 points on the SAT compared with Whites—that is, they need an SAT score 140 higher than Whites do to get into these schools, all other things being equal.⁴⁵

Although the complaint focuses on the question of a ceiling or “negative action,” and makes no argument connecting “negative action” and “affirmative action,” it nevertheless asks the court to issue “a permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions,” and a declaratory judgment that “any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964” (p. 119).⁴⁶ No explanation is proffered as to how the (alleged) ceiling on Asians would be remedied by not using race as a “plus” factor for certain underrepresented groups. To justify what appears as overreach on the plaintiffs’ part, the complaint opines:

[T]he proper response is the outright prohibition of racial preferences in university admissions—period....Harvard and other academic institutions cannot and should not be trusted with the awesome and historically dangerous tool of racial classification. As in the past, they will use any leeway the Supreme Court grants them to use racial preferences in college admissions—under whatever rubric—to engage in racial stereotyping, discrimination against disfavored minorities,

and quota-setting to advance their social-engineering agenda. Strict scrutiny has proven to be no match for concerted discrimination hidden behind the veil of 'holistic' admissions. There may be times when social problems can be solved democratically. But massive resistance to racial equality is not one of them. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (pp. 6-7).

Once again, the script is flipped to create a more serviceable alternative reality. The persistent truth of Black subjection, the integrationist intent of Harvard's plan, and the immunities and advantages that attach to Asian Americans as not-Blacks—each of these factors is turned on its head. Blacks and their allies, we are told, control the levers of power, which they use to oppress innocent, "disfavored" Asians. Asians are Daisy Bateses braving crowds of hateful Whites to integrate Little Rock Central High School, and Harvard admissions officers are the White segregationists committed to "massive resistance" to integration.

In its most recent filing, a motion for summary judgment submitted in June 2018, the SFFA argues that documents gleaned during discovery show that Harvard conducted its own internal investigation (through the Office of Institutional Research) in 2013 that indicated bias against Asian Americans in the admissions process and then concealed the findings.⁴⁷ Even without a "smoking gun," the motion adds, plaintiffs can prove that the facially neutral Harvard plan has a discriminatory purpose through circumstantial evidence and the elimination of other plausible explanations. Here the motion presents a report by the plaintiffs' expert, Dr. Peter Arcidiacono, which conducts a statistical analysis of six years of Harvard's admissions data and finds that the admissions plan "disproportionately harms" (p. 7) Asian applicants.

Harvard's admissions plan rates students along four dimensions: academic, extra-curricular, athletic, and personal. Then each student receives an overall rating, which takes into account but is not mechanically determined by the other four ratings. Arcidiacono's report argues that the university discriminates against Asian applicants in three ways: in the personal rating, where Asians receive the lowest scores of all groups (here applicants are assessed on traits such as "positive personality," "others like to be around him or her," "likeability...helpfulness, courage [and] kindness," "attractive person to be with," "widely respected," and "good person") (pp. 7-8);⁴⁸ in the overall rating, which, like the personal rating, is subjective;⁴⁹ and in selection for admission. On this last point, Dr. Arcidiacono argues that Asians face a "ratings penalty" (p. 10)—meaning their chances of admission would go up if they were White.

Harvard's motion for summary judgment, also filed in June 2018, argues that the admissions plan passes strict scrutiny: it pursues a compelling interest in a diverse student body, is narrowly tailored, considers race flexibly along with other factors rather than using a quota or "racial balancing," and cannot be effectively replaced by race-neutral alternatives.⁵⁰ The university does not simply select students on the basis of academic criteria such as test scores and grades,⁵¹ but rather conducts a flexible and individualized "whole person evaluation" that considers:

information about the applicant's extracurricular and athletic participation, teacher recommendations, guidance counselor recommendations that frequently discuss much more than academic qualifications, the applicant's essays, an evaluation from a Harvard graduate in the applicant's community who interviewed the applicant, information reflecting the applicant's socioeconomic background, parental education and occupation, an expression of the applicant's likely academic and extracurricular interests at Harvard, any academic or artistic work the applicant has submitted, and much more (p. 4).

In addition, the admissions plan pays attention to many kinds of diversity in addition to race, including socioeconomic background, academic interests, experiences of hardship, passions, public service, and more.

