ASIAN AMERICANS AND THE HARM OF EXCEPTIONALIZED INCLUSION

Kaiponanea T. Matsumura & Erin Suzuki[†]

The use of race in college admissions is contentious not only because elite colleges are a gateway to good careers, but because the colleges themselves symbolize belonging at the highest levels of American society. In this sense, the Supreme Court's decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College ("SFFA") was more than a dispute over college admissions policies: its majority, concurring, and dissenting opinions offer competing visions of racial belonging in the twenty-first century.

Those visions do not include Asian Americans. The absence of Asian Americans in the opinions is all the more ironic because the lawsuit was cast as an Asian American civil rights case, centering on claims that Harvard College penalized Asian American applicants. This Article explores the causes and effects of the Supreme Court's absenting of Asian Americans in SFFA. It documents how the Justices restored a black and white view of race relations in this country by treating Asian Americans as a proxy for whites. It shows how the Justices deployed the stereotype of Asians as model minorities to attack and defend affirmative action. And it reveals the irony of the Court's proposed remedy, requiring Asian American applicants to demonstrate leadership and individualism after completely flattening them and denying their individuality.

Extending recent theoretical advances in Asian American studies, the Article shows that the model minority is a paradigm for understanding one's place in society. It works internally to shape the realm of what is possible or desirable. It influences whether one is seen and, therefore, the terms on which one exists as an individual. This paradigm places Asian Americans in an impossible position: Asian Americans

† Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles. Associate Professor of Literature and Asian American Studies, University of California, San Diego. The authors contributed equally to this Article and are listed alphabetically by last name. We thank Shirin Bakhshay, Robert Chang, Gabriel "Jack" Chin, Tristin Green, Vinay Harpalani, Ariel Jurow Kleiman, Solangel Maldonado, Julia Mendoza, Kimberly West-Faulcon, and Tiffany Yang for their thoughtful feedback. We also thank the editors of *Cornell Law Review* for their careful and constructive work on this Article.

are rendered visible only when they represent themselves in a narrowly circumscribed way, a way that flattens individuality and renders them undesirable. The struggle to establish oneself as a meaningful subject on these terms inevitably ends in failure, inflicting a psychological harm that has yet to be accounted for in the law.

INTRODUCTION

To hear it told by journalists, scholars, and cultural critics in the years and months leading up to the Supreme Court's *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*") decision,[1] one might have expected to see a bunch of Asian American teenagers standing over affirmative action's corpse when the dust settled. After all, Students for Fair Admissions had placed Asian American students with superlative test scores who had failed to gain acceptance into America's elite universities front and center in their lawsuit.[2]

---

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

[2] For a collection of news reporting describing the lawsuit as a challenge by Asian Americans against affirmative action, see, for instance, Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action [https://perma.cc/4X9U-ZSUP]; Anemona Hartocollis & Stephanie Saul, *Affirmative Action Battle Has a New Focus: Asian Americans*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/us/affirmative-action-battle-has-a-new-focus-asian-americans.html [https://perma.cc/SB8F-JGHJ]; Adam Liptak & Anemona

During the five years of litigation, Asian Americans attempted to be visible advocates on both sides of the dispute. Students like Austin Jia and Michael Wang assumed the roles of sympathetic victims[3] or unwitting pawns,[4] depending on whom one asked. Others, like sociologist Jennifer Lee and activist Sally Chen, offered passionate defenses of affirmative action, responding to attacks point by point.[5] By the time of the Court's decision,

---

Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/N687-R6X4] (centering the claim of discrimination against Asian Americans); Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES MAG. (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/magazine/where-does-affirmative-action-leave-asian-americans.html [https://perma.cc/C5YJ-RC7K]; Jeannie Suk Gersen, *Affirmative Action and the Supreme Court's Troubled Treatment of Asian Americans*, NEW YORKER (Nov. 6, 2022), https://www.newyorker.com/news/our-columnists/affirmative-action-and-the-supreme-courts-troubled-treatment-of-asian-americans [https://perma.cc/KP7D-MZAA].

3 *See, e.g.*, Hartocollis & Saul, *supra* note 2; Allison Lau, *How Asian Americans Became the Center of the Affirmative Action Debate*, CNBC (May 26, 2022), https://www.cnbc.com/video/2022/05/26/how-asian-americans-became-the-center-of-the-affirmative-action-debate.html [https://perma.cc/8L4V-5WJY] (describing Asian American students with exceptional grades and test scores who still found themselves rejected by elite colleges); Taylor Penley, *Asian-American Student with 1590 SAT Score Rejected by 6 Elite Colleges, Blames Affirmative Action*, FOX NEWS (June 8, 2023), https://www.foxnews.com/media/asian-american-student-1590-sat-score-rejected-by-6-elite-colleges-blames-affirmative-action [https://perma.cc/T5BG-4RHD].

4 *See, e.g.*, Alvin Chang, *Asians Are Being Used to Make the Case Against Affirmative Action. Again.*, VOX (Aug. 30, 2018), https://www.vox.com/2018/3/28/17031460/affirmative-action-asian-discrimination-admissions [https://perma.cc/E895-6TTB]; Kevin Ball & Donya Ziaee, *Asian-American Plaintiffs Are 'Pawns' in Affirmative Action Lawsuit, Says Professor*, CBC (Sept. 3, 2018), https://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.4731087/asian-american-plaintiffs-are-pawns-in-affirmative-action-lawsuit-says-professor-1.4808856 [https://perma.cc/ZKG3-QM5X] (interviewing sociologist Jennifer Lee); Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color. Here's How*, NPR (July 2, 2023), https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc [https://perma.cc/T5K5-HBD2] ("I feel like Asian Americans have been used.").

5 *See, e.g.*, Sally Chen, *Op-Ed: I'm an Asian American Harvard Grad. Affirmative Action Helped Me*, L.A. TIMES (Oct. 25, 2022), https://www.latimes.com/opinion/story/2022-10-25/affirmative-action-supreme-court-asian-american [https://perma.cc/988Z-AKET] (defending the value of affirmative action to the Asian American community); Jennifer Lee, *Asian American Students Face Bias, But It's Not What You Might Think*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/opinion/affirmative-action-asian-american-bias.html [https://perma.cc/S7QG-VEAJ] (pushing back on the argument that affirmative action is unfair); Serena Puang, *Affirmative Action Is in Peril and 'Model Minority' Stories Don't Help*, N.Y. TIMES (Mar. 30, 2023), https://www.nytimes.com/2023/03/30/opinion/affirmative-action-model-minority-asian-americans.html [https://perma.cc/B5M3-C6N2]; Janelle Wong & Viet Thanh Nguyen, *Opinion: Affirmative Action Isn't Hurting Asian Americans. Here's Why That Myth Survives*, L.A. TIMES (June 14, 2023), https://www.latimes.com/opinion/

however, a sense of fatalism had set in. School administrators had already begun planning how to preserve the diversity of their institutions in the face of the Court's anticipated ruling.[6] The obituary was readied before the decision was announced.[7] When the opinion came down, accounts of the decision focused on the consequences for Black and Latino students, mentioning Asian Americans if at all only for their role in the initiation of the lawsuit.[8] Just a small handful articles bothered to ask, "so what does this decision mean for Asian Americans, really?"[9] In the end, the opinion was something of an Asian-American

---

story/2023-06-14/affirmative-action-supreme-court-harvard-case-asian-americans [https://perma.cc/LU8Z-RQW2].

6 *See, e.g.*, Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022), https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/ [https://perma.cc/WSD8-5F3U]; Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html [https://perma.cc/M4RZ-PYRN]; Jeannie Suk Gersen, *After Affirmative Action Ends*, NEW YORKER (June 26, 2023), https://www.newyorker.com/news/daily-comment/after-affirmative-action-ends [https://perma.cc/B59Z-A7RU] (discussing next steps even before the decision was announced); Jay Caspian Kang, *The Sad Death of Affirmative Action*, NEW YORKER (Nov. 4, 2022), https://www.newyorker.com/news/our-columnists/the-sad-death-of-affirmative-action [https://perma.cc/5REX-KX3T] (discussing what would happen after an anticipated ruling striking down race-based affirmative action); Anemona Hartocollis, *With Supreme Court Decision, College Admissions Could Become More Subjective*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/us/affirmative-action-college-admissions-future.html [https://perma.cc/LKC3-944Y] (describing plans by college admissions officials and administrators in a story published on the day of the Supreme Court decision).

7 *See, e.g.*, Gersen, *supra* note 6 (anticipating the end of affirmative action later that same week).

8 *See, e.g.*, Ariane de Vogue, Devan Cole & Tierney Sneed, *Supreme Court Guts Affirmative Action in College Admissions*, CNN (June 29, 2023), https://www.cnn.com/2023/06/29/politics/affirmative-action-supreme-court-ruling/index.html [https://perma.cc/HD7D-AAU8] (mentioning "Black and Latino students" in the opening paragraph and not mentioning Asian Americans until near the end of the article).

9 *See, e.g.*, Anemona Hartocollis, *After the Affirmative Action Ruling, Asian Americans Ask What Happens Next*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/affirmative-action-asian-american-students.html [https://perma.cc/P7MB-XGLX]; Jeong Park & Milla Surjadi, *The End of Affirmative Action Won't Change Much for Them, Some Asian Americans Say*, L.A. TIMES (June 29, 2023), https://www.latimes.com/california/story/2023-06-29/affirmative-action-wont-change-much-asian-americans-say [https://perma.cc/G9HF-JSBR]. A notable exception is Jeannie Suk Gersen in the *New Yorker*. *See, e.g.*, Jeannie Suk Gersen, *The Supreme Court Overturns Fifty Years of Precedent on Affirmative Action*, NEW YORKER (June 29, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-court-overturns-fifty-years-of-precedent-on-affirmative-action [https://perma.cc/A39X-NASS] (commenting on the absence of Asian Americans in the Court's opinions).

anticlimax, leaving supporters unsure of what exactly they had won.[10]

This Article returns the focus to Asian Americans.[11] To be clear, much has already been written in the past half-century

---

[10] By characterizing the opinion in this way, we do not mean to downplay its unjustness, which others have already begun to expound, *see, e.g.*, Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023), or its overall impact on admissions, which remains to be seen. While initial data from the first class of college students admitted after *SFFA* has indicated a drop in Black and Latinx admissions at many selective colleges and universities, it may take several years for consistent patterns to emerge, especially regarding Asian Americans. *See, e.g.* Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, N.Y. TIMES (Aug. 30, 2024), https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html [https://perma.cc/GPZ4-UU46]; Anemona Hartocollis & Stephanie Saul, *At M.I.T., Black and Latino Enrollment Drops Sharply After Affirmative Action Ban*, N.Y. TIMES (Aug. 21, 2024), https://www.nytimes.com/2024/08/21/us/mit-black-latino-enrollment-affirmative-action.html [https://perma.cc/3GXM-GM4P]; Anemona Hartocollis & Stephanie Saul, *Affirmative Action Was Banned. What Happened Next Was Confusing*, N.Y. TIMES (Sept. 13, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html [https://perma.cc/HUS7-TA77] (noting that Black enrollment was down at three-quarters of selective schools, but not by as much as some experts had feared, and that there were counterintuitive outcomes across colleges, e.g., that the percentage of Black students stayed the same at Yale and increased at Duke, and that the percentage of Asian American students at Harvard stayed the same). *But see* Aaron N. Taylor, *An Unprecedented Shift in Law School Admissions: The Post-Affirmative Action Era Is Underway, With Baleful Results*, CHRON. HIGHER EDUC. (Feb. 7, 2025), https://www.chronicle.com/article/an-unprecedented-shift-in-law-school-admissions [https://perma.cc/ZQJ9-DRYW] (noting that although Asian American law school enrollment only increased 2% in the admissions cycle after *SFFA*, Asian Americans were 11% more likely to enroll in a top-fourteen-ranked law school and 13% more likely to enroll in a top-twenty-five-ranked law school than the previous year).

[11] We recognize that "Asian American" is a politically constructed category whose boundaries are contested and imprecise. It groups "linguistically, culturally, and geographically diverse groups" through both "political and social processes." YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 2, 13 (1992). Asian individuals may differ regarding the extent to which they identify with the racial category of Asian as opposed to other (e.g. ethnic) identities, and the extent to which they are perceived as Asian by others. *See, e.g.*, Jennifer Lee & Karthick Ramakrishnan, *Who Counts as Asian*, 43 ETHNIC & RACIAL STUDS. 1733, 1745–49 (2019) (finding that East Asians experienced "racial assignment congruity" in that they perceive themselves as Asian and are perceived as Asian, whereas South Asians experience "racial assignment incongruity," in that they perceive themselves as Asian but are much less likely to be perceived as Asian by others). Further, although there are political benefits to belonging to a panethnic political identity, *see* ESPIRITU, *supra*, at 25 (noting how Asian American college students in the 1960s came together to challenge racist institutional structures), there is also the constant risk that the broader racial category will obscure distinct experiences of subgroups like refugee status or socioeconomic disadvantage. *See, e.g.*, Vinay Harpalani, *Can "Asians" Truly Be Americans?*, 27 WASH. & LEE J. C.R. & SOC. JUST. 559, 572 (2021). That all said, we are also mindful of Yen Le Espiritu's observation that racial categorization "is

about Asian Americans and college admissions policies.[12] A considerable amount of this work has studied the impact of race-conscious admissions policies on a groupwide basis (looking at specific ethnic groups or Asian Americans as a whole) or the relative positions of Asian Americans and other racial groups. For example, sociologist Dana Takagi has studied how Asian Americans went from early beneficiaries of race-conscious admissions programs to purported victims of discriminatory efforts to limit their presence on selective campuses.[13] Political scientist Claire Jean Kim has proposed a theory of racial triangulation to describe how the "dominant group A (Whites) valorizes subordinate group B (Asian Americans) relative to subordinate group C (Blacks) on cultural and/or racial grounds in order to dominate both groups, but especially the latter."[14] In the context of affirmative action, Kim argues that whites position Asian Americans as hard workers who "excel by meritocratic standards," making it look like "Blacks demand special treatment."[15] Asians therefore appear as victims, justifying calls to end race-based preferences. Kim's model, now over two decades old, foretold what happened in the *SFFA* litigation.

Our concern in this Article is different. We look *inward* to ask what the college admissions process—and by extension

---

intimately bound up with power relations" and is "coercively imposed" on nonwhite groups. ESPIRITU, *supra*, at 6. For clarity of analysis, we rely on the formal definition of "Asian" promulgated by the federal Office of Management and Budget and relied on by the U.S. Census Bureau: "[i]ndividuals with origins in any of the original peoples of Central or East Asia, Southeast Asia, or South Asia, including, for example, Chinese, Asian Indian, Filipino, Vietnamese, Korean, and Japanese." Rachel Marks, Nicholas Jones & Karen Battle, *What Updates to OMB's Race/Ethnicity Standards Mean for the Census Bureau*, U.S. CENSUS BUREAU (Apr. 8, 2024), https://www.census.gov/newsroom/blogs/random-samplings/2024/04/updates-race-ethnicity-standards.html [https://perma.cc/UJM6-CX44]. We acknowledge that claims about the experiences of Asian Americans will necessarily entail some overgeneralization due to the inherent limitations of the racial categories we have inherited. And we hope that in the future, scholars will explore the extent to which the phenomena we identify in this Article reflects, or fails to reflect, the lived experiences of groups and individuals.

12 Some leading examples are explored in Part I, *infra*.

13 DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS (1992).

14 Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 107 (1999). Kim calls this process "relative valorization." *Id.* While Asian Americans are being used to denigrate Black Americans, they remain subordinated in terms of civic membership because they are depicted as "immutably foreign and unassimilable" in comparison to Black Americans. *Id.*

15 *Id.* at 123. As Part I will demonstrate, many scholars share the concern that Asian Americans are being used in this way.

all efforts by Asian Americans to access elite cultural institutions—reveals about the position of the Asian American individual, or *subject*, within contemporary American society. We argue here that the precise nature of the injury perpetuated by the *SFFA* decision and manifested within it has not been satisfactorily elaborated. We do not approach the *SFFA* opinion as a collection of legal rules and arguments.[16] Instead, it is a *parable of absenting*.[17] It exemplifies and perpetuates the challenges Asian Americans face in establishing their subjectivity, by which we mean their existence as a person with "particular perspective[s], feelings, beliefs, and desires."[18] Our concern is the harm experienced by Asian American individuals as a result of this absenting, not just in terms of success in admissions, where applicants are now being asked to individualize in a way that they are not capable of doing,[19] but in terms of the psychological, personal toll imposed across society.

---

16 Our Article is therefore quite different from those that have begun to analyze the legal basis for the Court's decision. *See, e.g.*, Cass R. Sunstein, *The Invention of Colorblindness*, 2023 SUP. CT. REV. 67 (criticizing the Court's decision for lacking a doctrinal and methodological basis); Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113 (2023) (analyzing the extent of the Court's decision); Kimberly West-Faulcon, *Affirmative Action After* SFFA v. Harvard*: The Other Defenses*, 74 SYRACUSE L. REV. 1101 (2024) (analyzing what the Court did and, more importantly, did not decide). It is also different from those articles that consider group-based claims to racial equality. *See, e.g.*, Vinay Harpalani, *The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23 (2023) (identifying issues and arguments that an Asian American Supreme Court justice might have surfaced); Onwuachi-Willig, *supra* note 10 (revealing the assumptions of white baseline underlying the majority opinion and exploring the impact of the decision on Black and Latinx students); Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123 (2023) (predicting that the *SFFA* case will have no practical impact on college admissions because of the difficulty in proving race-based discrimination); Kimberly West-Faulcon, *The* SFFA v. Harvard *Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355 (2024) (criticizing the decision on various grounds and linking it to a larger agenda of rolling back civil rights gains for Black and non-white Americans).

17 "Excision" or "erasure" implies something active: a deliberate attempt to isolate and remove Asian Americans from the landscape. "Absenting," by contrast, connotes a more passive form of action: an imaginative reconstruction in which Asian Americans were never there in the first place. For complementary uses of the term, see Marita Sturken, *Absent Images of Memory: Remembering and Reenacting the Japanese Internment*, 5 POSITIONS: EAST ASIA CULTURES CRITIQUE 687 (1997), and CAROLINE CHUNG SIMPSON, AN ABSENT PRESENCE: JAPANESE AMERICANS IN POSTWAR AMERICAN CULTURE, 1945-1960 (2001).

18 Robert C. Solomon, *Subjectivity*, *in* THE OXFORD COMPANION TO PHILOSOPHY 900, 900 (Ted Honderich ed., 2d ed. 2005).

19 We recognize that there are exceptions to this generalized statement, which, for us, ultimately prove the rule.

In articulating this harm, we add new perspectives to the decades-old literature exploring and criticizing the model minority "myth" or "stereotype." In a nutshell, the stereotype posits that Asian Americans are a "model minority whose cultural values of diligence, family solidarity, respect for education, and self-sufficiency have propelled [them] to notable success."[20] The critiques center on the overgeneralizations inherent in the stereotype, the tendency of the stereotype to obscure ongoing discrimination against Asian Americans, and the weaponization of Asian American economic success against other racial groups.[21] We advance this discussion in several important ways. Drawing on recent work in Asian American studies, we argue that the model minority stereotype is not a false perception against which Asian Americans must struggle to assert their genuine identity as much as a paradigm for understanding one's own place in society. We posit that it works on a deeper level to shape even the realm of what is possible or desirable. It is a form of exceptionalized inclusion that renders Asian Americans visible only when they represent themselves in a narrowly circumscribed way, a way that flattens individuality and renders them stereotypically socially undesirable. It influences how, or whether, one is seen and, therefore, the terms on which one exists as an individual. The struggle to establish oneself as a meaningful subject on these terms cannot possibly end in success.[22]

---

20 Kim, *supra* note 14, at 118.

21 For just a small sampling of the many excellent articles describing the model minority stereotype and articulating these critiques, see Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24–55 (1994) (describing the stereotype and identifying some of its harmful effects in terms of employment outcomes); Kim, *supra* note 14, at 117–21 (defining the "myth" and explaining its origins); Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth,"* 100 NW. U. L. REV. 331, 331 (2006) (providing a similar description of the stereotype and its outcomes); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 76 (1997) (describing the model minority concept and arguing that it perpetuates racial hierarchies); Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 813 (1996) (arguing that "[c]riticism of the model minority image of Asian Americans has become so familiar as to be taken for granted by many of us" and that "[a]nyone who studies Asian Americans knows about the model minority myth").

22 Critical theorist Kandice Chuh makes this point when she observes that "a 'subject' only becomes recognizable and can act as such by conforming to certain regulatory matrices . . . . [W]e have not, I think, always paid such critical attention to 'Asian Americans' . . . as 'subjects' that emerge through epistemological objectification." KANDICE CHUH, IMAGINE OTHERWISE: ON ASIAN AMERICANIST CRITIQUE 9–10 (2003).

All of these dynamics are illustrated by the Justices' opinions in the *SFFA* decision.[23] Conservative and liberal Justices alike presume that Asian Americans cannot be underrepresented minorities because of their higher-than-average household incomes and higher levels of educational attainment. Indeed, the liberal Justices point to these markers of privilege to deny that Asian American students face discrimination. By contrast, conservative Justices rely on stereotypes of Asian American success—that their exemplary grades and test scores are the product of hard work—to conclude that they are victims of discrimination. Then, in an ironic twist given its stereotyping of Asian Americans, the Court encourages colleges to find and reward exemplary *individuals* through essays that show how applicants' experiences with race "affected [their] li[ves], be it through discrimination, inspiration, or otherwise."[24] The Court suggests that traits like "courage and determination" will indicate applicants' "unique ability to contribute to the university."[25] But these are stories that Asian Americans cannot tell, because the particular discrimination they face channels them into roles that society devalues.

Our analysis unfolds as follows. In Part I, we set the stage for our argument by highlighting the unresolved question of Asian American belonging in colleges and universities. For a half-century, Asian Americans have posed the question whether there is such a thing as overrepresentation of a minority group, a question that selective institutions still dance around. Although the District Court ultimately concluded that SFFA could not prove that Harvard penalized Asian American applicants, the trial unearthed troubling and ultimately uncontroverted evidence that Asian Americans received lower "personal ratings" than any other group.

In Part II, we analyze the Supreme Court's absenting of Asian Americans from what was presented as an Asian American civil rights case. In the First Circuit opinion, Asian Americans comprised 55% of the references to different ethnic and racial groups; Black and white people together comprised only 30%. In the Supreme Court, by contrast, Asian Americans comprised a mere 16% of the total references. What happened? We expose the Court's absenting through four ironies, or ways

---

23 The contentions in this paragraph are supported in ample detail in Part II, *infra*.

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

25 *Id.* (emphasis omitted).

that Asian American expectations yielded to opposing realities. First, the Justices reverted to the Black/white paradigm of race relations in the United States. This move was no mistake, as it allowed them to articulate competing visions of equality in which Asian Americans do not play a role. Second, the Justices erased Asian Americans on the level of doctrine. They actively disputed the meaning of Justice Harlan's famous statement, in his dissent in *Plessy v. Ferguson*,[26] that "[o]ur Constitution is color-blind."[27] Not once did they mention another statement made by Harlan in that dissent: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . . I allude to the Chinese race."[28] Third, they relied on model minority stereotypes to tear down affirmative action without once attempting to analyze the claim that similar stereotypes leveled at Asian American applicants amounted to intentional discrimination against them. And fourth, after illustrating through their very absenting the impossible task of Asian Americans establishing themselves as meaningful subjects, the Court proposed that colleges select applicants based on individualized attributes like leadership and courage.

This last irony leads to Part III, in which we explain why the *SFFA* remedy exacerbates existing harms suffered by Asian Americans. We argue that this invisible harm stems from the specific history of Asian Americans entering into legal discourse as exceptions and limit cases largely for the purpose of reestablishing or contesting the legality of anti-Black racism in the United States. This dynamic ultimately came to align Asian Americans with a policy of racial colorblindness—in the form of the model minority myth—that purports to transcend or look beyond, rather than directly address, the legal mechanisms that promote white supremacy. We show how these forces have channeled Asian Americans to adopt the very traits that constitute the model minority myth, such that the model minority becomes the dominant paradigm through which Asian Americans think about and represent themselves. This paradigm offers a form of exceptionalized inclusion, in which Asian Americans are only allowed to participate in society along narrow lines. In college admissions and society at large, Asian Americans are placed in an impossible bind of acting as model

---

26 Plessy v. Ferguson, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

27 *Id.* at 559.

28 *Id.* at 561.

minorities in order to be seen at all, becoming flattened in the process, and simultaneously demonstrating the dimensionality valued by society. This bind results in feelings of perpetual failure, self-blame, and dissatisfaction that takes a psychological and spiritual toll.

This Article was conceived in late 2023 and initially drafted in 2024, before the election of President Donald Trump. It is being published in 2025 amidst a flurry of executive actions purporting to curtail diversity, equity, and inclusion in a wide range of institutions, including higher education.[29] Predictably, Asian Americans and *SFFA* are being misused to justify the Trump administration's unfortunate broadsides.[30] It is now more important than ever that those in power—judges, legal scholars, practitioners, lawmakers—recognize the ways that Asian American subjectivity and agency have been effaced and work to create the conditions in which Asian American voices can be truly heard. Addressing the harm of exceptionalized inclusion is central to the broader project of mapping the myriad ways that racial harm has been historically and legally diffracted across multiple groups and, ultimately, dismantling white supremacy.

I
UNBELONGING ON CAMPUS

- Why are Asians invading our study room
- It's so annoying. They're having movie night in our study room
- Did you try asking them to leave
- Fuck, there's one in my room too

— Group chat, Washington University[31]

---

29 *See, e.g.*, Zach Montague, *Education Dept. Gives Schools Two Weeks to Eliminate Race-Based Programs*, N.Y. TIMES (Feb. 17, 2025), https://www.nytimes.com/2025/02/17/us/politics/education-dept-race-based-programs.html [https://perma.cc/DYZ6-88MG].

30 *See* Craig Trainor, U.S. Dep't of Educ., Dear Colleague Letter 1–3 (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf [https://perma.cc/RD2X-FHT4] (inaccurately contending that, under *SFFA*, schools may not "treat[] students differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity" and claiming that "white and Asian students" have been harmed).

31 Emma Whitford, *When Asians Are Targets of Racism*, INSIDE HIGHER ED (Oct. 10, 2018), https://www.insidehighered.com/news/2018/10/11/anti-asian-messages-spread-washington-university-st-louis [https://perma.cc/HNA6-L3KK] (quoting an undergraduate group chat in 2018).

Selective colleges are both gateways to social and economic success and symbols of achievement and belonging. Viewed in that light, college acceptance is more than a mere invitation to enroll in an institution; it signifies access to a world that provides a different range of possibilities.[32] This Part shows that Asian Americans have lurked awkwardly in the racial landscape of such institutions, not white, but not quite like other persons of color. As such, they have posed an uncomfortable challenge for those determining the composition of student bodies and those advocating for race-based admissions policies.

A. Too Many Asians?

What we have come to call affirmative action began during the Kennedy administration as a set of programs designed to counteract the historical and contemporaneous discrimination faced by the Black community.[33] At the time, Asian Americans comprised one-half of one percent of the U.S. population,[34] most of whom were American-born descendants of people who had immigrated under restrictive immigration laws that had virtually closed the border to immigrants from Asia by 1924.[35]

---

32 *Cf.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2276 (2023) (Jackson, J., dissenting) (arguing that acceptance to college empowers one to make contributions in different realms, affecting the fate of future generations).

33 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 341–46 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (noting that federal agencies during the period "adopted regulations *requiring* affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and *authorizing* the voluntary undertaking of affirmative-action programs by federally funded institutions"); *see also* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. Rev. 233, 260 n.139 (2022) (presenting some of this history). Political scientist and historian Ira Katznelson has argued that this historical framing overlooks the federal government's role in creating racial inequality by enacting laws and policies favoring whites during the New Deal and postwar periods, what he characterizes as affirmative action for white people. Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 17–23 (2005).

34 U.S. Census Bureau, Facts for Features: 50th Anniversary of the Civil Rights Act: July 2 (June 26, 2014) (noting that the total Asian American and Pacific Islander population in 1960 was 980,337).

35 Juanita Tamayo Lott, *Asian-American Children Are Members of a Diverse and Urban Population*, Population Reference Bureau (Jan. 9, 2004), https://www.prb.org/resources/asian-american-children-are-members-of-a-diverse-and-urban-population/ [https://perma.cc/29R3-F46A] (noting that a majority of Asian Americans in 1960 were American-born descendants of earlier immigrants); *see also infra* note 237 and accompanying text.

Asian Americans were included in many early affirmative action programs.[36] Indeed, at the time of *Regents of University of California v. Bakke*,[37] the Supreme Court's first consideration of the legality of affirmative action programs, the University of California's Davis and Berkeley campuses included Asian Americans among their list of targeted minorities.[38]

Even by the 1970s, however, demographic changes were resulting in a more robust presence of Asian Americans in secondary and post-secondary institutions.[39] Much of the increase can be attributed to the Immigration and Nationality Act of 1965 ("Hart-Celler Act"),[40] which replaced country-based quotas with a skills- and family-based system.[41] Many of the first post-Hart-Celler immigrants from Asia were either already highly educated or had come to the United States to pursue educational opportunities.[42] They and their children began to populate U.S. universities. "[B]etween 1976 and 1986, the proportion of Asian Americans in freshman classes grew from 3.6% to 12.8% at Harvard, from 5.3% to 20.6% at Massachusetts Institute of Technology, from 5.7% to 14.7% at Stanford, and from 16.9% to 27.8% at Berkeley."[43]

---

36 *See* Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 132 (2008).

37 *Bakke*, 438 U.S. 265.

38 Lee, *supra* note 36, at 133.

39 *See* TAKAGI, *supra* note 13, at 21 ("Between 1976 and 1982 Asian American undergraduate enrollment climbed 62 percent while Hispanic enrollment grew 32 percent, white enrollment grew 5 percent, and black enrollment rose 1.3 percent.").

40 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

41 *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 419–20 (Back Bay Books 1998) (1989).

42 JENNIFER LEE & MIN ZHOU, THE ASIAN AMERICAN ACHIEVEMENT PARADOX 6 (2015); Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 150 (1996); Lee, *supra* note 36, at 134.

43 Lee, *supra* note 36, at 134. Sociologists Jennifer Lee and Min Zhou have convincingly argued that the success of post-Hart-Celler Asian Americans in gaining admission to elite universities can be attributed to two factors: "starting points" and "hyper-selectivity." LEE & ZHOU, *supra* note 42, at xv. They explain that many Asian American immigrants were both more highly educated than the populations of the countries from which they came, and more highly educated than the average American. *Id.* at 6 (explaining the concept of "hyper-selectivity"). Thus, they were able to import "success frames," expectations about behaviors and milestones that would generate academic and professional success, and cultivate reinforcement mechanisms and ethnic resources. *Id.* The success frame might entail "earning straight A's, graduating as the high school valedictorian, . . . and working in [a] high-status professional field[]." *Id.* A reinforcement mechanism

As the proportion of Asian Americans in selective educational institutions began to increase, a new question arose: whether there was such a thing as too many Asians. Many of these elite institutions appeared to answer that question in the affirmative. A Stanford University professor complained that Asian American and Jewish students were "way overrepresented" while "white Christian students" had become underrepresented minorities.[44] An official at UCLA wrote, "The campus will endeavor to curb the decline of Caucasian students. . . . A rising concern will come from Asian students and Asians in general as the number and proportion of Asian students entering at the freshman level decline . . . ."[45] According to sociologist Dana Takagi, concerns about Asian American enrollment centered on two assertions: "that Asian American students were narrowly concentrated in technical fields and hence poor all-around candidates for the top schools," and "that Asian Americans had more than their share of admissions slots."[46] In the mid-1980s, U.C. Berkeley adopted a policy to aim for "parity between the racial and ethnic composition of the undergraduate enrollment and that of the state population in general."[47] Berkeley stripped Asian Americans (except Filipinos) of eligibility for special admissions programs and minority-targeted outreach programs.[48] As a result, Asian American enrollment as a percentage of the entering class dropped despite an increase in the proportion of Asian American applicants.[49] This decline in admission rates occurred at private universities as well, and

---

could include enrollment in Advanced Placement and honors courses. *Id.* Knowledge of these mechanisms or pathways—how to "navigate the U.S. educational system"—becomes an ethnic resource. *Id.*

44 Selena Dong, Note, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1029 n.5 (1995).

45 ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 117 (1999).

46 TAKAGI, *supra* note 13, at 58. *See also id.* at 57 (quoting a Princeton faculty member saying, "You have to admit, there are a lot" in the process of voting to reject an Asian American applicant).

47 Lee, *supra* note 36, at 143. These policy changes are catalogued extensively in TAKAGI, *supra* note 13, at 33–49.

48 Lee, *supra* note 36, at 143 & n.64. Boalt Hall (Berkeley Law) had made a similar decision a decade earlier, eliminating special admissions for Japanese Americans and capping it for other Asian ethnicities after having concluded that the representation of those groups in the student body was sufficient. *Id.* at 136–37.

49 *See* CHANG, *supra* note 45, at 117 (reporting a 20.9% drop in admissions from the previous year); Lee, *supra* note 36, at 144.

investigations ensued at Brown, Harvard, Princeton, Stanford, and Yale.[50]

As summarized by Takagi, schools generally responded to allegations of anti-Asian bias in three ways.

> Some administrators denied that they used quotas to limit the number of Asian Americans in each freshman class, and they used different statistics to argue that Asians were in fact overrepresented at the university. Others accepted the figures used by Asian American critics but insisted that differential admission rates of whites and Asians were statistically explainable.[51]

Brown University, for example, argued that Asian American applicants were being turned away because of their choice of major (e.g., premed) and not race.[52] Princeton University acknowledged that Asian American admitted students had higher academic ratings than their white counterparts, but attributed the difference in admission rates to nonacademic criteria such as legacy status.[53] "Still other officials conceded that their policies were discriminatory but denied that the policies were meant to be so."[54] Stanford University, for example, admitted that there was "latent bias" against Asian Americans but maintained that there was no intent to discriminate.[55]

It is important to note that much of what was quickly described in the previous two paragraphs could be called "negative action," or "unfavorable treatment based on [Asian] race, using the treatment of Whites as a basis for comparison."[56] Several scholars have argued that to the extent Asian Americans face unfair obstacles to admission, negative action is to blame, rather than affirmative action programs targeting underrepresented minorities.[57] Kimberly West-Faulcon explains

---

50 *See* CHANG, *supra* note 45, at 116; Harpalani, *supra* note 33, at 268–71; Lee, *supra* note 36, at 144.

51 TAKAGI, *supra* note 13, at 62.

52 *Id.* at 64–65 (citing the need for "academic balance").

53 *Id.* at 67.

54 *Id.* at 62.

55 *Id.* at 66.

56 Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (explaining that negative action against Asian Americans would occur "if a university denies admission to an Asian American who would have been admitted had that person been White").

57 *See* Chin, Cho, Kang & Wu, *supra* note 42, at 159–60; Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 710–11 (2019); Harpalani, *supra* note 33, at 267–73; Kimberly

that "[b]ecause whites most often make up the vast majority of applicants to elite universities, mathematical reality dictates that Asian American applicants denied admission to such institutions are almost always edged out by white applicants."[58] Using data contained in an influential book published by Thomas Espenshade and Alexandria Radford,[59] West-Faulcon has found a statistically significant disparity between white and Asian American composite public and private university admission rates that cannot be explained by mere chance.[60] As we will soon see, this pattern played out in the *SFFA* trial, where Harvard allegedly penalized Asian American applicants vis-à-vis white applicants by assigning lower personal ratings, lower overall scores, and lower admission rates.[61] SFFA's own expert concluded that this discrimination, and not preferences given to Black and Hispanic students, explained the depressed rates of admission of Asian Americans.[62]

At the same time that questions were arising about discrimination against Asian Americans, non-Asian opponents of affirmative action began to recognize the usefulness of enlisting Asian Americans in their challenges to affirmative action policies.[63] Pointing to Asian American standardized test scores and grades, which often exceed those of white students, opponents could claim that affirmative action actually harms minorities: "Asian Americans become the 'innocent victims' in

---

West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 593 (2017).

58 West-Faulcon, *supra* note 57, at 593.

59 THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009).

60 *See* West-Faulcon, *supra* note 57, at 631 n.167, 635–44 (finding Espenshade and Radford's dataset fits a white selection advantage fact pattern under Title VI disparate impact law). West-Faulcon cautions that "because the Espenshade and Radford admission rate data is a compilation of many decades-old admissions datasets from eight different universities," her findings are "illustrative of disparate impact methodology" but do not constitute "proof of Asian penalty at any single college or university within the dataset." *Id.* at 631 n.167, 636.

61 Feingold, *supra* note 57, at 722.

62 *Id.* at 722–28 (explaining the argument).

63 Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226 (1995) ("The linkage of Asian Americans and affirmative action, however, is an intentional maneuver by conservative politicians to provide a response to charges of racism. The advocates against affirmative action can claim that they are racially sensitive, because, after all, they are agitating on behalf of a non-white minority group."); *see also* Harpalani, *supra* note 33, at 273–82 (providing a comprehensive account of the conservative political and legal strategy); Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 90, 91–92 (2016).

place of whites."[64] As Claire Jean Kim has argued, "[t]he valorization of Asian Americans as a model minority who have made it on their own cultural steam only to be victimized by the 'reverse discrimination' of race-conscious programs allows White opinionmakers to lambast such programs without appearing racist."[65] Kim elaborates:

> Opinionmakers invariably interpret such conflicts as the bad minority victimizing the good minority, thus rendering each group's image more extreme: Blacks become evil, Asian Americans saintly. When Whites then side with Asian Americans in an effort to push back Black political demands, they can come across as antiracist champions of the underdog rather than as acutely self-interested actors.[66]

By the mid-1980s, politically conservative officials began to equate discrimination against Asian Americans with affirmative action.[67] They argued that restrictions on Asian American enrollment were being enacted in the name of "diversity," and that Asian Americans, like whites, were victims of "reverse discrimination."[68] These arguments were slow to emerge in the Supreme Court—in *Grutter v. Bollinger*,[69] decided in 2003, Asian Americans were barely mentioned—but they became much more prominent within the last decade in the two *Fisher v. University of Texas at Austin* cases,[70] setting the stage for the *SFFA* lawsuit.[71]

Before moving on to the *SFFA* lawsuit, it is important to note that affirmative action has enjoyed strong support in the Asian American community as a whole. A study conducted by

---

64 Wu, *supra* note 63, at 272; *see also* Feingold, *supra* note 57, at 718–19.

65 Kim, *supra* note 14, at 117; *see also id.* (calling this attack a "proxy skirmish between non-Whites").

66 *Id.* at 122.

67 This history is covered extensively in TAKAGI, *supra* note 13, at 103–22. *See also* Harpalani, *supra* note 33, at 273–77; Kim, *supra* note 14, at 123–24; Claire Jean Kim, *Are Asians the New Blacks? Affirmative Action, Anti-Blackness, and the 'Sociometry' of Race*, 15 DU BOIS REV. 217, 228 (2018) [hereinafter Kim, *Are Asians the New Blacks?*].

68 TAKAGI, *supra* note 13, at 115; *see also* Kim, *supra* note 14, at 124 (documenting how the Reagan Education Department vigorously pursued Title VI claims on behalf of Asian Americans, spokespersons conflated anti-Asian quotas with affirmative action, and Republican lawmakers introduced anti-affirmative action legislation through the lens of anti-Asian quotas).

69 Grutter v. Bollinger, 539 U.S. 306 (2003).

70 Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016).

71 Kim, *Are Asians the New Blacks?*, *supra* note 67, at 232–34; *see also* Harpalani, *supra* note 33, at 279–80.

Pew Research Center in 2022 and 2023, for example, found that 53% of Asian Americans who have heard of affirmative action think it is a "good thing," as compared to only 19% who say it is a "bad thing."[72] Support varied by ethnic group, with Indian Americans showing the strongest support (60% saying affirmative action is "a good thing" versus 13% saying it is "a bad thing") and Chinese Americans the weakest (45% saying it is "a good thing" versus 27% saying it is "a bad thing").[73] As a baseline for comparison, only 36% of respondents from all racial groups say affirmative action is "a good thing."[74] These results are consistent with other surveys that show overall support for affirmative action amongst Asian Americans.[75] That said, there are some contradictory indicators. Support has decreased significantly between 2012 and 2016 for Chinese Americans, the largest Asian ethnic group in the U.S., from 78% to 41% in one study.[76] Moreover, the same Pew study quoted above revealed internal contradictions, finding that 76% of Asian adults think that "race or ethnicity should not factor into college admissions decisions."[77] There are two takeaways here. The Asian American community is not a monolith when it comes to support for affirmative action. And even a single individual might support some aspects of affirmative action while holding reservations about other aspects.

---

72 Neil G. Ruiz, Ziyao Tian & Jens Manuel Krogstad, *Asian Americans Hold Mixed Views Around Affirmative Action*, PEW RSCH. CTR. 6 (June 8, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/RE_2023.06.08_Asian-Americans-Affirmative-Action_Report.pdf [https://perma.cc/KQ6A-528X].

73 *See id.* at 7.

74 *Id.* at 13. White Americans are more likely to say affirmative action is "a bad thing" (34%) than "a good thing" (31%). *Id.* Asian Americans are more supportive than Hispanic respondents, 36% of whom think affirmative action is "a good thing" and 23% of whom think it is "a bad thing." *Id.*

75 *See, e.g.*, Jennifer Lee, Janelle Wong, Karthick Ramakrishnan & Ryan Vinh, *69% of Asian American Registered Voters Support Affirmative Action*, AAPI DATA (Aug. 2, 2022), https://aapidata.com/blog/affirmative-action-aavs-2022 [https://perma.cc/P856-BL2P] (reporting the results from Asian American Voter Surveys (n=1564) collected between 2014 and 2022, asking, "Do you favor or oppose affirmative action programs designed to help Black people, women, and other minorities get better access to higher education?").