Harvard's motion also challenges the SFFA's standing to file the suit. The first line of the brief states: "This case is the latest salvo by ideological opponents of the consideration of race in university admissions" (p. 1). Then: "Although SFFA purports to be an organization dedicated to vindicating the interests of Asian-American applicants, it is nothing of the sort—it is merely a vehicle to litigate the ideological preferences of its founder Edward Blum, and does not have standing to bring this lawsuit" (p. 3). Ed Blum, the motion notes, is on record saying "I needed plaintiffs; I needed Asian plaintiffs...so I started...*HarvardNotFair.org*" (p. 10). SFFA amended its bylaws once it realized that Harvard would challenge its standing, but even now, the motion avers, members say they have not attended meetings and refuse to testify about whether they have voted in any SFFA elections. And only a "tiny fraction" of its 20,000 supposed members have paid dues, while unidentified donors gave the organization nearly two million dollars in 2015-2016 (pp. 12-13).⁵²

Finally, the Harvard motion rejects the claim that the university discriminates against Asian Americans, whose percentage of the admitted class has increased by 29% over the past decade to nearly 23% today (p. 2).⁵³ To prove the claim, the motion argues, SFFA must show Harvard "discriminated on the basis of race, the discrimination was intentional, and the discrimination was a substantial or motivating factor for [Harvard's] actions" (p. 35).⁵⁴ On this point, the internal review by Harvard's Office of Institutional Research was not designed to detect *intentional* discrimination and did not in fact do so. Its analysis was also "incomplete, preliminary, and based on limited inputs" (p. 38). As months of discovery produced "no documentary or testimonial support" for the charge that Harvard uses quotas and pursues "racial balancing," the motion continues, plaintiffs' case is "entirely statistical" (p. 35), and, as such, must demonstrate "gross disparities" (p. 38) in order to meet the bar of evidence. Far from finding such "gross disparities," the statistical analysis of Harvard admissions data conducted by the university's expert, Dr. David Card, finds "no negative effect of Asian-American ethnicity" (p. 39).⁵⁵

The statistical report produced by SFFA's expert Dr. Arcidiacono is marred by "fatal defects" (p. 41), the motion argues: first, its sample excludes recruited athletes, "legacies," and other "special category" students, on the grounds that they are evaluated under a separate process (which is not true);⁵⁶ second, it excludes personal ratings from its analysis, on the grounds that these are biased against Asian Americans (which has not been demonstrated). Personal ratings are in fact too complex to be modelled statistically, as they involve multiple components that are statistically unobservable, or impossible to measure. "Where so much relevant information is statistically unobservable, it is methodologically unsound to conclude that intentional discrimination is the cause of the perceived association between race and personal ratings" (p. 43).⁵⁷ As Dr. Card's rebuttal report demonstrates, once these methodological errors and omissions are corrected, a proper statistical analysis shows no discernible discrimination, let alone "gross disparities."⁵⁸

The federal district court in Massachusetts will be hearing arguments in this case in October 2018, as this article goes to press. On August 30, 2018, the Department of Justice formally declared its support for SFFA's lawsuit in a "statement of interest" (Benner 2018), extending Attorney General Jeff Sessions' assault on affirmative action and deepening the fateful convergence of White and Asian conservatism on this issue. Will the judge accept SFFA's claim that the disparity in personal ratings proves intentional discrimination, or Harvard's claim that it is the innocent result of a combination

of “statistically unobservable” factors? Whatever the outcome at the district court level, will SFFA, at subsequent levels of review, persuade the courts that a ceiling on Asian Americans, if it does exist, is inextricably tied to a floor for other “minorities,” and that the consideration of race in admissions should therefore be prohibited altogether? It remains to be seen whether the “Asian spoilers” narrative will accomplish what White charges of “reverse racism” could not: the final dismantling of affirmative action in U.S. higher education.

FINAL THOUGHTS

This article sheds light on the Harvard case by tracing a brief history of how Asian Americans are figured (and figure themselves) in U.S. Supreme Court discussions of race-conscious admissions in higher education. What emerges clearly from this history is the two-staged development of an “Asian spoilers” narrative, starting with Asians casting doubt from the inside of programs by supposedly delinking discrimination and injury/need, and ending with Asians casting doubt from the outside of programs as putative victims. In the first stage, the “Asian spoilers” narrative undercuts the “societal discrimination” rationale for race-conscious admissions, leaving only the diversity rationale. In the second stage, the “Asian spoilers” narrative has come to threaten the diversity rationale as well. Throughout, this troubling narrative, zealously taken up by White and Asian conservatives alike, has depended upon and, in turn, bolstered the ideological project of despecifying Black subjection and disavowing racial positionality in U.S. society.

In Jordan Peele’s 2017 film *Get Out*, the sole Asian character, an unnamed man of Japanese descent played by Hiroki Tanaka, is an invited guest at the cocktail party thrown by the Armitages during Chris’ (Daniel Kaluuya) visit. He approaches Chris at one point during the party and asks, in accented English, if being African American is “an advantage or a disadvantage.” This is his only line in the film. It is a surprising question to hear in a film about anti-Blackness. Indeed anti-Blackness hangs over the Armitage’s party like a miasma, oozing out in the comments of numerous guests as they fawn over Chris and size up his physical value. The Asian man then goes on to make a formal bid, alongside the White guests, for the use of Chris’ body. What does it mean that an Asian man asks this question of the “slave” in the middle of what turns out to be an extended slave auction? What does it mean that he imagines being Black could be anything but a “disadvantage” in that context?

One way to read this scene is as a commentary on how Asian Americans show bad faith when they insist on “minority” equivalencies and disavow their relatively advantaged position within an anti-Black order. Like the White people at the party, the Asian man is lying when he speaks with Chris, concealing his real motives, and, we realize in retrospect, eyeing him hungrily. When he asks the question of Chris, he is not so much seeking an answer as expressing a refusal to acknowledge the reality around him. He dissembles his own racial status, that is, even to himself. He wonders if he has it worse than a Black man as he prepares to bid on that man’s body in an auction. Anti-Blackness is disappeared at the moment of its most complete expression. The man intends to take over Chris’ body, but only after he performs for himself (and perhaps for Chris) his uncertainty and angst about his own indeterminate relation to Blackness. He must first relieve his conscience before he settles in for the feast. What Peele invokes so powerfully here is the fraught question of Asian American complicity in an anti-Black order. Sometimes Asians are not unwilling conscripts. Sometimes they weaponize themselves.

We need a new response to the “Asian spoilers” narrative that escapes the recursive loop of “minority” discourse. This means taking the long view, moving the conversation about affirmative action back toward considerations of injury, harm, responsibility, and justice, and opening the conversation up in new directions. It means articulating a thoughtful and transparent sociometry that conceptualizes the differentiated, unequal statuses of groups caught together in the racial net of anti-Blackness and White supremacy. (This is a theoretical-political project that can be broadened to explore the synergism between racial positionality and neoliberal capitalism, as well.) Of course Justice Powell was right that sociometry is a difficult and contentious task. But as he himself demonstrated (inadvertently), it is not a choice between sociometry and no sociometry but a choice between one that is covert and unsubstantiated and one that is open and transparently defended. We are all sociometrists now. The question is whether we will accede to a sociometry that dissembles about existing structures of racial power or instead produce one that analyzes these structures and exposes them to the light.

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NOTES

1. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation); and the Honorable and Reverend the Board of Overseers*, “Complaint.” The SFFA has also filed suit against University of North Carolina and University of Texas, Austin. Title VI of the Civil Rights Act of 1964 forbids institutions that receive federal funding from engaging in discrimination on the basis of race, color, or national origin.
2. See “Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts,” filed August 15, 2018.
3. Blum has initiated more than two dozen lawsuits aimed at restricting affirmative action and voting rights across the country. He was the moving force behind *Fisher v. Texas*, an important affirmative action case (to be discussed below), and *Shelby County v. Holder*, wherein the U.S. Supreme Court, in a 5-4 decision, effectively disabled the Voting Rights Act of 1965. The Donors Trust, which distributes donations from conservatives and libertarians, gave almost \$2.9 million to support his work from 2010 to 2015 (Hartocollis 2017).
4. The AALF and 80/20 are both dedicated to dismantling affirmative action in school admissions. In this article, I focus on the AALF, which was originally formed to file the anti-affirmative action lawsuit, *Brian Ho v. SFUSD*. The AALF calls itself the *Asian American Legal Foundation* even though it is almost exclusively Chinese American and has worked (in the *Brian Ho* case, for example) against the interests of other Asian national origin groups. The organization borrows the pan-Asian mantle for greater legitimacy and to convey broader support than it in fact commands. Similarly, the collection of organizations that comprise the “Coalition of Asian American Associations” that filed the OCR-CRD complaint includes none of the major Asian American advocacy organizations with a national presence such as Asian Americans Advancing Justice or Organization of Chinese Americans. At least 43 of the 64 listed organizations are identifiably Chinese, and many are local, relatively obscure groups like “1441 Manufactured Home Residents Association (Rowland Heights, CA),” “Howard County Chinese Parents Group,” and “Millburn Short Hills Chinese Association.”
5. Other issues include sanctuary cities, the placement of homeless shelters, and the trial of NYPD officer Peter Liang.
6. The *Fisher II* vote was 4-3.
7. For discussion of foundational anti-Blackness, see Wilderson (2010).
8. 78-11 *Regents of University of California v. Bakke*—folder 2. www.law2.wlu.edu/powellarchives/page.asp?pageid=1322. See also “The Harvard Plan That Failed Asian Americans” (2017).