76 Jennifer Lee, *Asian Americans, Affirmative Action, and the Rise in Anti-Asian Hate*, 150 DAEDALUS 180, 190–91 (2021) (citing AAPI Data surveys). Lee argues that the decrease in Chinese American support is troubling because "Chinese is synecdoche for Asian." *Id.* at 181. *See also id.* at 190.

77 Ruiz, Tian & Krogstad, *supra* note 72, at 6. Even 71% of Black Americans, 61% of whom said affirmative action "is a good thing," responded that colleges should not consider race in admissions. *Id.* at 13.

B. Asian Penalty?: The SFFA Lawsuit

Despite the dynamics described in the previous section, a vocal minority of Asian Americans have come to blame affirmative action for what they perceive to be diminished prospects of getting into selective colleges. This belief is reflected in advice that Asian American students hide or downplay their ethnic or racial identity, steer clear of certain extracurricular activities or essay topics, and avoid declaring certain majors to maximize their chances of admission.[78] It is also reflected in the reactions of Asian American students who are denied admission despite their stratospheric test scores.[79] And it has been fed by a study suggesting that Asian American applicants must score over 140 points higher than white students on the SAT to have similar admissions outcomes.[80]

---

78 *See, e.g.*, Hsu, *supra* note 2 (describing the counseling industry that has arisen to help Asian American applicants downplay their Asian identities); Amy Qin, *Applying to College, and Trying to Appear 'Less Asian*,*'* N.Y. TIMES (Dec. 2, 2022), https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html [https://perma.cc/24C7-CZRV] (collecting anecdotes from people holding these views, including a competitive chess player who did not mention her interest in chess for fear of appearing "too . . . Asian"); Alia Wong, *Elite-College Admissions Are Broken*, THE ATLANTIC, (Oct. 14, 2018), https://www.theatlantic.com/education/archive/2018/10/elite-college-admissions-broken/572962/ [https://perma.cc/Q3CK-GBEW] ("[I]t's seen as common knowledge among many Asian American students and the application consultants who cater to them that emphasizing their racial and cultural identity could hurt their prospects."); Alia Wong, *Asian Americans and the Future of Affirmative Action*, THE ATLANTIC, (June 28, 2016), https://www.theatlantic.com/education/archive/2016/06/asian-americans-and-the-future-of-affirmative-action/489023/ [https://perma.cc/S7T3-WHYX] (repeating the advice to downplay one's Asian American identity); *see also* Harpalani, *supra* note 33, at 289–90 (collecting sources cited in the *SFFA* Complaint making these points).

79 *See, e.g.*, Hartocollis & Saul, *supra* note 2 (telling the story of Austin Jia, a student with high grades, a "nearly perfect SAT score," who was also captain of the tennis team but who was rejected from several Ivy League schools); Hsu, *supra* note 2 (telling the story of Michael Wang, who was rejected from most Ivy League schools despite his 4.67 GPA, 99th-percentile SAT score, and his extracurriculars which included co-founding the Math Club, being an accomplished member on the speech and debate team, and performing in a choir that sang at Barack Obama's first inauguration); Puang, *supra* note 5 (noting the ubiquity of these types of stories in the Asian American community in which the author was raised).

80 *See* ESPENSHADE & RADFORD, *supra* note 59, at 93 ("[A]n Asian candidate with a 1250 SAT score would be just as likely to be admitted at a private [university or liberal arts college] as a white student with an SAT score of 1110, other things the same."). For sources describing the impact of the Espenshade and Radford study within some Asian American communities, see Chang, *supra* note 4; Yi-Chen (Jenny) Wu, *Admission Considerations in Higher Education Among Asian Americans*, AM. PSYCH. ASS'N (2012), https://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission [https://perma.cc/KJ4P-LFQE]. Many opponents of affirmative action assume that higher grades and

Many of these beliefs were put to the test in the lawsuit filed by SFFA on behalf of Asian American applicants and their parents against Harvard College. SFFA alleged that Harvard's admissions practices violated Title VI of the Civil Rights Act of 1964.[81] It advanced two basic theories.[82] First, that Harvard "treated [Asian Americans] differently and less favorably than members of another race and that [Harvard] did so with a racially discriminatory purpose" such as "animus or 'stereotyped thinking.'"[83] In the alternative, working within the legal framework governing voluntary affirmative action programs set forth in the Court's decisions in *Fisher v. University of Texas at Austin*,[84] *Grutter v. Bollinger*,[85] and *Regents of the University of California v. Bakke*,[86] SFFA argued that Harvard's use of race was not narrowly tailored because it "(1) involves racial balancing or quotas, (2) uses race as a mechanical plus factor, or (3) is used despite workable race-neutral alternatives."[87]

---

test scores are objective measures of merit that qualify one for admission to elite institutions. Yet research has shown that standardized test scores and GPAs "underpredict the academic promise of Black students," Onwuachi-Willig, *supra* note 10, at 210, and that Asian American students benefit from positive stereotypes in the classroom that might result in inflated grades, Lee, *supra* note 5 (reporting how Asian American students benefit from positive stereotypes in school). *See also* Wong & Nguyen, *supra* note 5.

81 Complaint at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-DJC) [hereinafter Complaint].

82 The two theories are distinct, and some scholars have correctly observed that SFFA could have obtained the relief it sought without having to analyze the constitutionality of affirmative action programs. *See, e.g.*, Jeff Chang, *For Most Asian Americans, Diversity Is a Core Value – Even if a Loud Minority Contests It*, THE GUARDIAN (July 1, 2023), https://www.theguardian.com/us-news/2023/jul/01/asian-americans-affirmative-action-supreme-court [https://perma.cc/RY2X-X4SE] (arguing that the case "did not turn significantly on the alleged harms done to Asian Americans, but rather on how the Justices interpreted the equal protection clause"); Harpalani, *supra* note 16, at 33 (arguing that there was a bait-and-switch relationship between the two claims); Jeena Shah, *Affirming Affirmative Action by Affirming White Privilege:* SFFA v. Harvard, 108 GEO. L.J. ONLINE 134, 134–35 (2020) (arguing that it was unnecessary and wrong for the district court in *SFFA* to consider the challenge to affirmative action); Gersen, *supra* note 2 ("[T]he practice of race-conscious admissions is not what has limited the number of Asian American students; it is instead the parts of the process in which Harvard claims not to think about race at all.").

83 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 195–96 (1st Cir. 2020).

84 Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016).

85 Grutter v. Bollinger, 539 U.S. 306 (2003).

86 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

87 *SFFA*, 980 F.3d at 185, 187–88 (citations omitted).

Our focus here is on the allegations of intentional discrimination against Asian Americans. SFFA's overarching theory was that Harvard's current admissions practices were a modern-day incarnation of antisemitic policies adopted in the 1920s to reduce the number of Jewish students.[88] SFFA argued that history was repeating itself with Asian American applicants. Like the Jewish applicants of a century ago, Asian Americans "tended to have superior academic records, and were well represented among the most successful students."[89] It accused Harvard of coming to the similar conclusion that Asian Americans were over-represented in the student body,[90] and similarly using "personal qualities" of the applicants to produce lower rates of admission for Asian American applicants.[91]

At trial, SFFA attempted to marshal evidence of discrimination.[92] SFFA was not able to produce smoking-gun-type admissions of bias against Asian Americans.[93] The focus shifted to evidence of *unconscious* prejudice, namely, the deployment of harmful stereotypes. SFFA noted that a previous investigation by the Office of Civil Rights ("OCR") of the U.S. Department of Justice had "found recurring characterizations of

---

88 *See* Complaint, *supra* note 81, at 3 ("[T]he Harvard Plan was created for the specific purpose of discriminating against Jewish applicants. . . . Today it is used to hide intentional discrimination against Asian Americans."); *see also id.* at 12–27 (describing alleged historical antisemitism and the adoption of legacy preferences, personal essays, and letters of recommendation); *id.* at 34–37 (attempting to connect the history of antisemitism to alleged discrimination against Asian Americans).

89 *Id.* at 34.

90 *Id.* SFFA supported this contention by quoting a former Acting President of the university, who stated that "Asian-American students were 'no doubt the most over-represented group in the university.'" *Id.*

91 *Id.* at 35–36.

92 The trial received significant media attention because it exposed the inner workings of Harvard's admissions process to the public. *See* Anemona Hartocollis, *Harvard's Admissions Process, Once Secret, Is Unveiled in Affirmative Action Trial*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/harvard-admissions-affirmative-action.html [https://perma.cc/XLG2-HH3B].

93 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 139 (D. Mass. 2019). Jeannie Suk Gersen has criticized certain evidentiary rulings of the district court for barring the introduction of evidence that could have elicited additional testimony from Harvard's witnesses. Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case*, THE NEW YORKER (Mar. 23, 2023), https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case [https://perma.cc/R7P3-65JH]. She notes that the court suppressed a joke email containing rampant Asian American stereotypes written to Harvard's admissions director by someone at the Office of Civil Rights and prevented SFFA from questioning the admissions director about his reaction to the email. *Id.*

Asian American applicants that were broadly consistent with stereotypes."[94] For example, admissions files contained statements such as: "He's quiet and, of course, wants to be a doctor" or "[A]pplicant's scores and application seem so typical of other Asian applications I've read: extraordinarily gifted in math with the opposite extreme in English."[95] The OCR report warned that the careless deployment "of 'model minority' stereotypes could negatively impact Asian American applicants as a whole."[96]

SFFA attempted to make much of the fact that in the decades following the issuance of the OCR report, Harvard did not take any action to "modify their evaluation practices to avoid actual stereotyping or the appearance of stereotyping."[97] Moreover, SFFA pointed to "recent examples of admissions officers referring to Asian American applicants as 'quiet,' 'hard worker,' 'bright,' but 'bland,' 'flat,' or 'not exciting.'"[98] In making its findings of fact, the court recognized that the comments could "evidence actual stereotyping, animus, or racism," but might also "reference a stereotypical characteristic, like 'hard working,' . . . reflect[ing] an actual strength or weakness of that particular applicant."[99] The court observed invocations of these traits were not pervasive and also that some white, Black, and Hispanic applicants were called "'quiet,' 'shy,' or 'understated.'"[100] Thus, the court found that SFFA failed to establish a "pattern": the labels given to Asian American applicants could be "truthful and accurate rather than reflective of impermissible stereotyping."[101]

SFFA also attempted to prove discrimination through statistical and econometric models. In the discovery process, Harvard provided "applicant-by-applicant admissions data for more than 150,000 domestic applicants to Harvard's classes of 2014 through 2019, as well as aggregate information for the classes of 2000 through 2017, and a sample of actual application files and summary sheets from the classes of 2018 and

---

94 *SFFA*, 397 F. Supp. 3d. at 154.

95 *Id.* at 155 (alteration in original).

96 *Id.*; *see also* CHANG, *supra* note 45, at 116 (providing context for the investigation).

97 *SFFA*, 397 F. Supp. 3d at 155.

98 *Id.* at 156.

99 *Id.* at 156–57.

100 *Id.* at 157.

101 *Id.*

2019."[102] SFFA's expert, Professor Peter Arcidiacono of Duke University, concluded, on a high level, that Asian American applicants were stronger than white applicants and should have been admitted at a higher rate.[103] The model produced by Harvard's expert, Professor David Card of U.C. Berkeley, resulted in a "very slight, and not statistically significant, negative coefficient for Asian American identity."[104]

The District Court favored Professor Card's model, and for the purposes of this Article, and we can assume that the district court correctly found that Harvard does not statistically discriminate against Asian Americans in its admissions process.[105] We focus instead on several uncontested findings that relate to our analysis in later Parts. First, Asian Americans "would likely be admitted at a higher rate than white applicants if admissions decisions were made based solely on academic and extracurricular ratings."[106] We highlight this finding not to establish some objective deservedness but simply to show that there was in fact a basis for the plaintiffs to make an argument based on superior academic qualifications.[107] Second, Asians received lower personal ratings—an assessment of a candidate's "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit"[108] based on the personal essay, interview, and recommendations[109]—than applicants from other racial groups.[110]

---

102 *Id.* at 159.

103 *Id.* at 158–61.

104 *Id.* at 159.

105 *See id.* The court's lengthy and detailed evaluation of the two reports can be found on pages 159 through 175 of the opinion. For a more detailed summary of this part of the opinion than the one provided here, see Harpalani, *supra* note 33, at 292–94.

106 *SFFA*, 397 F. Supp. 3d at 161 (citing Arcidiacono's report); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 181 (1st Cir. 2020) (summarizing the district court's findings).

107 Harvard values other skills and traits where Asian American applicants lag. Harvard's expert, Professor Card, found, for example, "that Asian American applicants' disproportionate strength in academics comes at the expense of other skills and traits that Harvard values," such as athletics, in which white students excel. *SFFA*, 397 F. Supp. 3d. at 163. "[B]eing a recruited athlete (and therefore receiving an athletic rating of 1) vastly improves an applicant's odds of admission, with 86% of recruited athletes typically admitted and Asian Americans especially underrepresented in that group." *Id.*

108 *Id.* at 141.

109 *Id.* at 170.

110 *See id.* at 169 (noting that "an average Baseline Dataset Asian American applicant has a 17.8% probability of receiving a 2 or higher on the personal rating, which is lower than the 21.6% chance that the model suggests the applicant

To be clear, the District Court held that this discrepancy in personal ratings was not proof of discrimination and could be explained away by non-discriminatory factors. Asian American applicants' admissions essays and personal statements might have been less effective at demonstrating "their abilities to overcome obstacles or personal achievements that might reasonably be perceived as an indication of leadership ability or other personal strengths."[111] Moreover, "teacher and guidance counselor recommendations seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants," also depressing their personal ratings.[112] The court noted that Harvard admissions officers were not responsible for these inputs.[113]

Nonetheless, the District Court was disturbed by the discrepancy in personal ratings, saying that it "ha[d] not been fully and satisfactorily explained."[114] Why, for instance, were teachers and guidance counselors rating Asian American students lower?[115] In the face of these concerns, the court essentially deferred to the expertise of admissions officers, expressing the hope that they would "carefully review individual applicants in a holistic way."[116]

As the foregoing discussion indicates, Asian Americans were the focus of the trial. The experiences and testimony of Asian Americans featured prominently in SFFA's Complaint and in the evidence presented.[117] SFFA's attorney, Adam Mortara, centered Asian Americans in his opening statement, saying that "[t]he future of affirmative action in college admissions is not on trial . . . . This trial is about what Harvard has done

---

would have in the absence of any racial preference" and that Harvard did not attempt to refute this showing); *see also id.* at 162 (providing further comparisons).

111 *Id.* at 169–70; s*ee also id.* at 166 (this was also the position of Harvard's expert, who argued that "race correlates with personal qualities that affect personal ratings, but that race does not itself affect the personal ratings assigned by admissions officers")

112 *Id.* at 170.

113 *Id.*

114 *Id.* at 171.

115 *See id.* at 168, 170–71 (speculating that the quality of guidance counselors at a particular school, the relative socioeconomic privilege of the applicants, teacher bias, or other factors might have some role to play).

116 *Id.* at 170.

117 *See, e.g.*, Hartocollis, *supra* note 92 (reporting that the court was presented with admissions files of several Asian American students and was told what aspects of their experiences warranted admission, and that at least one Asian American student was listed as a potential fact witness).

and is doing to Asian-American applicants."[118] Some Asian Americans high-fived Edward Blum, the founder of SFFA, as he entered the courtroom while others protested the lawsuit outside.[119] Discussion of the lawsuit rippled through diverse Asian American quarters.[120] Some have contended, not without basis, that the lawsuit was always about dismantling affirmative action and never about Asian Americans.[121] But the evidence presented at trial and the involvement of Asian Americans in the proceedings complicate that narrative. Asian Americans were lead characters in the litigation, and members of the Asian American community found themselves drawn into broader discussions of the role of merit, privilege, and equality in American society.[122]

II
ABSENTING ASIANS

> *When they approach me, they see only my surroundings, themselves, or figments of their own imagination—indeed, everything and anything except me.*
>
> – Ralph Ellison[123]

The previous Part makes the point that the *SFFA* case raised the long simmering question of Asian American belonging in the most elite of institutions even if it was also a vehicle for white activists to dismantle affirmative action. This Part documents the Supreme Court Justices' absenting of Asian

---

118 Anemona Hartocollis, *Harvard Admissions Dean Testifies as Affirmative Action Trial Begins*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-trial-asian-americans.html [https://perma.cc/E6YY-VL7G].

119 *See id.*

120 *See, e.g.*, Kang, *supra* note 2 (observing the prevalence of discussions amongst "friends and colleagues").

121 See, e.g., Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, ACS BLOG (May 13, 2013), https://www.acslaw.org/expertforum/asian-americans-and-the-bait-and-switch-attack-on-affirmative-action/ [https://perma.cc/6AS4-V4W4]; Ball & Ziaee, *supra* note 4 (interviewing sociologist Jennifer Lee). This characterization perhaps deflects some responsibility onto Edward Blum and SFFA, but it also objectifies the Asian American members of SFFA, denying them agency and suggesting that they are complicit in their own dehumanization.

122 *See, e.g.*, Kang, *supra* note 2 (interviewing Asian American college applicants and observing the larger issues about meritocracy, whether Asian Americans are minorities, and more).

123 RALPH ELLISON, INVISIBLE MAN 3 (1952).

Americans from the narrative.[124] The Justices' opinions in *SFFA* are a parable of the marginal position of Asian Americans in American society.

Writing separately in the *Regents of the University of California v. Bakke* case, Justice Thurgood Marshall called it "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."[125] Irony stems from the divergence between expectation and reality. In Justice Marshall's view, one might expect to enact a class-based remedy to address discrimination against a group of people "not as individuals, but rather solely because of the color of their skins."[126] One might expect the same Court that hamstrung the Fourteenth Amendment in the *Civil Rights Cases* and *Plessy v. Ferguson* to avoid reproducing that outcome decades later when societal institutions were finally recognizing the importance of taking steps to remediate historical discrimination.[127] But no.

The more sympathetic one is to the systemic discrimination faced by Black Americans, the more ironic it seems to prevent institutions from remedying the effects of that discrimination on a class-wide basis. The more convinced one is that the Fourteenth Amendment was essentially a remedial measure designed equalize the status of Black Americans,[128] the more ironic it seems to rely on the Fourteenth Amendment to *thwart* programs designed to help Black students and other disadvantaged minorities. Justice Marshall's invocation of irony in dissent is therefore an indictment of the Justices in the majority.

---

124 A few commentators have noticed the diminished role that Asian Americans played in the Supreme Court decision, *see, e.g.*, Harpalani, *supra* note 16; Jay Caspian Kang, *Why the Champions of Affirmative Action Had to Leave Asian Americans Behind*, The New Yorker (June 30, 2023), https://www.newyorker.com/news/our-columnists/why-the-champions-of-affirmative-action-had-to-leave-asian-americans-behind [https://perma.cc/6P9P-KT4H], but have not examined *how* this absenting occurred, nor do they draw the same lessons that we do in this Article.

125 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., separate opinion).

126 *Id.*

127 *Id.* at 401 ("[H]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978.").

128 *Id.* at 396–97 ("[T]he Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes.").

It reveals that those Justices do not share a commitment to the same values.

We use irony in such a way in this Part to reveal the Justices' assumptions about how Asian Americans fit within the landscape of selective colleges like Harvard and University of North Carolina and within the racial landscape of the country more broadly. We show, depressingly but unsurprisingly, that the Justices see no role for Asian Americans in the litigation, legal doctrine, and the racial landscape of America. Ultimately, there is little evidence that the Justices even view Asian Americans as individuals with human subjectivity.

A. Irony 1: The Resurgence of the Black/White Binary

One might expect Asian Americans to feature prominently in the Court's *SFFA* decision. After all, the case was brought on their behalf, and much of the news coverage of the lower court proceedings examined evidence pertaining to the existence of bias against Asian Americans. When the Court granted certiorari, and even when the case was argued, major news outlets continued to highlight the importance of the case to Asian Americans.[129] As this section will show, however, the Justices relegated Asian Americans to bit parts in a much broader narrative.

The racial landscape in the United States is often conceptualized as a Black/white binary, the view that "race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White."[130] As scholars have noted, the binary view discounts the views and experiences of "other people of color," allowing those experiences to be ignored altogether or explaining them by analogy to the "'real' races" of

---

129 *See, e.g.*, Liptak & Hartocollis, *supra* note 2. Around the time of oral arguments in the case, CNN said this: "Affirmative action is on trial again, and this time Asian Americans are at the center." Harmeet Kaur, *How Asian Americans Fit into the Affirmative Action Debate*, CNN (Nov. 3, 2022), https://www.cnn.com/2022/11/03/us/affirmative-action-asian-americans-qa-cec/index.html [https://perma.cc/9R4N-9N74].

130 Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1219 (1997); *see also, e.g.*, CHANG, *supra* note 45, at 11 ("[R]ace in America is generally understood to mean black and white."); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 154–55 (2d ed. 1994); Kim, *supra* note 14, at 105 (noting a scholarly movement to transcend the binary); Wu, *supra* note 63, at 248–49 (arguing that race is conceived of in a bipolar way).