9. Between 1970 and 1974, the total number of Asian Americans admitted to the UC Davis Medical School through general admissions was 41. The number of Black and Chicano students admitted through general admissions during those five years was 1 and 6, respectively. See Justice Powell's opinion in *Bakke*, footnote 6. In 1973, 13 of 84 general admissions slots were filled by Asian Americans, who at that time were less than 6 percent of California college graduates. *Ibid*, 70.
10. *Regents of the University of California v. Bakke*, 98 S.Ct. 2733 (1978). All page numbers refer to this case as published in the U.S. Supreme Court Reports.
11. Quoting from *United States v. Associated Press*, D.C., 52 F.Supp. 362, 372.
12. See Foster (1993); Lawrence (2001).
13. Interestingly, Powell indirectly raises but does not explore the question of intra-Asian diversity here. It is not uncommon for universities to differentiate Asian national origin groups and offer some but not others special consideration, depending upon their enrollment numbers, although the discourse about race-conscious remedies has tended to treat Asian Americans as a homogeneous group.
14. See Ross (1990) for discussion of how White innocence is constructed in discussions of affirmative action, and for specific analysis of Justice Powell's contributions on this front in *Bakke*.
15. Median household income figures overstate Asian Americans' wealth because Asian Americans tend to live in larger, extended family formations where there are numerous income-earners. Also, Asian Americans are concentrated in areas of the nation that have higher incomes and standards of living.
16. See Kim (2001).
17. Latinos are sometimes conceptualized as an interstitial group as well, with the complicating caveats that they have been classified as White in a legal-technical sense and currently have SES measures that skew closer to Blacks than Asians' do.
18. See Bob Comfort's handwritten comments to Justice Powell on first draft of Justice Marshall's opinion in *Bakke*, circulated by Marshall on June 23, 1978. 76-811 *Regents of University of California v. Bakke*—Opinion drafts—Marshall (1 of 2). <http://law2.wlu.edu/powellarchives/page.asp?pageid=1322>. In Folder 14 of this same archive of Powell's papers, Powell's memo "Fullilove v. Kreps" (January 28, 1980), relating to a case on minority business contracting, states "We also need a footnote dealing with the sticky problem of Chinese and other 'minorities' being bracketed indiscriminately with Negroes" (4-5). Although no such footnote appears in Powell's concurring opinion in *Fullilove v. Klutznick*, it is clear that Powell's embrace of the "Asian spoilers" narrative continued after *Bakke*.
19. Asian Americans were included in affirmative action programs at Boalt Law School (UC Berkeley) in the 1960s, but by the mid-1970s, faculty started to reconsider this as Asian numbers under regular admissions became more robust. They met with resistance, foreshadowing the tensions captured in *Bakke*. In 1984, UC Berkeley excluded Asian Americans from race-conscious admissions (Lee 2008). UCLA Law School did not include Asian Americans in its race-conscious admissions program initially, and when Asian American students asked for inclusion in 1969, faculty initially resisted, "arguing that Asian Americans had suffered less socioeconomic and educational disadvantages than blacks, Chicanos, and Native Americans" (Muratsuchi 1995, p. 97). Black and Mexican American law students offered to each give up one slot to create a total of two slots for Asian Americans in the special admissions program. Conflict over the issue continued at UCLA Law School in the 1980s.
20. Asian American conservatism on this issue has had a predominantly Chinese face, although some Indian Americans and Korean Americans have been involved, too. I say "White conservatism" because this is a viewpoint/movement led largely by Whites, with a much smaller number of Black leaders/adherents like Justice Thomas. White plaintiffs advance the argument that affirmative action occurs against a "colorblind" background and thus constitutes "reverse discrimination." See Gotanda (1991). Depicting Asian Americans as affirmative action's "victims" is a related move. It is important to note that many Whites view *any* race-conscious remedial action as discriminatory against them, and that this dates back to