Black and white.[131] According to its critics, the Black/white binary erases the experiences of groups such as Latinos, and Asian Americans, and Native Americans, denying them their rightful place in history and leading to an incomplete understanding of how racism functions in this country.[132]

The raw numbers suggest the dominance of the Black/white binary in *SFFA*. Collectively, the Justices mentioned Asian Americans 90 times. They mentioned white people 136 times; Black Americans 265 times; Hispanics[133] 57 times; and Native Americans 9 times.[134] Asian Americans comprise a mere 16% of the references to different racial and ethnic groups.

---

131 Perea, *supra* note 130, at 1219; *see also id.* at 1238–39 (criticizing the paradigm for ignoring the unique experiences of Mexican Americans and Native Americans); Wu, *supra* note 63, at 248–51 (noting that groups are characterized as "honorary whites" or "constructive blacks" and otherwise ignored).

132 *See* Perea, *supra* note 129, at 1251; Wu, *supra* note 63, at 252 (noting the danger of neglecting racial stereotypes, which can be used for political purposes); Kim, *supra* note 14, at 106 (arguing that incomplete or inaccurate understandings of racial dynamics facilitate the perpetuation of white supremacy). The general trend has been to criticize the Black/white binary as oversimplistic and inadequate. *See, e.g.*, Kim, *supra* note 14, at 105 (describing the current scholarly landscape); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2386 (1999) (same). Some scholars, however, have made thoughtful arguments against full-scale abandonment. *See, e.g.*, *id.* at 2386–87; Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107 (2010); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1307–12 (2002) (suggesting notes of caution); Kim, *supra* note 14, at 2386; Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 170 (2001).

133 We use the term "Hispanic" because it is used by both the Court and the schools that were subject to the *SFFA* lawsuit. We recognize that the term itself is contested both for its accuracy in denominating a particular group of people and because it has colonialist overtones. *See* Onwuachi-Willig, *supra* note 10, at 195 n.21.

134 For purposes of counting, a "mention" means that the group was either the subject or object of a sentence. Multiple invocations of a racial group in the same sentence are counted together as part of a single mention. For example, the following sentence from the majority opinion uses the word "Asian" three times in furtherance of one point, so it is counted once: "[B]y grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented . . . ." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2167 (2023). Words like "Asian" in citations are ignored if the citation is unaccompanied by independent substantive reference (e.g. in a parenthetical), however brief. Mentions of "Asian" include references to countries and ethnicities like China/Chinese, Japan/Japanese, etc. "White" includes references to European countries or ethnicities. "Black" includes the terms "African American" and "Negro." "Hispanic" also includes "Latino/a," Mexico/Mexican, and other Latin American ethnicities. "Native American" includes "Indian" and "American Indian." The total numbers include references in footnotes.

Collectively, references to Black and white people account for 72%. To be sure, these numbers do not distinguish between passing references and deep engagement. In the aggregate, however, they demonstrate the interests and preoccupations of the Justices, confirming the dominance of the Black/white binary.[135] These figures speak for themselves, even more so when compared to the First Circuit's opinion in the case, which mentioned Asian Americans 70 times, white people 17 times, Black Americans 21 times, Hispanics 19 times, and Native Americans 1 time. In the First Circuit, Asian Americans comprised 55% of the references to different ethnic and racial groups; Black and white people together comprised only 30%.

Table 1: Mentions by Opinion

	Asian	White	Black	Hispanic	Native American
Roberts	14	13	18	8	1
Thomas	21	38	98	11	3
Gorsuch	23	11	4	8	3
Kavanaugh	0	0	1	0	0
Sotomayor	29	44	76	28	2
Jackson	3	30	68	2	0

If anything, these numbers overstate the relative importance of Asian Americans from a qualitative perspective. Substantively, the opinions reveal a lack of concern for the plight of Asian Americans. The majority opinion, for example, remarks only once about purported disadvantages faced exclusively by Asian American applicants, repeating a First Circuit finding that Harvard's affirmative action policy resulted in an 11.1% decrease in the total number of Asian Americans enrolled.[136]

---

135 It is also important to note that the Justices differed significantly in their emphases, as demonstrated in Table 1. Justice Gorsuch focused heavily on Asian Americans, for example, because of his interest in arguing that the category "Asian," devised by "[b]ureaucrats," is "incoherent," sweeping in East Asians, South Asians, and even "Filipino Americans." *Id.* at 2210 (Gorsuch, J., concurring) (calling the inclusion of Filipino Americans in the Asian category a "curiosit[y]"). Justices Thomas and Jackson engaged in a debate about the legacy of slavery and Jim Crow on Black communities and the contemporary racial landscape of the United States. *See id.* at 2200–06 (Thomas, J., concurring); *id.* at 2263–71 (Jackson, J., dissenting). Unsurprisingly, their opinions both mentioned Black Americans more than all other racial groups combined.

136 *Id.* at 2168 (majority opinion). The First Circuit noted that without affirmative action, Asian Americans would make up 27% of the class instead of 24% but found that this difference was less significant than that approved in the

In all other instances, Chief Justice Roberts pairs Asian Americans with whites, noting, for example, that at the University of North Carolina "underrepresented minority students were 'more likely to score [highly] on their personal ratings than their *white and* Asian American peers,'"[137] or that "Harvard's 'policy of considering applicants' race . . . overall results in fewer Asian American *and white* students being admitted.'"[138] The Court claims that *all* are "demean[ed]" when "judged by ancestry instead of by his or her own merit and essential qualities."[139] The Asian American experience is largely folded into white existence or genericized completely.

The dissenting opinions by Justices Sotomayor and Jackson do not go much further in focusing on the experiences of Asian Americans. Placed in the position of having to defend affirmative action from the charge that it harms Asian Americans, they mostly mention Asian Americans while rebutting any suggestion that they are disadvantaged.[140] Moreover, although Justice Sotomayor at one point groups Asian Americans with other persons of color whose experiences related to their race that are important to their sense of identity,[141] she implicitly excludes them from the category of "underrepresented minority." She cites statistics showing that a much higher percentage of Asian American students have parents who attended

---

Grutter v. Bollinger decision. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 191 n.29 (1st Cir. 2020).

137 *SFFA*, 143 S. Ct. at 2155 (alteration in original) (emphasis added) (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 616 (M.D.N.C. 2021)).

138 *Id.* at 2169 (emphasis added) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 178 (D. Mass. 2019)).

139 *Id.* at 2170 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

140 *See, e.g.*, *id.* at 2274 (Jackson, J., dissenting) (noting that "a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants"); *see also id.* at 2272 n.83 (providing the example of a Vietnamese American student whose race was "integral to [her] story" and therefore contributed to her admission (quoting *SFFA*, 567 F. Supp. 3d at 639)); *id.* at 2257–58 (Sotomayor, J., dissenting) (observing that the district court in *SFFA* found "no discrimination against Asian Americans," and that "some Asian American applicants are actually 'advantaged by Harvard's use of race'" (quoting *SFFA*, 980 F.3d at 191, 202)).

141 *See id.* at 2251 (including Sally Chen and Thang Diep among other "[s]tudents of color" who "testified at trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves").

college (higher even than whites),[142] and that Asian American students are over-represented when compared to the general population.[143] Likewise, Justice Jackson's only other reference to Asian Americans comes when she describes race-based disparities in median income: "$76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households."[144] If Asian Americans have any presence at all in the two dissents, it is one of economic and educational privilege, in some respects even as compared to white people.

The concurring opinions of Justices Thomas and Gorsuch most deeply engage the experiences of Asian Americans, albeit in a generally unsatisfying way.[145] In furthering the narrative of Asian American victimhood, Justice Thomas notes that "Asian Americans can hardly be described as the beneficiaries of historical racial advantages."[146] The nation's first exclusionary immigration laws "targeted the Chinese"; western states enacted "discriminatory laws . . . similar to those aimed at blacks in the South"; the Supreme Court itself had denied a Chinese American girl entrance to a white school; the federal government removed 120,000 Japanese Americans to relocation camps.[147] This history, he argues, makes it "particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants."[148] But then Justice Thomas makes an-

---

142 *Id.* at 2235 & n.12 (drawing a contrast with underrepresented minorities, who "are less likely to have parents with a postsecondary education who may be familiar with the college application process").

143 *Id.* at 2258 & n.39 ("At Harvard, 'Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes,' even though 'only about 6% of the United States population is Asian American.'" (quoting *SFFA*, 397 F. Supp. 3d at 203)). This claim is untrue for some Asian American ethnic groups. Children of Southeast Asian immigrant groups, including Hmong, Cambodian, Laotian, and Vietnamese people, are less likely than the average American to attend college and earn a bachelor's degree. *See* Matt Krupnick, *These Groups of Asian-Americans Rarely Attend College, but California Is Trying to Change That*, PBS NEWS (May 21, 2015), https://www.pbs.org/newshour/education/these-groups-of-asian-americans-rarely-attend-college-but-california-is-trying-to-change-that [https://perma.cc/8NGC-TZB4].

144 *SFFA*, 143 S. Ct. at 2269 (Jackson, J., dissenting).

145 *See* Harpalani, *supra* note 16, at 24 (reaching a similar conclusion).

146 *SFFA*, 143 S. Ct. at 2199 (Thomas, J., concurring).

147 *Id.* at 2199–200 (Thomas, J., concurring) (using Justice Thomas's description of what we elsewhere call "incarceration camps").

148 *Id.* at 2200 (Thomas, J., concurring). For the record, we disagree with this characterization of the universities' admissions policies. Professor Harpalani faulted this account for ignoring "the more recent, complex history of Asian

other rhetorical move: if you agree that Asian Americans do not deserve to be victimized by affirmative action policies because of their lack of complicity and even victimhood in events of the past, what about the many "millions of applicants" who likewise did not perpetuate those harmful policies?:

> Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors.[149]

Having already spoken about Asian Americans in preceding sentences, it is clear that "[t]oday's 17-year-olds" are white.

Justice Gorsuch makes a similar move in his concurring opinion. Justice Gorsuch notes that the use of race by schools like Harvard and UNC has led Asian Americans to "try to conceal their race or ethnicity"[150] because of concerns about overrepresentation. He refers to the cottage industry of private college counselors who help Asian American applicants to look "less Asian."[151] And then he wonders "whether those left paying the steepest price" are Asian Americans from lower-income families who lack the financial resources to hire consultants (and who, therefore, will fail to conceal their Asian-American identity).[152] The problem with this argument is that it assumes the stakes of concealment are limited to acceptance or rejection, not the *psychological toll* of denying one's identity or interests.[153] If the alleged harm is only that one might face a higher prospect of rejection, then it is equally shared by white applicants. And indeed, this is where Justice Gorsuch takes the argument, stating in the following sentence that "there is no question both schools intentionally treat some applicants

---

Americans" that would have complicated Justice Thomas's historical narrative. Harpalani, *supra* note 16, at 27.

149 *SFFA*, 143 S. Ct. at 2200 (Thomas, J., concurring).

150 *Id.* at 2211 (Gorsuch, J., concurring).

151 *Id.*

152 *Id.*

153 Justice Gorsuch neither sympathizes with this personal toll nor does he speculate about its impacts. *See SFFA*, 143 S. Ct. 2141, 2208–21 (Gorsuch, J., concurring).

worse than others because of their race."[154] From this point on, the victims are "white and Asian."[155]

These opinions treat Asian Americans as little more than proxies or ciphers of white people, useful only to illustrate or deny the existence of harms perpetuated by race-conscious admissions.

B. Irony 2: The Harlan Dissent

Justice John Marshall Harlan has been lionized as "the great dissenter" for his powerful rebuke of racial segregation in his *Plessy v. Ferguson* dissent.[156] In that opinion,[157] as well as in several other opinions, Justice Harlan forcefully condemned the Court's unwillingness to strike down race-based laws promoting white supremacy and Black inferiority.[158] *Plessy* famously upheld the legality of a law requiring railway companies to "provide equal but separate accommodations for the white, and colored races."[159] The majority opinion observed that while "[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality."[160] Justice Harlan cut through the pretense: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[161] In the process of making the argument, Justice Harlan issued these famous words:

---

154 *SFFA*, 143 S. Ct. at 2212 (Gorsuch, J., concurring).

155 *Id.* at 2214. *See generally id.* at 2212–16 (referring to white and Asian applicants collectively six more times and Asian Americans alone only once).

156 *See, e.g.*, PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO (2021); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 155 (1996); Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1384–85 (2008); Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, The "Color-Blind" Constitution and the Meaning of His Dissents in the* Insular Cases *for the War on Terror*, 48 AM. J. LEGAL HIST. 119, 119–21 (2006).

157 Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

158 *See* Liu, *supra* note 156, at 1392 (concluding that "on civil rights, Harlan's vision of racial equality was exceptional on the Court").

159 *Plessy*, 163 U.S. at 540.

160 *Id.* at 544.

161 *Id.* at 557 (Harlan, J., dissenting).

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[162]

This language has proven to be inspirational but also susceptible to competing interpretations. As California Supreme Court Justice Goodwin Liu observes, "Harlan's legacy has been claimed by two Justices with virtually opposite views on race: Thurgood Marshall and Clarence Thomas."[163] Justice Marshall famously adopted Harlan's *Plessy* dissent as his "bible," reading aloud to his legal staff during his days at the NAACP the phrase, "Our Constitution is color-blind."[164] Justice Thomas, meanwhile, has argued, "My view of the Constitution is Justice Harlan's view in *Plessy*: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[165]

In *SFFA*, the Justices cited Harlan's *Plessy* dissent more than *twenty* times across four opinions. Indeed, the meaning of colorblindness as articulated by Justice Harlan became a central point of contention between the majority and dissenting Justices. Chief Justice Roberts's majority opinion cites the *Plessy* dissent for the proposition that the equal protection clause forbids the state from picking "winners and losers based on the color of their skin."[166] As elaborated by Justice Thomas, Harlan's *Plessy* dissent establishes an "equality principle" that prohibits state actors from making distinctions based on race, benign or otherwise.[167] Accepting anything less than formal equality would repeat the mistake of the *Plessy* majority by elevating "present arrangements" over the text of the Constitution.[168] Justice Sotomayor's dissent, by contrast, centers

---

162 *Id.* at 559.

163 Liu, *supra* note 156, at 1384.

164 Constance Baker Motley, Tribute to Thurgood Marshall, *in In Memory of Thurgood Marshall*, 68 N.Y.U. L. REV. 205, 210 (1993) (calling the quotation "Marshall's favorite" and "our basic legal creed").

165 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). Despite its acceptance by judges of different political orientations, the concept of colorblindness has been subjected to withering critique by legal scholars. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

166 *SFFA*, 143 S. Ct. 2141, 2175 (2023).

167 *Id.* at 2176–77 (Thomas, J., concurring).

168 *Id.* at 2207. The Justices in the majority all express mistrust of the elite institutions making determinations based on their own views of what America's

Justice Harlan's discussion of caste. She emphasizes the centrality of Justice Harlan's observation that the purpose of the law at issue was to denote white people as superior and Black people as inferior.[169] She argues that the Court's decision in *Brown v. Board of Education*,[170] which adopted race-conscious remedies to promote substantive equality for Black schoolchildren, vindicated Harlan's vision by ensuring "racial equality of opportunity, not . . . a formalistic rule of race-blindness."[171]

Despite the lengthy and fiery[172] debate over the meanings of *Brown* and Justice Harlan's *Plessy* dissent, the Justices in *SFFA* were united in at least one respect: they all neglected to mention the appearance of Chinese people in Justice Harlan's dissent. Three paragraphs after Justice Harlan declared, "there is in this country no superior, dominant, ruling class of citizens. There is no caste here,"[173] he made the following observations that are worth repeating in full:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana . . . who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.[174]

Harlan depicts the Chinese as inherently alien. By contrast, he notes that "[t]he destinies of the [black and white] races, in this country, are indissolubly linked together."[175] The exclusion of the Chinese highlights the shared citizenship of

---

racial landscape should look like. *See, e.g.*, *id.* at 2218–19 (Gorsuch, J., concurring) (implying that universities "discriminate as they please").

169 *Id.* at 2230 (Sotomayor, J., dissenting).

170 Brown v. Bd. of Educ., 349 U.S. 294 (1955).

171 *SFFA*, 143 S. Ct. at 2231 (Sotomayor, J., dissenting).

172 Justice Sotomayor characterized the majority's interpretation of *Brown* as an "affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness." *Id.* at 2232.

173 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

174 *Id.* at 561.

175 *Id.* at 560.

Black and white people, drawing them into the same American family.[176] But to Harlan, the Chinese are not merely noncitizens. Harlan's suggestion that it would be absurd for a Chinese person to share a coach with a white person denotes their degraded position in the social hierarchy vis-à-vis whites.

We are not the first to notice this aspect of Harlan's *Plessy* dissent, what one scholar has called "seemingly anomalous,"[177] and another has called a "fault."[178] For decades, legal scholars and historians have been calling for a more complete account of Justice Harlan's jurisprudence that confronts his dim view of Chinese people. Several have attempted to establish that Harlan was anti-Chinese, even compared to the generally racist views of his time.[179] Others have tried to explain away Harlan's disquisition on the "Chinaman" by arguing that his views later evolved or that he never intended to endorse anti-Chinese sentiment.[180] Still others have tried to limit Harlan's statements to

---

176 In the preceding sentence, Harlan emphasized that, through the Fourteenth Amendment, "the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge." *Id.*

177 Schepard, *supra* note 156, at 119.

178 Chin, *supra* note 156, at 156. Several scholars, in addition to Professor Chin, have called attention to Harlan's demeaning depiction of Chinese people in the *Plessy* dissent. *See, e.g.*, Chew, *supra* note 21, at 34 & n.152 (associating it with the view that Asians are "not American"); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* Justice at War, 85 COLUM. L. REV. 1186, 1189 & n.11 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983) (linking Harlan to anti-Chinese views and pointing to the *Plessy* dissent)); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 354 n.11 (1995).

179 Historians have identified evidence of Harlan's anti-Chinese attitudes as part of their efforts to create a more complete account of the Justice. *See* LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 120–21 (1999); TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 190–92 (1995). Legal scholars Gabriel Chin and Earl Maltz provided early, comprehensive accounts of Harlan's biases against the Chinese. *See* Chin, *supra* note 156, at 156 & *passim*; Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 999 ("In the Chinese-related cases, . . . Harlan proved even more reactionary than most of his contemporaries."). Chin defended his account by scouring Harlan's voting record and engaging in a systematic qualitative analysis of Harlan's opinions, which reaffirmed the conclusion that Harlan was notably unsupportive of the Chinese. Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter?"*, 32 AKRON L. REV. 629, 633 (1999). Chin's *The* Plessy *Myth* has been cited over 110 times in law reviews.

180 *See* Schepard, *supra* note 156, at 120 (arguing that Harlan's later decisions in the *Insular Cases* shows that he "may have rejected the racism he seemingly endorsed in *Plessy* and the *Chinese Immigrant Cases*"); James W. Gordon, *Was the First Justice Harlan Anti-Chinese?*, 36 W. NEW ENG. L. REV. 287, 289–90,

an expression of views about citizenship and not racial caste.[181] But regardless of the conclusion one draws about Harlan's views, the debate itself surely sheds some light on the meaning of caste and colorblindness embedded in the *Plessy* dissent.[182]

It is therefore ironic that *none* of the nine Justices recognized the presence of the Chinese in Justice Harlan's *Plessy* dissent, especially in a case of great concern to Asian Americans. There are several possible explanations, each more depressing than the previous. Perhaps none of the nine Justices or their law clerks came across this literature during their research of the issues presented by the case.[183] Perhaps while reading *Plessy*, as surely they must have in the course of making interpretive arguments about it, they saw the reference to the "Chinaman" but thought nothing of it, even if the antiquated term might rankle a bit. Or perhaps they did notice the presence of Chinese foreigners in Harlan's opinion and could not square it with the arguments they were making about its meaning. How would this intersect with Justice Thomas's argument that Harlan envisioned "'full and complete equality of all persons under the law,' forbidding 'all legal distinctions based on race or color'"?[184] How would this intersect with Justice Sotomayor's argument that Harlan was principally concerned with dismantling America's "caste system" if Harlan viewed Chinese

297 n.44 (2014) (largely arguing that historical evidence is too thin to make a definitive judgment, but also citing the *Insular Cases*).

181 *See* Liu, *supra* note 156, at 1391 ("[Harlan's] strong nationalism provides a window for understanding why he did not have much sympathy for the plaintiffs in the *Chinese Exclusion Cases*. . . . Harlan saw no reason why Congress should not have plenary power to set criteria for membership, even criteria based on race [for people outside of the national community]."). Chin has responded to this point, arguing that, "if the government can pick and choose which races to make citizens, then *Dred Scott v. Sandford* was entirely sound." Chin, *supra* note 156, at 166 (emphasizing that Harlan found it perfectly acceptable to discriminate on the basis of race when determining who could become a citizen).

182 Chin, for example, has argued that Harlan's anti-Chinese views prevented him from conceiving of the Fourteenth Amendment as embodying "a general anti-discrimination principle" based on the idea that discrimination is "normatively undesirable." Chin, *supra* note 156, at 171–72. As a consequence, Harlan deprived himself, and future generations, of a robust argument centered in anti-racism. *Id.* at 174. Neil Gotanda has gone further, arguing that the color-blindness metaphor legitimates racial subordination. *See* Gotanda, *supra* note 165, at 2–3 & *passim*; *see also* Gersen, *supra* note 2 (concluding that Harlan's statements about the Chinese were based on views about "racial difference").

183 As far as we can tell, none of the amicus briefs mention it.

184 *SFFA*, 143 S. Ct. 2141, 2177 (2023) (Thomas, J., concurring) (quoting Supplemental Brief for the United States on Reargument at 115, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1)) (claiming "[t]his was Justice Harlan's view").

as both orthogonal and inferior to other Americans?[185] Better not to mention it.

The previous section shows that Asian Americans disappeared from the *SFFA* litigation when they entered the Supreme Court. This section demonstrates the same phenomenon on a doctrinal level. In the judicial opinion serving as the linchpin to both sides' analysis, Asian Americans either were unseen to the Justices or were ignored by them, despite their conspicuous presence in the opinion as a racial "other." Just like Harlan, the Justices in *SFFA* moved Asians from the center to the outer limits of the law. Adding irony upon irony, attempts by scholars, including Asian American scholars, to confront Justice Harlan's depiction of Chinese people and examine its significance in his understanding of racial equality were completely ignored.

C. Irony 3: Stereotypes

A central contention of the Justices in the *SFFA* majority is that affirmative action programs engage in racial stereotyping. They argue that giving consideration to membership in a racial group must be based on an assumption that members of that group share a particular trait, "that there is an inherent benefit in race *qua* race."[186] But not everyone who belongs to a particular race thinks alike: to suggest otherwise "demeans the dignity and worth of a person."[187] According to Justice Thomas, racial categories are "little more than stereotypes" because they suggest "that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities."[188] For these Justices, racial categories are problematic because they impute shared experiences and viewpoints regardless of how given individuals actually think and feel.[189] Justice Sotomayor's dissent offers a powerful response to this line of argument:

---

185 *Id.* at 2230–31 (Sotomayor, J., dissenting) (opening her explanation of the *Plessy* dissent by focusing on caste).

186 *Id.* at 2170 (pointing to "the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer'" (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.))).

187 *Id.* (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

188 *Id.* at 2202 (Thomas, J., concurring).

189 *Id.* ("Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria . . . ."); *see also id.* at 2205 (Thomas, J., concurring) (accusing affirmative action defenders of "[e]schewing the complexity that comes with individuality").

> It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students.[190]

This debate, while interesting, ironically ignores the arguments marshaled on behalf of Asian Americans that Harvard and UNC's discrimination unfolded along lines predicted by the model minority stereotype: that Asians are quiet and hardworking but lack individuality.[191] The closest any Justice comes to acknowledging the impact of negative stereotypes on Asian Americans is when Justice Sotomayor declares "that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society."[192] But Justice Sotomayor does not specify what these stereotypes are, and denies that anti-Asian stereotypes play any role in the admissions process.[193] None of the Justices, including the ones ruling on behalf of the plaintiff, acknowledge the actual instances of stereotypical thinking that allegedly affect the Asian American applicants.

The other irony is that despite their purported concern about the impact of racial stereotypes, the Justices in the

---

190 *Id.* at 2252 (Sotomayor, J., dissenting) (noting that parents of "black and brown" children must give "the talk"—advice about how to deal with law enforcement to avoid becoming the victim of violence—and that Black people are racially profiled regardless of their socioeconomic status or other qualities).

191 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 154–55, 203–04 (D. Mass. 2019) (considering evidence that some Asian American applicants were labeled "quiet," "reserved," "hard-working," or "wants to be a doctor," but that those instances did not prove intentional discrimination); *id.* at 170 n.48 (exploring the perception of the lack of leadership ability or other personal strengths and how those views might affect both a student's opportunities to obtain leadership positions in school organizations as well as a teacher's perception of that student's personal qualities).

192 *SFFA*, 143 S. Ct. at 2258 (Sotomayor, J., dissenting). Justice Gorsuch argues that Asian Americans are being stereotyped by the very category of "Asian," given the diversity of ethnicities that comprise it. *Id.* at 2210 (Gorsuch, J., concurring). This argument stretches the meaning of the term incredibly far: Gorsuch does not appear to be referring to the wrongful attribution of views or traits like his colleagues, but rather the lack of precision in the construction of a legal category. If this is a "stereotype," it is not one in a meaningful sense.

193 Justice Sotomayor notes *SFFA*'s failure to prove intentional discrimination against Asian Americans at trial but sidesteps the district court's finding that Asian Americans received lower personal scores than other racial groups. *See id.* at 2258 (Sotomayor, J., dissenting).

majority unselfconsciously deploy those stereotypes to justify the outcome. They are all too willing to repeat uncritically the core tenets of the model minority stereotype: the notion that Asian Americans have excelled despite their disadvantages, disproving any suggestion that America is a racist society or that minorities face insurmountable headwinds.[194]

Justice Thomas's concurring opinion provides the clearest illustration. Asian Americans, Justice Thomas notes, have historically experienced racial discrimination, including laws "similar to those aimed at blacks in the South."[195] They too experienced school segregation, not to mention exclusionary immigration laws and forced detention in internment camps.[196] What, then, explains their success? Justice Thomas next equates metrics such as grades and standardized test scores to work ethic: "As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration."[197] Justice Thomas then completes the comparison, drawing a contrast between "white and Asian" students and "black and Hispanic" students who allegedly "receiv[e] mediocre or poor grades once they arrive in competitive collegiate environments."[198] The implication is that through "hard work and practice," Asian Americans have attained the same level of success as whites. Justice Thomas even invokes STEM fields, which are closely associated with Asian Americans[199]: "[t]hose students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not

194 *See* Wu, *supra* note 63, at 226 ("According to the model minority myth, Asian Americans have suffered discrimination and overcome its effects by being conservative, hard-working, and well-educated, rather than through any government benefits or racial preferences."); *see also id.* at 236–40 (describing the stereotype's basic substance).

195 *SFFA*, 143 S. Ct. at 2199 (Thomas, J., concurring) (quoting U.S. COMM'N ON C.R., CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 7 (1992)).

196 *Id.* at 2199–00.

197 *Id.* at 2197.

198 *Id.* at 2197–98 (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 332 (2013)).

199 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 155 (D. Mass. 2019) (describing the stereotype that Asian Americans are "science/math oriented"); *id.* at 156 (noting that it is both a stereotype and the reality that Asian Americans "are more likely to hold science, technology, engineering, and mathematics occupations than the United States population more broadly").

receive such a preference."[200] Asian American (and white) work ethic renders Black and Hispanic students pathological.

This depiction obviously flattens Asians into a monolithic category, exactly the sin the Justices in the majority attribute to affirmative action policies. What does Chinese exclusion or Japanese American incarceration have to do with the history or contemporary experiences of the vast majority of East Indian or Vietnamese Americans, for example? Not even all Japanese and Chinese Americans can trace their roots back to people who experienced those forms of discrimination.[201] Similar questions could be asked about whether all Asian American success can be attributed to hard work, or whether some students instead benefit from better schooling, parents who have careers in STEM fields, or any number of other explanatory factors.

The dissenting Justices mostly fail to call out this reasoning. As mentioned above, Justice Jackson barely mentions Asian Americans at all except to note their relative position of economic privilege.[202] Justice Sotomayor offers mild resistance. She argues, for example, that some Asian Americans "who would be less likely to be admitted without a comprehensive understanding of their background" benefit from affirmative action.[203] She also argues that, "[b]ecause the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to 'consider the vast differences within [that] community.'"[204] This appears to be the opposite of stereotypical thinking.

---

200 *SFFA*, 143 S. Ct. at 2198 (Thomas, J., concurring).

201 Indeed, a recent study found that 57% of Asian Americans were not born in the U.S., as compared to 14% of the general population. Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, A Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-americans/ [https://perma.cc/YA73-B2LL].

202 It bears mentioning that while Asian Americans on the whole have higher median incomes than other groups, Asian Americans from several countries of origin lag behind other Asian Americans and fall below the national average. Additionally, Asian Americans from several origin groups—Pakistani, Nepalese, Bangladeshi, Burmese, and Mongolian—are more likely to live in poverty than the national average. Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Origin Groups in the U.S.*, PEW RSCH. CTR. (Apr. 29, 2021), https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-origin-groups-in-the-u-s/ [https://perma.cc/BBA4-6S3Z].

203 *SFFA*, 143 S. Ct. at 2258 (Sotomayor, J., dissenting) (quoting *SFFA*, 397 F. Supp. 3d at 195).

204 *Id.*; *see also id.* at 2251 (providing the examples of a Harvard alumna who wrote about "being the child of Chinese immigrants" and a Harvard alumnus who

The challenge for her is that implicit in these arguments is the assumption that some, but not all, backgrounds will be valued—*some* backgrounds make a positive difference. By implication, others will not. Based on statements made in other parts of the opinion, we can guess that they might be applicants with wealthy, well-educated parents from healthily represented ethnic groups. This might be a distressing reality for those people even if it does not amount to discrimination or cognizable harm.[205] So Justice Sotomayor then declares, in broad strokes, that "race-conscious admissions benefit all students, including . . . the Asian American community."[206] The group returns to stand in for the individual.

What is going on here? It would be easy enough for Justice Sotomayor to argue that some Asian Americans have interesting or unique backgrounds, backgrounds that render them "underrepresented" in an important sense. But doing so would compromise the integrity of the "underrepresented minority" category's boundaries, calling into question the precision with which it is defined: the very argument lobbed against it by the majority.[207] It would be to concede the propriety of the majority's proposed solution, that a "student must be treated based on his or her experiences as an individual—not on the basis of race."[208] We surmise that Justice Sotomayor falls back on stereotypes so that she can simultaneously argue that Asian Americans are beneficiaries of affirmative action (and honorary people of color) and yet decidedly not underrepresented minorities (white adjacent).[209] The dissenting Justices, just like those

---

discussed his Vietnamese identity).

205 Scholars have noted that Asian Americans, along with everyone else, benefit from diverse learning environments. It is therefore difficult to argue that affirmative action overall causes harm to an individual, even if—and this is contested—it results in the denial of admission. *See* Leong, *supra* note 63, at 92.

206 *SFFA*, 143 S. Ct. at 2258 (Sotomayor, J., dissenting). *But see* Harpalani, *supra* note 16, at 40–42 (noting generally Justice Sotomayor's failure to explore what differentiating among subgroups might reveal).

207 *See supra* notes 183–189 and accompanying text.

208 *SFFA*, 143 S. Ct. at 2176.

209 As Justice Sotomayor notes, Asian American admissions numbers "have 'increased roughly five-fold since 1980 and roughly two-fold since 1990.'" *Id.* at 2244 (Sotomayor, J., dissenting) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 180 (1st Cir. 2020)); *see also id.* at 2258 n.39 (noting that Asian Americans "'make up more than 20% of Harvard's admitted classes,' even though 'only about 6% of the United States population is Asian American'" (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 203 (D. Mass. 2019))).

in the majority, are invested in stereotypical thinking about Asian Americans.

D. Irony 4: The Rise of Racial Narratives

We highlight one final irony of the *SFFA* opinion, to be explored in greater depth in the next Part. There is some dispute over what the Court actually held in *SFFA*.[210] Most people assume, however, that the categorical consideration of race is prohibited.[211] They also agree that the Court created quite a big loophole[212] by stating that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[213] As Jeannie Suk Gersen put it, the focus now shifts "from a person's race to a person's *story* about their race."[214]

During the Biden administration, scholars and advocates largely concurred that this was the way forward. An information statement jointly published by the Justice Department and the Education Department ("joint guidance"), for example, suggested ways that universities could continue to enroll a diverse student body after the *SFFA* decision.[215] The joint guid-

---

210 *See generally* Watson, *supra* note 16. The Court stated that Harvard and UNC's programs were unconstitutional, but did not say that it was overruling previous precedents like *Grutter* that upheld affirmative action programs. *See SFFA*, 143 S. Ct. at 2223–24 (Kavanaugh, J., concurring) (contending that *SFFA* does not overrule *Grutter* because that case, itself, said that its holding would expire in a generation). This has left some room for people to argue that differently constructed affirmative action programs might yet survive. *See, e.g.*, Jeffrey S. Lehman, *Don't Misread* SFFA v. Harvard, Inside Higher Ed. (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion#main-content [https://perma.cc/9UZU-CVLH] (proposing five features that would comply with the *SFFA* decision).

211 This was the assumption of the Departments of Justice and of Education during the Biden administration, which instructed that *SFFA* "limited the ability of institutions of higher education to consider an applicant's race in and of itself as a factor" in admissions. U.S. Dep't of Just. & Dep't of Educ., Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina 2 (Aug. 14, 2023). This joint guidance claims that race-based recruitment programs and collection of data tracking race and ethnicity are acceptable as long as they do not affect admissions decisions. *Id.* at 5 (noting that it would be problematic for universities to "adjust[] their admissions priorities dynamically in response to demographic data").

212 *See, e.g.*, *id.* at 2–3.

213 *SFFA*, 143 S. Ct. at 2176.

214 Gersen, *supra* note 9 (emphasis added).

215 U.S. Dep't of Just. & Dep't of Educ., *supra* note 211, at 3.

ance advised that "universities may . . . provide opportunities to assess how applicants' individual backgrounds and attributes—including those related to their race, experiences of racial discrimination, or the racial composition of their neighborhoods and schools—position them to contribute to campus in unique ways."[216] An applicant could discuss "what it means to him to be the first Black violinist in his city's youth orchestra," or "how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family."[217] The joint guidance also opined that recommenders could continue to comment on an applicant's race within the context of that applicant's individual experiences.[218] Following the *SFFA* decision, Harvard University adjusted its application to ask "five separate short-answer questions asking students how they will contribute to a diverse student body."[219] Brown University asked applicants to write an essay on "how an aspect of your growing up has inspired or challenged you."[220] One admissions officer advised students to "tailor their admissions essays to describe how race had affected their lives": "Right now, students write about their soccer practice, they write about their grandmother dying . . . They don't write about their trials and tribulations. They don't write about the challenges that they've had to experience."[221]

The second Trump administration has wielded *SFFA* as a cudgel. In a "Dear Colleague" letter, Craig Trainor, the Acting

---

216 *Id.* at 2.

217 *Id.*; *see also* Letter from David Hinojosa, Dir. of the Educ. Opportunities Project, Laws.' Comm. for C.R. Under L., to Presidents, Deans of Admissions, and General Counsels 1 (July 14, 2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/07/FINAL-Open-Letter-re-SFFA-July-12-Letter.pdf [https://perma.cc/ZS3N-GNCG] ("[P]rospective students may describe the ways that their personal racial identities inform and shape their individual experiences in their applications.").

218 *See* U.S. DEP'T OF JUST. & DEP'T OF EDUC., *supra* note 211, at 2.

219 STAN. CTR. FOR RACIAL JUST., STAN. L. SCH., STUDENTS FOR FAIR ADMISSIONS FAQ 3 (2023), https://law.stanford.edu/wp-content/uploads/2024/02/SFFA-v-Harvard-FAQ_SCRJ.pdf [https://perma.cc/8GW3-RFFA].

220 *Id.* at 4.

221 Hartocollis, *supra* note 6 (quoting "Shannon Gundy, an admissions official at the University of Maryland, in a recent presentation sponsored by the American Council on Education"). There is some anecdotal evidence supporting an opposite view: that students are aware they need to "write about hardship." Hartocollis, *supra* note 9 (interviewing students who identified pressure to "'sell some kind of story,'" what one called a "'fad of trauma dumping'"). Recent anecdotal accounts suggest that applicants have gotten the message and are weaving their experiences with race into their admissions essays. Bernard Mokam, *After Affirmative Action Ban, They Rewrote College Essays with a Key Theme: Race*, N.Y. TIMES (Jan. 21, 2024).

Assistant Director of the Office of Civil Rights within the Department of Education, has claimed that following *SFFA*, "use of racial preferences in college admissions is unlawful" unless it satisfies strict scrutiny.[222] The letter cautions against the use of "personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student's race and favoring or disfavoring such students."[223] Despite its bluster, the letter does not clearly stake out a position different from the joint guidance produced during the Biden administration, at least as it pertains to the permissible use of personal statements in admissions. Invoking experiences touching on race to reveal *desirable personal characteristics* is obviously not the same as using essays to identify race for the purpose of making categorical admissions decisions. And the Dear Colleague letter says nothing about the former.[224]

Especially in light of the turbulent political climate, the long-term impact of the *SFFA* decision on Asian American enrollment in elite institutions is hard to foresee. Some who cheered the decision have expressed hope that it "fundamentally changed the way college admissions will work."[225] The joint guidance's inclusion of the Hmong American applicant in the example above, as well as Justice Sotomayor's dissenting opinion, which makes references to Sally Chen and Thang Diep's admissions essays,[226] suggest that Asian American applicants, like all others, will be able to invoke their life experiences during

---

222 Trainor, *supra* note 30, at 2.

223 *Id.* at 2–3.

224 The position of the Trump administration could very well evolve after the publication of this Article, as could legal doctrine in response to these positions. Moreover, it is possible that some institutions will rely on the Dear Colleague letter to do far less than allowed to diversify their student bodies, either to avoid legal scrutiny or because of a lack of genuine commitment to diversity. *See, e.g.*, Sonja B. Starr, *The Department of Education Threatens to Pull the Plug on Colleges*, N.Y. TIMES (Feb. 26, 2025), https://www.nytimes.com/2025/02/26/opinion/education-department-dei.html [https://perma.cc/7N8D-MZNH] (describing the Dear Colleague letter as "a brazen attempt to bully schools").

225 Federalist Society, *College Admissions After SFFA*, YOUTUBE (Nov. 2, 2023), https://www.youtube.com/watch?v=YIqpdMhpwlo&t=2s [https://perma.cc/KL2W-L4DR]. To be clear, universities should be able to implement other policies like changing the pool of schools from which they recruit, minimizing or eliminating standardized testing requirements, accepting more transfers from community colleges, and more to achieve their recruiting goals as long as those policies are not merely a means to circumvent the *SFFA* holding. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023) (warning that "universities may not simply establish through application essays or other means the regime we hold unlawful today").

226 *Id.* at 2251 (Sotomayor, J., dissenting).

the admissions process. They, like other applicants, will be able to tell their stories as part of a holistic assessment of their worthiness for admission.

As Jeannie Suk Gersen has cautioned, however, any preexisting desire to limit Asian American enrollment will not simply go away.[227] Subjective factors like the personal rating, where Asian Americans already lag, "could become far more determinative."[228] Teachers and high school guidance counselors are not going to suddenly see leadership qualities in Asian American students.[229] Studying late into the night or spending hours at the piano are not going to suddenly reveal desirable character traits. Asian American applicants will have to establish their worthiness through narrative. And there lies the irony: that the "solution" proposed by *SFFA* calls on Asian Americans to establish their individual worth while simultaneously denying them individuality. Exactly why this outcome is ironic is the focus of the next Part.

III
EXCEPTIONALIZED INCLUSION

Here are some things my daughters, Sophia and Louisa, were never allowed to do:

-attend a sleepover
-have a playdate
-be in a school play
-complain about not being in a school play
-watch TV or play computer games
-choose their own extracurricular activities
-get any grade less than an A . . .

– Amy Chua[230]

---

227 *See* Gersen, *supra* note 2 (predicting that "schools will likely play with formulas to produce a diverse class in which Asian admissions don't get unacceptably out of proportion"); *see also* Kang, *supra* note 124 (predicting that elite schools "will more or less carry on with their diversity missions, albeit with even less transparency than before").

228 Gersen, *supra* note 2.

229 Angela Onwuachi-Willig has made a related point, arguing that "race (including, for example, how a student is perceived racially by others as well as how others attach social meanings to their perception of that individual applicant's race) shapes so many aspects of each applicant's record, including how the applicant's work, both within and outside of the classroom, is evaluated and assessed before and during the application process." Onwuachi-Willig, *supra* note 10, at 217; *see also id.* at 218 (predicting that Black and Latinx applicants will be affected by biases inherent in the process (but not commenting on Asian Americans)).

230 Amy Chua, *Why Chinese Mothers Are Superior*, WALL ST. J. (Jan. 8, 2011), https://www.wsj.com/articles/SB10001424052748704111504576059713528698754 [https://perma.cc/969S-9EPS].

In this Part, we explore how the racialization of Asian Americans in the United States has shaped the dynamics of invisibility and exceptionality that continue to delimit representations of Asian Americans in legal, political, and popular culture. These representations have in turn informed the ways that Asian American *personhood* is still understood largely in terms of its relationships to discourses of alienness, inscrutability, exoticism, and subversion (reflecting the fears of or desires for the "Other within") *and* success through overcoming, assimilation, or achievement (the celebration of the "model minority"). While the latter purports to offer a more individualized form of agency for Asian Americans, its achievement comes at a cost. This is because, as we will show, the condition of *becoming* a model minority requires adherence to a specific kind of story that remains tethered to the very suspicions of subversion, artificiality, and mimicry that marked Asian Americans as "other" in the first place. To become a model minority is to be included, but only exceptionally; it promises visibility, but only so long as one lives up to others' preconceived expectations.