- the backlash against the Freedmen's Bureau after the Civil War, where programs to help Blacks emerging from slavery were castigated as unfair to Whites (Schnapper 1985; Ross 1990). Today, polls suggest that many (perhaps most) White Americans feel that they are discriminated against on the basis of race.
21. Since 1974, the University of California has been governed by a state legislative resolution calling for the ethnic mix of the student body to match that of state high school graduates.
 22. For an elaboration of this point, see West-Faulcon (2017).
 23. See also Kidder (2005-06).
 24. Cited in Takagi (1992, p. 104).
 25. See Wong and Silver (2018); Selingo (2018). Also see Au (2015) on how standardized tests have been used as a "racial project" in the U.S. for over a century. Au writes: "The logic of test-based structural denial works thusly: If standardized tests provide for the fair and objective measurement of individuals, then standardized testing holds the promise that every test taker is objectively offered a fair and equal chance at educational, social, and economic achievement. Problem like racism and class privilege are thus supposedly neutralized through testing....As such, with the empirical evidence provided by presumptively 'objective' standardized tests, Whites and wealthy elites could mask their own structural advantages, deny the existence of systemic racism, justify racial hierarchies, and structure specific racial groups as less intelligent and inferior, all under the guise of 'naturally' occurring aptitude among individuals competing within a meritocratic framework" (2015, pp. 46-7).
 26. See Wong and Silver (2018) on how Black and Latino high school graduates are less likely to enroll in college than Asian Americans and Whites; less likely to attend elite, private four-year higher educational institutions than Asian Americans and Whites; more likely to experience substandard schooling and poverty than Asian Americans and Whites; and less likely to be referred to gifted programs than Asian Americans and Whites.
 27. *Grutter v. Bollinger et al.*, 123 S. Ct. 2325 (2003).
 28. A parallel lawsuit—*Gratz. v. Bollinger*—challenged the University of Michigan's undergraduate admissions program. That program, which was structured differently than the law school's (it gave an automatic 20-point advantage to "underrepresented minorities"), was struck down at the same time that the law school's program was upheld.
 29. To be distinguished from the broader "societal discrimination" rationale which Justice Powell rejected as too "amorphous" in *Bakke*.
 30. See Kim (forthcoming).
 31. Chinese Americans were unsuccessful in both cases.
 32. The brief (in support of Respondents Grutter/Gratz) was also sponsored by Asian Law Caucus and Asian Pacific American Legal Center.
 33. "Asian Pacific American" (APA) and "Asian Pacific Islander" (API) are terms that capture a moment in time when Asian Americans and Pacific Islanders were considered one racial category under the U.S. Census. To highlight their specific needs and grievances, Pacific Islanders, who have a markedly lower SES profile than most Asian national origin groups, have since broken away from this formation.
 34. Chief Justice Rehnquist's dissent, joined by Justices Scalia, Kennedy, and Thomas, argues that "critical mass" is a concept meant to conceal "racial balancing." Justice Kennedy's separately filed dissent repeats this argument.
 35. *Fisher v. University of Texas at Austin et al.*, 133 S.Ct. 2411 (2013). *Fisher v. University of Texas at Austin et al.*, 136 S. Ct. 2198 (2016). All page numbers refer to these cases as published in the U.S. Supreme Court Reports.
 36. *Fisher v. Texas*, 645 F.Supp.2d 587 (2009).
 37. This brief was co-authored by the Judicial Education Project.
 38. *Plessy v. Ferguson* (1896) was the most important U.S. Supreme Court case upholding Jim Crow in the American South. Here the Court ruled that segregated railway cars in New Orleans, Louisiana did not violate the Equal Protection Clause of the Fourteenth Amendment because as long as facilities were "separate but equal," they satisfied the clause. *Brown v. Board of Education* (1954) overturned *Plessy*, finding that "separate but equal" facilities were inherently unequal.