In what follows, we explore how Asians in America have come to be paradoxically viewed as both foreign threats and domestic exemplars, as a way of managing national identity and upholding structures of white supremacy. We address the ways that this has happened through the racialization of Asian Americans as figures that can possess economic, but not cultural, capital.[231] We then address how this racial formation has not only operated as an externally imposed stereotype, but has worked to dynamically shape the ways that Asian Americans and Asian American communities have come to think about and represent themselves.[232] We conclude this Part by showing

---

231 Sociologists define "economic capital" as capital directly related to earnings and income while "cultural capital" represents the ability to align oneself or be associated with the dominant tastes, ideas, cultural objects in a society. *See* PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE 29–73 (1993). The two forms of capital can be connected, in that people who have economic capital can afford to purchase objects or experiences that confer cultural capital, such as artwork, clothing, private education, trips to concerts and museums, etc. *See generally id.* However, because cultural capital is determined *relationally* rather than on a fixed scale, its terms are continually being contested and remade in a "field of struggles." *Id.* at 30. In this sense, the objects or tastes that confer cultural capital in one community or time period may not necessarily do the same in another. *See id.* at 29–32.

232 Throughout this Part we borrow from Michael Omi and Howard Winant's concept of "racial formation," which shows how race is neither "*essence* . . . something fixed and concrete" nor "mere *illusion*," which an ideal social order would eliminate, but instead "an unstable and 'decentered' complex of social meanings

how adherence to this model minority formation continues to ironically render Asian American personhood invisible or illegible within dominant discourses about race. In other words, we argue that the very processes that have positioned Asian Americans as exceptional figures also work to deny, diminish, or erase the idea of Asian American "personality." Seen in this light, the bar set for college applicants in *SFFA* is especially cruel to Asian Americans, because it asks them to perform a task they are almost certain to fail. Moreover, *SFFA* perpetuates the *social* harm stemming from Asian American experiences of racialization, as it posits "personality" as a deniable proxy for race.

A. From Exclusion to Inclusion: Expanding the Model Minority Paradigm

Scholars working in the field of Asian American studies have persuasively established how the racialization of Asian Americans as perpetual foreigners has been largely shaped not only by Asian American communities' histories of transnational migration but by the legal measures used to exclude them from, and disenfranchise them within, the United States from the late nineteenth to the mid-twentieth centuries.[233] In this section, we refer to and then build on these insights to show how this history of exclusion worked to shape the persistent concept of the racialized Asian "model minority" as a *paradigm* that not only negotiates the binary of exclusion and inclusion, but also distinguishes economic success from cultural belonging.

While Asian immigrants made up only one of many groups emigrating to the United States during this period, Asian immigrants' obvious racial difference meant that they, unlike their European contemporaries, could not choose to distance themselves from their ethnic backgrounds, becoming "mere individuals, indistinguishable in the cosmopolitan mass of the population."[234] Indeed, as Susan Koshy notes, Asian exclusion

---

constantly being transformed by political struggle." *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 109–10 (3d ed. 2015). This process of transformation and change is what we refer to when using the term "racialization."

233 *See generally,* TAKAKI, *supra* note 41; GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE (1994); LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (1996); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943 (2003).

234 TAKAKI, *supra* note 41, at 13 (quoting Robert E. Park, *Racial Assimilation in Secondary Groups with Particular Reference to the Negro*, 19 AM. J. SOCIO. 606, 611 (1914)).

during this period helped to consolidate definitions of *whiteness* into its modern form, allowing previously marginalized European immigrant groups such as Irish and Italian Americans to shore up their claims to citizenship and belonging by "shifting the debate about Americanness from the question of nativity to the question of race."[235]

Interpreting Asians' racial difference as evidence of a fundamental cultural incompatibility with Western culture and values, U.S. courts at the turn of the twentieth century repeatedly upheld discriminatory laws that materially prevented Asians' ability to either blend into the mainstream or to distinguish themselves as "mere individuals."[236] In addition to the federal exclusion laws enacted in 1875, 1882, 1917, and 1924 that limited or outright banned Asian immigration and naturalization,[237] laws at the state level preventing interracial marriage and barring Asian immigrants from owning property meant that people of Asian descent faced legal barriers to

---

235 Susan Koshy, *Morphing Race Into Ethnicity: Asian Americans and Critical Transformations of Whiteness*, 28 BOUNDARY 2 153, 165 (2001). *See generally* DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY (1994); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 5–6 & *passim* (2006); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1409–12 (1997). Some scholars have argued that southern and eastern Europeans were always recognized as white, even as they were considered "racially inferior" based on traits like religion, national origin, and citizenship status. Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 AM. J. SOCIO. 327, 334 (2012); *see also id.* at 342–43 (arguing that people in the early twentieth century understood color and race to mean slightly different things).

236 *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (analyzing the Alien Land Laws and legal challenges); Chang & Aoki, *supra* note 235, at 1409–12; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 23–28 (1998) (considering the relationship of immigration laws to the promotion of white supremacy).

237 For a discussion of the 1924 Act, see generally Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999). For an analysis of the 1875 Page Act and 1882 Chinese Exclusion Act, see generally Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005). Other federal laws had the effect of restricting Asian immigration as well, such as the Act to prohibit the "Coolie Trade." Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (repealed 1974) (prohibiting ship owners and operators from transporting indentured servants from China). Professors Jack Chin and Paul Finkelman argue that the 1790 Naturalization Act was "widely and clearly understood" to be "in part an immigration law." Gabriel J. Chin & Paul Finkelman, *The "Free White Person" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047, 1068 (2024).

settlement and assimilation that most immigrants from Europe did not.[238]

While perceived racial and cultural difference alone could and did function as an excuse for Asians' scapegoating and exclusion, it is important to note that these exclusionary measures were also entangled with specific economic concerns. Anti-Asian sentiment emerged specifically around the use of Asians, during this period primarily from China and Japan, as a low-cost labor force.[239] Because Asian immigrants labored for lower wages and under poorer conditions than their working-class white counterparts, their presence was perceived by white laborers as hostile to overall working conditions. Otherwise progressive labor leaders like Samuel Gompers, founder of the American Federation of Labor, condemned Asians' presence in the United States, warning in an influential public pamphlet that the Chinese "gradually invaded one industry after another . . . . Whatever business or trade they entered was, and is yet, absolutely doomed for the white laborer, as competition is simply impossible."[240] Gompers and other anti-Asian activists persistently portrayed Asian workers as unfeeling agents of the very economic processes that were exploiting them. Unlike "[t]he immigrants that come to us from the Pacific isles, and from all parts of Europe, [who] come here with the idea of the family as much engraven on their minds and hearts, and in customs and habits, as we ourselves have,"[241] Asians were not seen as fellow *victims* of an increasingly global capitalism but *representatives* of it, moving in a menacingly "silent and irresistible flow" across the Pacific.[242]

---

238 *See generally* Aoki, *supra* note 236 (analyzing Alien Land Laws); Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1 (2002) (on anti-miscegenation laws).

239 *See, e.g.*, TAKAKI, *supra* note 41, at 21–31. Erika Lee extends this analysis to the Americas as a whole, noting that the stereotype of the Chinese worker as "coolies, cheap workers who drive down wages, take away jobs, and are servile pawns of factory owners and greedy capitalists" initially derived from practices of indenture that brought migrants from Asia to Latin America. ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY 35 (2015). While the Chinese laborers who migrated to the United States were technically free (as opposed to formally indentured) labor, "the mass movement of Asian laborers to the United States beginning in the nineteenth century overlaps with and connects to the arrival of Asian coolies in Latin America." *Id.*

240 SAMUEL GOMPERS & HERMAN GUTSTADT, MEAT VS. RICE: AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM. WHICH SHALL SURVIVE? 6 (Asiatic Exclusion League 1908) (1902).

241 *Id.* at 22 (quoting Secretary of State James G. Blaine).

242 *Id.* at 7.

This connection of Asian bodies to economic anxieties produces what Colleen Lye has called an "economism of Asiatic racial form" that reimagines Asians as a form of capitalism personified.[243] Asians' value was measured through their labor and economic contributions, but as persons they remained socially abject.[244] While these connections between Asians and capitalism would, decades later, single out Asians as uniquely assimilable subjects,[245] at the turn of the century it was used to separate and distinguish Asians as a race apart from all other races.[246] In this sense, the "economism" of Asian racialization not only helped to consolidate working class whiteness in contrast against perceptions of coldly capitalistic Asianness, but worked to outline the limits of civil rights for other nonwhite groups as well. For an example of this dynamic in action, we briefly return to the case of *Plessy v. Ferguson*.[247]

While focused primarily on adjudicating the status of Jim Crow segregation in the post-Civil War South, the majority and dissenting opinions both invoke the "Chinese" to uphold or condemn the constitutionality of segregation, as discussed in Part II, above.[248] In the majority opinion, Justice Brown invokes the "Chinese" by way of comparing and subordinating the harm created by anti-Black racism in the Jim Crow South to the economic harm experienced by Asians in California.[249] Specifically, he refers to the Court's previous decision in

---

243 COLLEEN LYE, AMERICA'S ASIA: RACIAL FORM AND AMERICAN LITERATURE, 1893–1945, at 102 (2005); *see also* IYKO DAY, ALIEN CAPITAL: ASIAN RACIALIZATION AND THE LOGIC OF SETTLER COLONIAL CAPITALISM 1–10 (2016).

244 *See, e.g.*, Ping v. United States, 130 U.S. 581, 595 (1889) (describing the Chinese as "strangers in the land, residing apart by themselves").

245 *See generally* Paul Nadal, *How Neoliberalism Remade the Model Minority Myth*, 163 REPRESENTATIONS 79 (2023); Grace Kyungwon Hong, *Speculative Surplus: Asian American Racialization and the Neoliberal Shift*, 36 SOC. TEXT 107 (2018); Susan Koshy, *Neoliberal Family Matters*, 25 AM. LITERARY HIST. 344, 344–49 (2013).

246 *See, e.g.*, *Ping*, 130 U.S. at 595 ("It seemed impossible for them to assimilate with *our* people . . . ." (emphasis added)).

247 Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

248 *See* discussion *supra* subpart II.B. Julia Lee points out the centrality of the figure of the "Chinese" in both majority and dissenting opinions in *Plessy* as evidence of the "persistent if unheralded presence of the Chinese within the history of race relations in this country" and suggests that greater attention to this presence might better address "the multilateral nature of racial encounters and . . . the ways that Asian Americans and African Americans often contest and disavow the ties that persistently bind them together." JULIA H. LEE, INTERRACIAL ENCOUNTERS: RECIPROCAL REPRESENTATIONS IN AFRICAN AND ASIAN AMERICAN LITERATURES, 1896–1937, at 43 (2011).

249 *Plessy*, 163 U.S. at 549–50 (1896).

Yick Wo v. Hopkins,[250] which found a San Francisco ordinance limiting the operation of laundries to be unconstitutional.[251] Because the enforcement of the ordinance had created "an arbitrary and unjust discrimination against the Chinese race"[252] that affected their means of living, Brown argues that *Yick Wo* provided a clear case of discrimination because the closing of Chinese laundries represented a use of police power that was not "reasonable."[253] By contrast, Brown dismisses Plessy's claims of the social harms of segregation, arguing that unlike the economic harm inflicted by the city of San Francisco in *Yick Wo*, the affective harm and feelings of "inferiority" caused by Louisiana's segregation laws "[are] not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[254] In acknowledging economic harm to Asians while simultaneously refusing to acknowledge social inequity as a material harm stemming from racist laws, Brown's opinion naturalizes both Black and Asian social inferiority. Brown's invocation of *Yick Wo* is not intended to buttress the standing of Chinese in the United States; rather, it is precisely because the "Chinese" represented in *Yick Wo* were petitioning for economic *but not social* equality[255] that the case was useful to the majority opinion.

The majority opinion of *Plessy* triangulates the differently racialized experiences of Chinese immigrants in California and Black Americans in the American South to uphold the legality of social segregation. Justice Harlan's dissent engages in the same triangulation for the opposite purpose. As discussed at length in the section above, even in his forceful call for "equality before the law of all citizens of the United States without regard to race," Harlan did not support the abolition of racialized exclusion altogether.[256] Harlan's invocation of the hypothetical "Chinaman" on the train shows how his argument for Black inclusion is still based on the idea that American social identity can be constructed along racial lines; he merely

---

250 *Id.* at 550 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

251 *Yick Wo*, 118 U.S. at 374.

252 *Plessy*, 163 U.S. at 550; *see also Yick Wo*, 118 U.S. at 363 (quoting the circuit judge, who opined that the law "prohibit[ed] . . . the occupation" and destroyed "business and property" (quoting *In re* Wo Lee, 26 F. 471, 475 (C.C.D. Cal. 1886))).

253 *Plessy*, 163 U.S. at 550.

254 *Id.* at 551.

255 The *Yick Wo* opinion contains no references to social status whatsoever.

256 *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting); *see supra* subpart II.B.

"disagrees . . . on where this line should be drawn," throwing Asians under the proverbial bus.[257] Harlan's critique of the material consequences of social harm to Black Americans under segregation thus ironically worked to simultaneously dismiss and exacerbate the *social harm* of Asian exclusion.

As the nineteenth century progressed, the racialization of peoples of Asian descent as fundamentally unassimilable to mainstream American society expanded to address not only socioeconomic anxieties but geopolitical ones. The emergence of Japan as an imperial power in the Pacific, in tandem with the domestic anti-Asian precedents and prejudices established and perpetuated by the exclusion acts,[258] alien land laws,[259] and anti-miscegenation laws,[260] set the stage for President Franklin D. Roosevelt's issuance of Executive Order 9066[261] in the wake of the Japanese bombing of Pearl Harbor in 1941, and the subsequent wide-scale incarceration of Japanese American citizens living in the continental United States.

The Supreme Court cases related to evacuation and incarceration of Japanese Americans—*Hirabayashi v. United States*,[262] *Yasui v. United States*,[263] and *Korematsu v. United States*[264]—represent the culmination of the racial othering of Asian Americans. In *Korematsu*, the most infamous of the three, the Court notoriously upheld the government's right to

---

257 LEE, *supra* note 248, at 46.

258 *See generally* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); Chinese Exclusion Act, ch. 126, §§ 1, 14, 22 Stat. 58, 58–59, 61 (1882) (repealed 1943); Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943); Geary Act, ch. 60, § 1, 27 Stat. 25, 25 (1892); *Immigration Act of 1917 (Barred Zone Act)*, IMMIGR. HIST., https://immigrationhistory.org/item/1917-barred-zone-act/ [https://perma.cc/JQD9-BVMW] (last visited Apr. 10, 2025); *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP'T OF STATE ARCHIVE, https://2001-2009.state.gov/r/pa/ho/time/id/87718.htm [https://perma.cc/ZL8K-LAMG] (last visited Apr. 10, 2025).

259 *See generally* WASH. CONST. art. II, § 33 (repealed 1966); Act of Mar. 8, 1921, ch. 50, 1921 Wash. Sess. Laws 156 (repealed 1967); Act of Mar. 10, 1923, ch. 70, 1923 Wash. Sess. Laws 220 (repealed 1967); Act of Mar. 19, 1937, ch. 220, § 1, 1937 Wash. Sess. Laws 1092, 1092 (repealed 1967); Alien Land Law, 1921 Cal. Stat. lxxxiii (1920) (repealed 1956).

260 *See, e.g.*, CAL. CIV. CODE § 60 (Deering 1949) (repealed 1959); *id.* at § 69 (repealed 1969); Roldan v. Los Angeles County, 18 P.2d 706 (Cal. Dist. Ct. App. 1933) (analyzing whether California's miscegenation statute, which referred to a "Mongolian," applied to a Filipino man).

261 Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

262 Hirabayashi v. United States, 320 U.S. 81 (1943).

263 Yasui v. United States, 320 U.S. 115 (1943).

264 Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

issue the evacuation order, citing it as a measure of military necessity while dismissing the charge of "racial prejudice."[265] In doing so, the Court relied on reports and testimony by military leaders and special interest groups referring to individuals of Japanese descent as "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[266] Calling attention to these racial stereotypes in his dissent, Justice Frank Murphy argued that the Court's decision to ignore the role that racial prejudice played in the execution of the evacuation order amounted to a "legalization of racism" that violated the Fourteenth Amendment.[267]

For our purposes, however, *Korematsu* marked a pivot point in the way that Asians were coming to be viewed as *American* subjects. The *Korematsu* decision fit in with the racist reasoning of earlier court opinions—such as Harlan's *Plessy* dissent—that excused or even encouraged Asian social exclusion to police the limits of citizenship and the boundaries of the state.[268] However, by the time *Korematsu* was decided in 1944, increasing activism by U.S.-born Asian Americans, alongside America's growing colonial and military presence in Asia and the Pacific, were testing the logics of exclusion that had defined the state in an earlier era.[269] As the United States' sphere of influence grew through the Pacific and Asia—first by way of annexing Hawai'i, Guam, and the Philippines in 1898 and, in the years following World War II, by setting up bases and acquiring new "trust territories" in Okinawa, Korea, Micronesia, and the Marshall Islands—the question of how to naturalize these places and populations as U.S.-aligned spaces also meant having to engage the question of how to encourage the people living in those spaces to conform to or align themselves with

---

265 *Id.* at 223.

266 *Id.* at 237 (Murphy, J., dissenting) (quoting J.L. DeWitt, Final Report: Japanese Evacuation from the West Coast 1942, at vii (1943)).

267 *Id.* at 242; *see also id.* at 237 (accusing the military of "condemn[ing]" people of Japanese ancestry "because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion'" (quoting DeWitt, *supra* note 266, at vii)).

268 *See supra* note 181.

269 *See* Takaki, *supra* note 41, at 357–78. See Victor Bascara, Model Minority Imperialism 26–32 (2006), and Meg Wesling, Empire's Proxy: American Literature and U.S. Imperialism in the Philippines *passim* (2011), for a discussion of how U.S. imperial expansion into the Pacific and Southeast Asia in the late nineteenth and early twentieth century introduced the possibility of Asian assimilation as part of a colonial civilizing mission.

American democratic ideology.[270] While still conceptually (and sometimes literally) occupying liminal, territorial, or borderline spaces in relation to the American polity, by the middle of the twentieth century, Asian Americans began to shift from figures of exclusion to figures of conditional inclusion.

Although this shift in mainstream perception of Asians in particular had much to do with these historical circumstances, Asian American communities also played an active role in their transformation by emphasizing how well they were able to assimilate to American culture.[271] Central to the advocacy on behalf of the litigants in *Korematsu* and other Supreme Court cases about Japanese incarceration was the unimpeachable loyalty of the litigants, indexed by proof of their acculturation to Anglo-American norms and values.[272] Korematsu himself was born and raised in the United States, was dating a non-Japanese woman, and had tried on several occasions to enlist in the U.S. military, only to be rejected on account of his race.[273]

Mitsuye Endo, the petitioner in *Ex parte Endo*,[274] the case that provided the legal grounds to end Japanese incarceration and relocation projects, had likewise been selected by lawyers on behalf of the Japanese American Citizens League (JACL) as an ideal "test case" precisely because she "had never

---

270 For a discussion of how the U.S. exercised "soft power" and enlisted discourses of racial liberalism to support the idea of military interventions in Asia, see generally JODI KIM, ENDS OF EMPIRE: ASIAN AMERICAN CRITIQUE AND THE COLD WAR (2010); JOSEPHINE NOCK-HEE PARK, COLD WAR FRIENDSHIPS: KOREA, VIETNAM, AND ASIAN-AMERICAN LITERATURE (2016); CHRISTINA KLEIN, COLD WAR ORIENTALISM (2003).

271 *See* TAKAKI, *supra* note 41. The "Japanese American Creed," written in early 1941 by Mike Masaoka, who would later become a leading figure in the Japanese American Citizens League, likewise expressed the belief that "Because I believe in America and I trust she believes in me, and because I have received innumerable benefits from her, I pledge myself to do honor to her at all times and in all places; to support her constitution; to obey her laws; to respect her flag; to defend her against all enemies, foreign or domestic; to actively assume my duties and obligations as a citizen, cheerfully and without any reservations whatsoever, in the hope that I may become a better American in a greater America." Brian Niiya, *Japanese American Creed*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Japanese%20American%20Creed [https://perma.cc/S4SU-VUD6] (June 13, 2024).

272 *See generally* IRONS, *supra* note 178, at 93–96. In *Ozawa v. United States*, 260 U.S. 178 (1922), Takao Ozawa employed similar assimilationist arguments when attempting to naturalize as a "free white person" but was unsuccessful. *See* Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 647–63 (2009) (detailing the arguments made in Ozawa's brief).

273 *See* ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR 34–35 (2013); *see also* LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 18–19 (2015).

274 *Ex parte* Endo, 323 U.S. 283 (1944).

been in Japan, did not speak Japanese, [and] was a practicing Methodist."[275] Her brother was also serving in the U.S. military, further emphasizing the sacrifices that she and her family had made to prove where their loyalties lay.[276] *Endo* argued that her detention in an incarceration camp was a violation of her rights, and in her case the Supreme Court unanimously agreed, finding that any "concededly loyal" citizen could not be detained against their will.[277]

The Court handed down rulings in *Korematsu* and *Ex parte Endo* on the same day. The juxtaposition of these two decisions—one upholding the forced evacuation and the other undermining the legal basis for incarceration—is jarring, and the Justices did not ignore the apparent contradiction. In his dissent to *Korematsu*, Justice Roberts used *Endo* to argue that the evacuation orders at issue in *Korematsu* were "but a part of an over-all plan for forceable detention" serving only as a pretext for the incarceration of American citizens.[278] For Roberts, *Endo* clearly showed the bad faith behind the argument of "military necessity" since, once evacuated, Japanese Americans were incarcerated rather than allowed to freely settle in places outside of the exclusion zone. Yet Justice Black, writing for the majority, insisted on understanding the two cases separately, arguing that *Endo* "graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected."[279]

When read together, these two rulings dissociate the cause of Japanese incarceration from its effects: while the ruling in *Korematsu* held that the government had the right to evacuate Japanese Americans on the basis of their ancestry, given the extenuating circumstances of the war and the time period, the ruling in *Endo* posited that it was *not* legal for the government to detain them on that basis alone.

The apparent paradox created by these dual rulings—one that restored civil rights to Japanese Americans while the other legitimated the abrogation of those same rights in the recent past—not only reflected liberalizing attitudes toward Asian Americans as a whole in the mainstream of U.S. political and

---

275 DANIELS, *supra* note 272, at 37.

276 *Id.*

277 *Endo*, 323 U.S. at 302.

278 Korematsu v. United States, 323 U.S. 214, 232 (1944) (Roberts, J., dissenting).

279 *Id.* at 222 (majority opinion).

popular opinion by mid-century, but also prefigured the conditions and limitations of those changes. Asian Americans were being offered an opportunity for civic inclusion, yet that inclusion was inextricably entangled with a justification for past discrimination and the imperative to prove oneself worthy through the performance of model citizenship.

The figure of the "model minority" began to take shape in the mainstream press and popular imagination in the 1940s through the 1960s as major newspapers and periodicals began to report on the successes of Asian American communities.[280] These stories tended to focus on the successful reintegration of Japanese Americans into the California communities that had called for their banishment, or the strong work ethic and lack of delinquency among Chinese American youth.[281] On the one hand, the shift from excluded other to contingently accepted "model" minority brought clear material benefits to Asian American communities, particularly the Japanese and Chinese Americans already resident in significant numbers in the United States. As historian Ellen Wu observes, in the aftermath of World War II and the overturning of immigration and civic laws that had explicitly targeted Asians as "aliens ineligible [for] citizenship," Asian Americans were able to gain access to "previously forbidden areas of employment, neighborhoods, and associational activities" as legal barriers to economic and social mobility began to fall.[282] On the other hand, their ability to move freely in these new spaces often remained contingent upon their ability to behave as exemplary or "model" citizens that "conform[ed] to the norms of the white middle class."[283] The implicit expectation of "model" behavior thus continued to exclude many who either refused or were unable to fit in to an English-speaking, gender-normative, self-reliant, filial or family-centered ideal.

While the "model minority" idea taking shape in the press and actively cultivated by Asian Americans' "self-stereotyping"[284]

---

280 *See* ELLEN D. WU, THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY 158–60, 187–202 (2014); Keith Osajima, *Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960s and 1980s*, *in* A COMPANION TO ASIAN AMERICAN STUDIES 215, 215–17 (Kent A. Ono ed., 2005).

281 *See* WU, *supra* note 280, at 158–60, 187–202.

282 *Id.* at 3–5, 159.

283 *Id.* at 5; *see also* Wu, *supra* note 63, at 239–40.

284 WU, *supra* note 280, at 5. Ellen Wu emphasizes the agency of Asian Americans in this period, arguing that Japanese and Chinese Americans "harbored a profound interest in characterizing anew their racial image and conditions of citizenship, and they often took the lead in this regard. By yoking US officialdom's

thus offered a compelling avenue to personal agency and upward mobility for the Asian Americans who could fit themselves within its frame, the racial liberalism that it purported to represent also remained locked into the same structure of racial triangulation that had served to *erase* Asian American claims to social equity in an earlier era.[285] The key to reproducing model minority discourse remained Asian Americans' fundamental cultural and racial *otherness*. However, under changed historical circumstances they represented an otherness that could be celebrated and incorporated, rather than abjected.

Nevertheless, the model minority's inability to disappear into whiteness or fully align with the specific racialized experiences of Blackness meant that Asian Americans remained in an outsider position, whose belonging remained contingent at best.[286] The relationship between the Asian American community and the civil rights movement illustrates this point. In the 1950s and 1960s, the civil rights and Black Power movements were gaining traction as Black Americans and their allies organized to end legalized segregation and changes to other discriminatory laws restricting housing, voting, and employment; they demanded, and brought about, the end of race-based segregation.[287] As racialized individuals also targeted by discriminatory race laws, including school segregation, anti-miscegenation laws, and alien land laws, Asian Americans directly benefited from these reforms. Yet popular perceptions of Asian Americans during this period were shaped by the idea that unlike Black Americans, who visibly staged protests, sit-ins, and

---

world-ordering logic to their own quests for political and social acceptance, they actively participated in the revamping of their racial difference." *Id.* Yet Wu also notes that the eventual alignment of these discourses of Asian American inclusion with cultural conservatism/the racial status quo was never a unanimous nor a foregone conclusion, but rather the result of a cultural struggle for representation where "success story *narrators*" ultimately prevailed over other Asian American voices, including the "zoot-suiters, sexual deviants, draft resisters, those who renounced citizenship, leftists, Communists, and juvenile delinquents—the various entities who did not subscribe to postwar racial liberalism and political-cultural conservatism as the most suitable guidelines for encountering postwar American life." *Id.* at 6 (emphasis added).

285 *See supra* notes 249–255 and accompanying text.

286 This dynamic is outlined by Claire Jean Kim's article on racial triangulation, *see* Kim, *supra* note 14.

287 *See, e.g.*, ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 279, 285–87, 289 (1984); THOMAS C. HOLT, THE MOVEMENT: THE AFRICAN AMERICAN STRUGGLE FOR CIVIL RIGHTS 30–33, 35, 39–40, 42, 46–49 (2021).

marches to draw public attention and change public opinion around the topic of race in the United States, Asian Americans overcame challenges of racial discrimination "by their own almost totally unaided effort."[288] Using logic similar to Justice Brown's majority ruling in *Plessy* more than half a century before, the model minority discourses taking shape at this time isolated Asian American economic mobility from its social and historical contexts, and instead triangulated Asian American economic success against Black Americans' demands for social equality, pitting the two groups against each other.

Yet even as these model minority narratives attribute a kind of bootstraps individualism to Asian Americans as a whole, the sense of Asian Americans *as individuals* drops out of the picture, replaced by broader assumptions about Asian American cultural norms. Each story about Asian success—whether written about Japanese Americans, Chinese Americans, and (by the 1980s) Korean, Filipino, Vietnamese, and South Asian Americans—shares a remarkably uniform focus on the role of Asian family values, particularly the role of parental sacrifice and/or filial piety and the high value placed on educational achievement.[289] Stories of Asian American success thus tend to become attributed not so much to personal effort but Asian "culture" in ways that allow "culture" to operate as a proxy for race. As Kim points out, following the passage of the Civil Rights Act, which explicitly outlawed discrimination on the basis of race, religion, gender, and national origin, the practice of racial triangulation became "rearticulated in cultural terms":

> [R]ather than asserting the intrinsic racial superiority of certain groups over others, opinionmakers now claim that certain group cultures are more conducive to success than others. . . . Since talk of cultural differences inevitably activates deeply entrenched views of racial differences, however,

---

288 William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES, Jan. 9, 1966, at 20.

289 In a study comparing representations of Asian American "model minorities" in the popular press from the 1960s and 1980s, Keith Osajima finds that while the more recent writings tended to feature people from a broader range of Asian ethnicities and also incorporated some of the critiques of model minority discourse that had emerged since the 1960s, "the core elements of the original model minority thesis—the empirical evidence for success and a culturally based explanation for achievement—continue to be an integral part of the current discussion on Asian Americans." Osajima *supra* note 280, at 215, 217–19; *see also* Harpalani, *supra* note 33, at 310.

> this field remains, at bottom, an ordering of racial groups qua racial groups.[290]

This slippage of *race* and *culture* in the post-Civil Rights moment thus allows systems of racial triangulation to continue to operate under the fiction of "colorblindness," with the effect of consolidating Asian American experience into a racial/cultural script that has remained more or less static in its essentials since its inception. In the next section we will discuss how this script has worked to not only reflect but also *shape* Asian American experience, as this historically constructed image of the model minority becomes a model for personhood that contemporary Asian Americans cannot help but conform to or depart from.

B. The Subject as Object: Asian American Personhood

We have just presented an intellectual history of the model minority concept. As we have seen, the concept orients Asian American subjects around two different axes. It positions Asians as both external to and internal to this country; and it distinguishes between economic and cultural resources. In the legal literature, the model minority concept is commonly depicted as a stereotype, something that operates externally upon Asian American subjects, attributing beliefs and values and shaping perceptions.[291] For example, scholars argue that the model minority stereotype is used to pathologize Black families, or cause employers to view Asian American employees as passive or uncreative.[292]

In this section, we argue something quite different. The model minority concept is a paradigm that constructs Asian American subjects from the inside out. It is internal to Asian American subjectivity and therefore much more difficult to shake off, cast aside, or transcend. If, as Lisa Lowe has argued, the figure of the American citizen "has been defined over against the Asian *immigrant*, legally, economically, and culturally" for the past century and a half, it follows that many of the individual choices made by Asian immigrants and their American-born descendants have necessarily taken place within and against the constraints of a national culture and legal system

---

290 Kim, *supra* note 14, at 117.

291 *See supra* note 21 and accompanying text.

292 For examples of the former, see, e.g., Harpalani, *supra* note 33, at 310; Kim, *supra* note 14, at 110, 121–22. For examples of the latter, see, for instance, Chew, *supra* note 21, at 40–41, 46–55.

that continues to view them simultaneously as exemplary citizens and suspicious outsiders.[293] For Asian Americans, this paradox often presents itself as a choice between operating as a "good" subject—the model minority who achieves economic success, yet remains socially awkward and politically complacent about, if not actively complicit in, projects of white supremacy, settler colonialism, and anti-Blackness—or as a "bad" subject, the person who rebels from the expectation of Asian academic achievement, meekness, and material success, and/or emphasizes their shared experiences of racialization with Black and Brown communities.[294]

Yet as scholars in Asian American studies have pointed out, this positioning of "good" and "bad" subjects, model minorities or traumatized Asians, are themselves flattening narratives that obscure or erase the complexities of Asian American personhood formed within and against Asian racial stereotypes that are so omnipresent as to present themselves as a kind of "common sense."[295] Further, these categories continue to limit the legibility of Asian American experience within the horizon of a Black/white racial binary.[296] We seek not to disprove or disavow the model minority concept, but rather to work through the ways that it stifles/erases narratives of Asian American experience at the point of civic incorporation.

While many have discussed how the model minority emerged as an externally imposed stereotype and figure of racial triangulation,[297] we agree with erin Khuê Ninh that for many Asian Americans the model minority operates not only as a myth or social function but an "*identity*: a set of convictions and aspirations, regardless of present socioeconomic status or

---

293 LOWE, *supra* note 233, at 4.

294 Takeo Rivera describes this dynamic as a describing a form of "model minority masochism" that "follows either a primary or secondary configuration." TAKEO RIVERA, MODEL MINORITY MASOCHISM: PERFORMING THE CULTURAL POLITICS OF ASIAN AMERICAN MASCULINITY, at xxv (2022). In the "primary configuration," model minoritarianism "entail[s] submission and obedience to the economic-racial idea—capitalist whiteness," while in the "secondary configuration," it "operates as disavowal . . . which often takes the form of an idealized Blackness." *Id.*

295 *See* VIET THANH NGUYEN, RACE AND RESISTANCE: LITERATURE AND POLITICS IN ASIAN AMERICA 4 (2002) (arguing that this binary has locked Asian American thinkers into a polarization of "resistance and accommodation" that excludes "flexible strategies"). The idea of the model minority transformed from static stereotype into a shared understanding or "common sense" comes from ERIN KHUÊ NINH, PASSING FOR PERFECT 5 (2021).

296 See *supra* subpart II.A for our analysis of how the *SFFA* opinion assumes this binary view.

297 *See supra* subpart III.A.

future attainability."[298] This is not to say Asian Americans *are* model minorities, but rather that many have internalized the expectations of high achievement and economic mobility that have come to accompany the idea of what it means to be Asian American in the twenty-first century.[299] Ninh emphasizes how many of these expectations—to get good grades, an elite education, and a prestigious and well-paying career—operate not only as goals to be met but a "framework for personhood," a way to become legible or visible *as* a person, not only before the state but to oneself and one's own community.[300] As such, we can think of the model minority as neither an inherently racial quality of Asianness nor a pure stereotype to be disavowed, but rather, as Takeo Rivera posits, a "foundation for the psychic and affective condition of being racialized as Asian in the United States; . . . a fabric inextricably woven into Asian American subjectivity itself."[301]

Ironically, while achieving the benchmarks of success required to measure up to the high standards expected of Asian Americans by themselves and others, Asian Americans are increasingly likely to be judged as lacking in "personal qualities."[302] Unlike test scores or grades, "personal qualities" are relational and subjective, and rely largely on an individual's ability to represent how their personal experiences and interests have shaped their potential to contribute to institutions, communities, or society at large. A life spent in pursuit of model minority benchmarks is not likely to lead to what Chief

---

298 NINH, *supra* note 295, at 5.

299 The narratives quoted in Part I of this Article bear witness to this point.

300 NINH, *supra* note 295, at 5. This dynamic of community perception is underexamined in legal scholarship. Most invocations of the model minority stereotype by legal scholars presume a white audience.

301 RIVERA, *supra* note 294, at xx.

302 *See* Harpalani, *supra* note 33, at 257–60; Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits*, N.Y. TIMES (June 15, 2018), https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html [https://perma.cc/LQT4-F3RJ]; Alia Wong, *Harvard's Impossible Personality Test*, THE ATLANTIC (June 19, 2018), https://www.theatlantic.com/education/archive/2018/06/harvard-admissions-personality/563198/ [https://perma.cc/9XHG-L64B]. Further evidence of these views comes from Professor Amy Wax, who has characterized "Asians" as "more conformist to whatever the dominant ethos is" and who lack "the spirit of liberty." Susan H. Greenberg, *Penn Law Professor Calls for 'Fewer Asians in the U.S.,'* INSIDE HIGHER ED (Jan. 4, 2022), https://www.insidehighered.com/quicktakes/2022/01/05/penn-law-professor-calls-%E2%80%98fewer-asians%E2%80%99-us [https://perma.cc/Z89U-R6MV]. Wax points to this claimed lack of individualism as a reason "the United States is better off with fewer Asians." *Id.*

Justice Roberts called a "*unique* ability to contribute."[303] Consider further the district court's finding in *SFFA* that teachers and guidance counselors rated Asian American students lower in "personal characteristics"[304] and questioned "the effect, positive or negative, of being Asian American on the probability of being selected to a leadership position such as class president, captain of a sports, math, or debate team, or the likelihood of being identified as an outspoken advocate, a natural leader, or an intellectual superstar."[305] We surmise that assumptions about Asian American students' lower personal qualities compounds at these various points, making it that much harder for them to eventually craft a narrative in which their "heritage or culture motivated [them] to assume a leadership role," as *SFFA* requires.[306]

In the context of college admissions, the college essay provides an important opportunity to convey one's personal qualities. Yet the college essay can be a particularly fraught space for Asian Americans. In recent years, some college counselors and advisors have recommended that Asian Americans should avoid writing about the very experiences that may have indeed shaped their outlook on life—such as the hardships that come with being the child of immigrants, or struggling to master piano or violin—because those narratives could be interpreted as too "typically Asian" or "basic."[307] However, as noted in subpart II.D. above, the joint guidelines from President Biden's Justice Department and the Department of Education push in the opposite direction, recommending that applicants highlight racial and cultural differences to demonstrate how they might contribute to a diverse student body.[308] Justice Sotomayor urges something similar, saying that "racial self-identification" can be key to "present[ing] a full version" of oneself.[309] These compet-

---

303 *SFFA*, 143 S. Ct. 2141, 2176 (2023) (emphasis added).

304 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 379 F. Supp. 3d 126, 169 (D. Mass. 2019).

305 *Id.* at 170 n.48.

306 *SFFA*, 143 S. Ct. at 2176.

307 Qin, *supra* note 78. We note that women and other people of color face different permutations of this same basic challenge: positioning oneself in light of the narratives that white supremacy allows or encourages. *Cf.* Swethaa S. Ballakrishnen, *Rethinking Inclusion: Ideal Minorities, Inclusion Cultures, and Identity Capitals in the Legal Profession*, 48 L. & SOC. INQUIRY 1157, 1159–61 (2023) (reporting the experiences of "minority actors" as they navigate their positionality in the legal workplace).

308 *See supra* subpart II.D.

309 *SFFA*, 143 S. Ct. at 2251 (Sotomayor, J., dissenting).

ing discourses place increased pressure on Asian Americans to not only reflect but actively reproduce the model minority paradigm by performing a recognizably Asian identity while not coming across as *too* Asian. They require Asian Americans to make a "full version" out of a flattened one.

This model minority balancing act is one that many Asian Americans have internalized or become invested in reproducing because it continues to appear as the most well-defined pathway against exclusion and toward economic mobility.[310] As Wu, Ninh, and Rivera have noted, the model minority is neither a racial given nor an externally imposed stereotype but a figure that many Asian Americans have themselves played a role in creating, perpetrating, and identifying with or against.[311] In this sense, one might understandably believe that Asian Americans who engage in model minority behavior are essentially complicit in their own objectification.[312] Yet if, as David Eng and Shinhee Han have argued, Asian Americans feel as if they must conform to some aspect of the model minority image "in order to be recognized by mainstream society—in order to *be* at all," then it certainly seems as if, for some Asian Americans, the path to *subjectification*—the ability to have one's subjectivity recognized, by "mainstream society" or even by oneself—also moves through this process of *objectification*.[313]

While the self-objectification that emerges from the model minority paradigm may generate economic benefits and mobility for Asian Americans, it still perpetuates social and psychological harm. As outlined in the first section of this Part, the model minority paradigm has persistently operated to disaggregate economic success from social inclusion: while we generally

---

310 *See supra* notes 282–83 and accompanying text.

311 *See* Wu, *supra* note 280, at 159–61, 187–202; Ninh, *supra* note 295, at 5; Rivera, *supra* note 294, at xix–xx.

312 Frank Chin and Jeffrey Paul Chan have theorized this encouragement to self-objectification as "racist love." Frank Chin & Jeffrey Paul Chan, *Racist Love*, *in* Seeing Through Shuck 65 (Richard Kostelanetz ed., 1972). While they problematically connect the process of self-stereotyping to feminization (or emasculation), they astutely observe that just as "[s]ociety is conditioned to accept the given minority only within the bounds of the stereotype," so "[t]he subject minority is conditioned to reciprocate by becoming the stereotype, live it, talk it, embrace it, measure group and individual worth in its terms, and believe it." *Id.* at 66–67.

313 David L. Eng & Shinhee Han, *A Dialogue on Racial Melancholia*, 10 Psychoanalytic Dialogues 667, 677 (2000). Writing specifically of the ways that Asian American women have been subject to racialized and gendered forms of objectification, Anne Cheng likewise argues that Asian women's "condition of objectification is often the very hope for any claims she might have to value or personhood." Anne Anlin Cheng, Ornamentalism, at xi (2019).

assume that economic advancement translates into improved opportunities for increased cultural and/or social capital,[314] for Asian Americans the pursuit of the former can often come *at the expense of* the latter. As Jeffrey Santa Ana argues, the "racialized perceptions that *contain* Asian Americans within the economic form of capital" tend likewise to either restrict or dismiss Asian Americans' access to the "cultural and symbolic forms" that structure systems of social mobility in the United States.[315]

This dynamic can be seen in the *SFFA* case, where Justices Jackson and Sotomayor both emphasize the economic success of Asian Americans[316] and then imply that Asian Americans have achieved all they need. Asian Americans' lack of cultural capital is also reflected in the district court's finding that "Asian American applicants are less likely than African American and Hispanic applicants, and far less likely than white applicants, to be recruited Athletes, Legacies, on the Dean's or Director's interest list, or Children of faculty and staff ("ALDCs"), all of whom are advantaged in Harvard's admissions process."[317] Harvard argued that it targets ALDCs because they help it "to attract *top quality* faculty and staff and to achieve desired benefits from relationships with its alumni and other individuals who have made *significant contributions*."[318] Read between the lines: Asian Americans are not among the top quality faculty nor are they in the position to make significant contributions.