39. Frank Wilderson (2010) argues that in an anti-Black society, Black suffering is illegible but serves as a vehicle for making the suffering of others legible.
40. This coalition includes the organization formerly known as NAPALC.
41. Notably, this brief starts to broaden the critique of admissions criteria, though it remains within the “minority” paradigm. It “question[s] the myopic focus on test scores as the *sine qua non* of merit” (p. 23). It also points out that a recent study shows that SAT scores are predicted by family income, parental education, and race. Indeed race and ethnicity, it argues, are the “single strongest predictor of SAT scores” (p. 23). In addition, it notes that SAT scores are “socioeconomically skewed in favor of wealthier students who have access to test preparation courses” (pp. 25–26).
42. In *Brian Ho v. SFUSD*, a case involving Lowell High School in San Francisco, the plaintiffs were Chinese American. See Liu (2008) for a discussion of Jian Li, a Yale freshman who filed a 2006 complaint with the Office of Civil Rights, charging Princeton with discriminating against Asian applicants.
43. The AALF submitted an amicus brief in the Harvard case. Since this brief substantially reprises the AALF’s briefs in *Grutter* and *Fisher*—except for a discussion of the racial disparity in personal ratings (see below)—I do not discuss it here.
44. See “Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts,” filed June 30, 2018, p.10.
45. Espenshade and Radford’s book is extensively cited by opponents of affirmative action. However, critics have noted that it has at least one serious methodological flaw: it looks only at GPAs and SAT scores, leaving out all other supplemental criteria used in admissions. Espenshade and Radford have since written: “It is likely that incorporating in our models an even fuller range of academic performance measures as well as these other non-academic factors would cast the effect of coming from an Asian background in a different light”. In addition, they emphasize that their book is “not able to settle the question of whether Asian applicants experience discrimination in elite college admissions” (cited in West-Faulcon 2017, p. 635).
46. On June 2, 2017, following the Supreme Court’s ruling in *Fisher II*, the district court in Massachusetts granted Harvard’s motion for partial judgment on two counts, including Count VI (asking the court to prohibit the use of race as a factor in admissions), declaring that Count VI would require the court to override Supreme Court precedent. This issue will now be dealt with on appeal.
47. “Plaintiff’s Memorandum of Reasons in Support of Its Motion for Summary Judgment,” filed June 15, 2018.
48. The personal rating score is composed of one personal rating by the admissions office and one by an alumnus/a interviewer. Alumni interviewers give Asian applicants personal ratings that are comparable to Whites and higher than those for Blacks and Latinos. However, the admissions office gives Asian applicants lower personal ratings than all other groups.
49. Again, the admissions office gives Asian applicants lower overall ratings than other groups, but alumni interviewers do not.
50. “Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts,” filed June 15, 2018.
51. According to the brief, for the Class of 2019, Harvard received 26,000 domestic applications for 1600 slots. Of the 26,000, 3500 had perfect SAT math scores, 2700 had perfect SAT verbal scores, and more than 8000 had perfect converted GPAs (3–4).
52. The brief explores other measures by which SFFA lacks standing as well, concluding that SFFA plaintiffs don’t fulfill the “core requirement that [students] suffer a concrete injury, traceable to the defendant’s conduct, that would be redressed by the relief sought” (p. 15).
53. According to Harvard’s website, the Class of 2021 is 14.6% Black, 22.2% Asian American, 11.6% Hispanic, 2.5% Native American or Pacific Islander. The remainder of students are White. (Hartocollis 2018).
54. Quoting from *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 43 (2004)
55. Dr. David Card produced an original report and a rebuttal report responding to Dr. Peter Arcidiacono’s report.

56. “Special category” students include recruited athletes, children of faculty and staff, “legacies,” and applicants on the Dean’s List or Director’s List. The admit rate for “legacies”—students who have a parent or two parents who are Harvard alumni—is as much as five times higher than that for non-legacies (Franklin and Zwickel, 2018).
57. According to the brief, Dr. Arcidiacono also errs in pooling admissions data across six admissions cycles instead of analyzing each cycle separately.
58. For his part, Dr. Arcidiacono argues that Dr. Card’s analysis is wrong because he refuses to exclude “special category” applicants, who must be excluded in order to determine whether similarly situated applicants are treated differently because of race. He also faults Dr. Card for refusing to exclude personal ratings in his model, when they should be excluded because they are discriminatory against Asians.

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