This exceptionalized inclusion of Asian Americans as economic equals but social outsiders produces what Eng and Han have termed "racial melancholia," which they define as a "psychic splitting" that occurs as Asian Americans attempt to live with the paradox of simultaneous belonging and unbelonging.[319] The effects of this melancholic splitting can be traced through the depressive symptoms and suicidal ideations that

---

314 *See generally* BOURDIEU, *supra* note 231 (describing this dynamic).

315 JEFFREY SANTA ANA, RACIAL FEELINGS: ASIAN AMERICA IN A CAPITALIST CULTURE OF EMOTION 9 (2015).

316 *See supra* notes 142–144 and accompanying text (noting this characterization).

317 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 138 (D. Mass. 2019). Despite being 28.3% of the general (non-ALDC) admissions pool, Asian Americans are only 11.4% of the ALDC pool. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2249–50 (2023) (Sotomayor, J., dissenting). The ALDC pool makes up less than 5% of applicants but constitutes about 30% of admissions. *Id.* at 2250.

318 *SFFA*, 397 F. Supp. 3d at 179–80 (emphasis added).

319 Eng & Han, *supra* note 313, at 675.

manifest among Asian Americans, and in Asian American college students in particular.[320] While statistics on Asian American mental health require a number of caveats,[321] a fact sheet distributed by the American Psychological Association indicates that among Asian Americans, those aged 18–34 had the highest rates of suicidal thoughts and attempts, U.S.-born Asian American women had higher levels of suicidal ideation than the general population, and Asian American college students had higher levels of suicidal ideation than their white counterparts.[322] Enacting the model minority identity can often come

---

320 Although Asian Americans are significantly under-studied in the realms of psychology and higher education, *see, e.g.*, SAMUEL D. MUSEUS, ASIAN AMERICAN STUDENTS IN HIGHER EDUCATION 1–4 (2014) (calling Asian Americans the "most misunderstood population in higher education" and noting that "although scholarship on Asian Americans is emerging faster than ever before, . . . [l]ess than 1 percent of articles published in the most widely visible peer-reviewed journals in the field of higher education include any focus on this population"), psychologists have begun to study and document the internalization by Asian Americans of stereotypes such as the model minority. For studies on the psychological effects of internalizing the "model minority myth," see, for instance, Wayne Chan & Rodolfo Mendoza-Denton, *Status-Based Rejection Sensitivity Among Asian Americans: Implications for Psychological Distress*, 76 J. PERSONALITY 1317 (2008); Arpana Gupta, Dawn M. Szymanski & Frederick T.L. Leong, *The "Model Minority Myth": Internalized Racialism of Positive Stereotypes as Correlates of Psychological Distress, and Attitudes Towards Help-Seeking*, 2 ASIAN AM. J. PSYCHOL. 101 (2011); Frances C. Shen, Yu-Wei Wang & Jane L. Swanson, *Development and Initial Validation of the Internalization of Asian American Stereotypes Scale*, 17 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 283 (2011); Hyung Chol Yoo, Kimberly S. Burrola & Michael F. Steger, *A Preliminary Report on a New Measure: Internalization of the Model Minority Myth Measure (IM-4) and Its Psychological Correlates Among Asian American College Students*, 57 J. COUNSELING PSYCH. 114 (2010); Hyung Chol Yoo. Matthew J. Miller & Pansy Yip, *Validation of the Internalization of the Model Minority Myth Measure (IM-4) and Its Link to Academic Performance and Psychological Adjustment Among Asian American Adolescents*, 21 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 237 (2015); Tiffany Yip, Charissa S.L. Cheah, Lisa Kiang & Gordon C. Nagayama Hall, *Rendered Invisible: Are Asian Americans a Model or a Marginalized Minority?*, 76 AM. PSYCH. 575 (2021).

321 These caveats include the absences created by underreporting or underutilization of mental health resources due to language barriers and cultural stigma, as well as the aggregation of different Asian American groups within one category. *See* Stanley Sue, Janice Ka Yan Cheng, Carmel S. Saad & Joyce P. Chu, *Asian American Mental Health: A Call to Action*, 67 AM. PSYCH. 532, 537–39 (2012); Alka M. Kanaya et al., *Knowledge Gaps, Challenges, and Opportunities in Health and Prevention Research for Asian Americans, Native Hawaiians, and Pacific Islanders: A Report from the 2021 National Institutes of Health Workshop*, 175 ANNALS INTERNAL MED. 574, 575–76 (2022); Jennifer Lee, Annie Lei & Stanley Sue, *The Current State of Mental Health Research on Asian Americans*, 3 J. HUM. BEHAV. SOC. ENV'T 159, 160–61, 169 (2001).

322 Shihoko Hijioka & Joel Wong, *Suicide Among Asian Americans*, ASIAN AM. PSYCH. ASS'N 1 (May 2012), https://aapaonline.org/wp-content/uploads/2014/06/AAPA-suicide-factsheet.pdf [https://perma.cc/8WNN-6A36]; *see also* Chan & Mendoza-Denton, *supra* note 320, at 1317–18 (citing studies showing that Asian

at a steep psychological cost despite the promise of economic and academic advancement.

The psychic and internal nature of this damage is compounded by the accompanying racial stereotype of Asian "inscrutability," which posits that Asians' internal thoughts and motivations are so culturally foreign as to be unknowable, and thus irrelevant or negligible.[323] As Vivian Huang points out, this ascription of inscrutability has historically "been employed as a powerful Orientalist discourse" in which "[t]he particulars of the Orientalized person, place, and/or thing are often flattened, homogenized, and objectified . . . appearing as a surface that can or cannot be penetrated."[324] The inability or unwillingness of any of the Justices in *SFFA* to acknowledge the emotions of Asian American college applicants bears witness to this point.[325] The assumption that "Oriental" or Asian American figures can be known or judged primarily by the faces that they put forward to the public makes it difficult for internal or emotional harms caused by precisely this kind of stereotyping to be visible or legible to others.

Yet another aspect militating against the recognition of the racial harm caused by the model minority paradigm is the tendency to focus on binary extremes of exclusion and inclusion. While it may be easy to identify and condemn racist harm when it is articulated through racialized forms of *exclusion,* it is harder to recognize when it operates through a process of *exceptionalized inclusion*: that is, the ability to be included, but while being held to an exceptional standard on constantly shifting terms. We return briefly to the paired rulings of *Korematsu v. United States* and *Ex Parte Endo* to underline this point. Of the two cases, *Korematsu* is well known and remains frequently cited as a major miscarriage of justice; however, *Endo* does not

---

American students have higher levels of depression and social anxiety and lower levels of self-esteem as compared to white students).

323 *See, e.g.*, JOSEPH JONGHYUN JEON, RACIAL THINGS, RACIAL FORMS: OBJECTHOOD IN AVANT-GARDE ASIAN AMERICAN POETRY, at xvii (2012); STEPHEN HONG SOHN, INSCRUTABLE BELONGINGS: QUEER ASIAN NORTH AMERICAN FICTION 68 (2018); SUNNY XIANG, TONAL INTELLIGENCE: THE AESTHETICS OF ASIAN INSCRUTABILITY DURING THE LONG COLD WAR 9–15 (2020); VIVIAN L. HUANG, SURFACE RELATIONS: QUEER FORMS OF ASIAN AMERICAN INSCRUTABILITY 25–34 (2023).

324 HUANG, *supra* note 323, at 2.

325 Justice Gorsuch's failure to explore how it might make Asian American applicants *feel* to have to avoid writing about subjects that matter to them for fear of being perceived as too Asian and therefore undesirable is one of several compelling examples provided in Part II. *See supra* notes 150–55 and accompanying text.

often get mentioned except as a historical note or a way to highlight its contrast with *Korematsu*.[326] Patrick Gudridge and others have pointed out that one significant reason that *Korematsu* overshadows *Endo* is because the decision in *Korematsu* was based on constitutional interpretation while the decision in *Endo* emerged out of statutory interpretation.[327] However, it is also worth noting that while *Korematsu* more fully highlights and condemns the *explicit* racism of Japanese incarceration, reading *Korematsu* in context with *Endo* forces one to confront the more difficult question of how that racism continued to remain embedded in and alongside narratives of postwar Asian American liberation.[328]

In contrast to Fred Korematsu, who disobeyed an exclusion order, Mitsuye Endo won her case and the liberation of Japanese Americans from incarceration by complying with the evacuation orders so perfectly that her very compliance highlighted the racism and flimsiness of the logic of military necessity that drove the incarceration program.[329] If *Korematsu* is regularly cited for representing a clear-cut case of racial harm

---

326 *See* ERIC K. YAMAMOTO, LORRAINE J. BANNAI & MARGARET CHON, RACE, RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION 170 (3d ed. 2020) (noting that *Endo* is relatively ignored).

327 Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933, 1938–39 (2003); *see also* Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 83 (1996). Another factor that may contribute to the greater visibility of the *Korematsu*, *Hirabayashi*, and *Yasui* cases is the renewed attention in the 1980s flowing from the petitions for writs of *coram nobis*, *see, e.g.*, Korematsu v. United States, 584 F. Supp. 1406, 1419–20 (N.D. Cal. 1984) (granting the writ and vacating Korematsu's conviction based on factual errors "of the most fundamental character" (quoting United States v. Morgan, 346 U.S. 502, 512 (1954))), and the advocacy and scholarly engagement by members of their legal teams in the ensuing decades. *See, e.g.*, Lorraine K. Bannai, *Reflections on the* Korematsu*,* Yasui*, and* Hirabayashi Coram Nobis *Cases on Their 40th Anniversary*, 30 ASIAN AM. L.J. 76 (2023). Still another is the advocacy on behalf of Fred Korematsu's legacy by his daughter, Karen Korematsu, who founded the Korematsu Institute, *see About KI*, FRED T. KOREMATSU INST., https://korematsuinstitute.org/about-ki/ [https://perma.cc/X32T-CCX3] (last visited Apr. 10, 2025) (describing the Institute's mission and achievements), and the Fred T. Korematsu Center for Law and Equality, founded by Professor Robert Chang, *see Korematsu Center*, U.C. IRVINE SCH. OF LAW. https://www.law.uci.edu/centers/korematsu/ [https://perma.cc/6XLG-43FU] (last visited Apr. 10, 2025) (describing the Center's advocacy goals).

328 *Cf.* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 960–65 (2004). Although it is not the main point of his article, Kang addresses the point we elaborate on here that the ruling in *Endo* is not so much a repudiation of *Korematsu* as an example of the court deploying a strategy of "segmentation" to produce an "epic whitewash" of the racial logics behind evacuation and incarceration. *Id.* at 961, 965 n.172.

329 *See id.* at 949, 959 & n.142.

through exclusion, it is telling that *Endo*'s demonstration of the harms inflicted by exceptionalized inclusion remains a footnote or afterthought in history. Many, including the current Supreme Court, have condemned *Korematsu* as a way of attempting to disavow and separate themselves from the racism exhibited in the Court's past decisions.[330] However, a reading of *Korematsu* together with *Endo* produces a more nuanced understanding of how the logic of exclusion transformed into a practice of exceptionalized inclusion whose paradoxes and contradictions model minorities are expected to both internalize and suture over.

What reading *Korematsu* and *Endo* together demonstrates is that the only way to overturn a racist law is not to disobey it (as Korematsu did), but to comply with it in the hopes that the injury will be recognized in court. Yet ironically, the only way that such injury *can* be recognized in court is when one becomes legible as a good subject or model minority. In this context, Asian Americans' internalization of a "model minority" identity can be seen as both an individual or personal choice *and* a choice that has been structured and shaped by legal and historical precedent. As we have argued, the model minority paradigm uses economic exemplarity and individual upward mobility to obscure the structural dimensions of racial harm caused by exceptionalized inclusion. Because this paradigm has been internalized by Asian Americans themselves, this harm manifests in melancholia or self-blame in moments when they fail to live up to the expectations of success that currently shape the conditions of model minority inclusion.[331]

For this reason, we do not expect the elimination of explicit racial considerations to result in more inclusion for Asian Americans, as the *SFFA* ruling did. The Court's emphasis on "courage," "determination," "leadership," and the "ability to contribute"[332] perpetuates conditionally inclusive or assimilative logics. By leaving unaddressed the actual root causes of discrimination against Asian Americans—causes that result in the perception that hard working Asian Americans are

---

330 *See* Trump v. Hawaii, 585 U.S. 667, 710 (2018) (calling *Korematsu* "overruled in the court of history").

331 As Eng and Han note, the failure of Asian American students to live up to the conditions of inclusion results in a "psychic ambivalence" that "opens upon the landscape of melancholia and depression for many of the Asian American students with whom we come into contact on a regular basis." *See* Eng & Han, *supra* note 313, at 678.

332 *SFFA*, 143 S. Ct. 2141, 2176 (2023).

"mindless" rather than "determined"—the Court's "remedy" serves to extend, rather than reform, a model minority paradigm that already substitutes "culture" for "race" to mark out Asian Americans as lacking in certain forms of cultural capital.[333] Instead, we call for more examination of the deep ironies, paradoxes, and self-contradicting logics that continue to structure mainstream perceptions of Asian Americans as the "minority which is not one."[334] We also call for deeper attention to the internal or psychic harms inflicted on Asian Americans themselves by these perceptions. If others refuse to grapple with the structural paradoxes of Asian American racialization, then that burden falls entirely on Asian Americans themselves.

CONCLUSION

In many ways, we have painted a bleak picture for Asian Americans in this country. The terms of inclusion in society still require the performance of acts and the pursuit of goals that appear slightly askew when held up to the white baseline. Asian Americans can be "too Asian" or "not Asian," but not much else. The limited research on Asian American mental health suggests that this dynamic takes a psychological toll. And if the Justices on the Supreme Court are any indication, the law is unconcerned with this reality.

By arguing for more nuanced consideration of racial harm as it pertains to Asian Americans specifically, we do not intend to exceptionalize the experience of racism or bias as it is experienced by Asian Americans, nor do we argue that it exists separately from other modes of racial formation in the United States. Quite the opposite: we posit that it is precisely the separation or selective absenting of Asian American experience within discussions of other forms of racial harassment and discrimination that prevents us from coming to terms with the full complexity of the ways that race and racial bias operate in the law.[335]

---

333 *See* Kim, *supra* note 14, at 117–18.

334 *See* LYE, *supra* note 243, at 1–11.

335 As Claire Jean Kim points out in her most recent book, even recent Asian American antiracist movements such as the "Stop Asian Hate" campaign continue to inadvertently serve a conservative agenda because of the way that Asian American experiences of racial discrimination have been structurally positioned as distinct and separate from other forms of racial injustice in the United States. *See* CLAIRE JEAN KIM, ASIAN AMERICANS IN AN ANTI-BLACK WORLD 352–57 (2023). For example, she notes how the executive and legislative actions and language condemning the surge of anti-Asian racism did not acknowledge or contextualize it with

To redress this absence, scholars and lawmakers must take account of the ways that personhood and personal experience—key to understanding racial discrimination and racial bias—give way to stereotype in the case of Asian Americans. The *SFFA* decision represents a complete failure in this regard. Not one Justice considered the thoughts or feelings of Asian American youth.[336] Indeed, the only time that Justice Sotomayor evoked the emotions of students was when she decried the "feelings of isolation and marginalization" that Black students experience on campuses where they are underrepresented.[337] Consistent with our predictions, the Justices view Asian Americans as figures bereft of interiority.

On the other side of the equation, we must call out how opponents of race-conscious admissions programs continue to selectively weaponize a model minority narrative of Asian American experience as a way to hypocritically deny the impacts of racism. At the time of this writing, the Trump administration has taken the *SFFA* ruling as an invitation to completely eliminate all race-conscious programming and scholarships, as the above-mentioned "Dear Colleague" letter issued by the Department of Education makes clear.[338] Yet far from addressing the complex ambivalence that many Asian Americans have felt about being viewed as either "too Asian" or "not Asian," this most recent statement clarifies that the only acceptable identity is "not Asian." It also yet again invokes Asian Americans as a racialized group in order to dismiss the persistent and harmful effects of racial bias and discrimination from which many Asian Americans, among others, still suffer. While the long-lasting effects of both the *SFFA* ruling and the Trump administration's attacks on race-conscious programming remain to be seen, we anticipate that, for Asian Americans, these actions will both extend and exacerbate the paradox of exceptionalized inclusion into the post-affirmative action era.

---

the experiences of anti-Black racism during the COVID-19 pandemic, namely the protests against the murder of George Floyd. *See id.*

336 Justice Thomas comes the closest when he suggests that applicants who are denied admission "may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned." *SFFA*, 143 S. Ct. at 2201 (Thomas, J., concurring). But he does not specify Asian Americans or attempt to focus on their experiences separate from the white majority.

337 *Id.* at 2239 (Sotomayor, J., dissenting); *see also id.* at 2257 (condemning the "racial stigma and vulnerability to stereotypes" that flows from "tokenization") (quoting UMA M. JAYAKUMAR, WHY ARE ALL THE BLACK STUDENTS STILL SITTING TOGETHER IN THE PROVERBIAL COLLEGE CAFETERIA? (2015)).

338 Trainor, *supra* note 30.

Given this context, we ask Asian American students, community leaders, and lawmakers to reflect on what conditions they are willing to accept—and what has to change—in order to access institutions that seem to promise economic advancement and personal prestige. We are not only talking about reforming the invisible limitations or biases that might hinder Asian American individuals from entering, advancing within, or moving into leadership roles in academia, corporations or other institutions—what Jane Hyun has called the "bamboo ceiling."[339] Rather, we call on our fellow Asian Americans to think more broadly about what we might expect from those institutions. Many Asian Americans (and our families) expend a great deal of time, energy, and—if we are so privileged—money to make ourselves into the kinds of people that might be accepted into the nation's most elite colleges, graduate schools, companies, or corporations. But what do we *want*, above and beyond a credential, a paycheck, or bragging rights, from these institutions? What kinds of relationships do we hope these institutions will help us build, both with others and with one other? And what kinds of efforts do our institutions make to genuinely understand us, in all of our ethnic, economic, experiential, and political diversity, and support us in achieving these goals?

In this Article, we have outlined the way academic and legal institutions continue to reproduce a racialized disjuncture between economic success and social inclusion for Asian Americans; we have also addressed how they have failed to meaningfully engage with the contradictions of exceptionalized inclusion. Yet to be clear, we are not arguing that Asian Americans should *not* attempt to enter elite spaces, strive for economic success, or advocate to be heard. This would be self-defeating and, for us, hypocritical. We ourselves are Asian Americans who attended elite institutions and now work in them. We know first-hand what it feels like to belong yet not quite belong; to succeed in your respective field and institution

---

339 JANE HYUN, BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS, at xx (2006); *see also* Liza Mundy, *Cracking the Bamboo Ceiling*, THE ATLANTIC, Nov. 2014, at 28; Chris Westfall, *Battling Discrimination and the Bamboo Ceiling: The Bias Facing Asian American Managers*, FORBES (Sept. 14, 2021), https://www.forbes.com/sites/chriswestfall/2021/09/14/discrimination-and-bamboo-ceiling-the-unconscious-bias-facing-asian-american-managers/ [https://perma.cc/MP7T-V5MH]; Jennifer Lee, *'Bamboo Ceiling' Asian Americans Face in the Workplace Is Disconcertingly Sturdy*, S.F. CHRON., https://www.sfchronicle.com/opinion/openforum/article/bamboo-ceiling-mighty-sturdy-workplace-18397939.php [https://perma.cc/LW97-TE35] (Oct. 12, 2023).

while remaining aware of the myriad ways they continue to stereotype or marginalize you in both positive and negative ways. We know how being on the receiving end of these stereotypes—rarely so blatant as to be explicitly offensive, but just wrong or off-color enough for you to notice—when repeated again and again by peers and people in a position of power or authority, can make you begin to question your own perceptions, judgment, and sense of reality.[340]

To this end, we have drawn from many decades' worth of scholarship by and about Asian Americans as a way of acknowledging and contextualizing the specific sense of racialized injury asserted by the Asian Americans represented in the *SFFA* case—even as we strongly disagree with their decision to work with SFFA to dismantle affirmative action. (Indeed, as we argued in Part II, the appeal to a meritocratic colorblindness ironically erases the specific grounds of their original complaint—that they were disadvantaged in comparison to white applicants because of implicit bias based on their race.) Like other racial minorities in the United States, for Asian Americans, race has never been limited to the matter of checking a box. Race not only informs the ways that we are perceived by others, granting us access to some spaces but not others; it even shapes the horizon for how we come to think of ourselves. Whether we position ourselves as being relatively *in* alignment with mainstream expectations or *against* them, we must still confront the intractable fact that those expectations and stereotypes continue to exist. To truly and honestly confront the complexity of race, class, and belonging in America, we cannot continue to dismiss Asian Americans as exceptional, inconvenient, or impossible subjects.

340 While "microaggressions" have fallen out of favor as a term, it describes this phenomenon well. It is also worth noting that one of the leading scholars working on the topic of microaggressions, Derald Wing Sue (author of MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION (2010)), drew inspiration from his own experiences growing up as an Asian American in a predominantly white suburban neighborhood. *See* Christopher Munsey, *A Family for Asian Psychologists*, 37 MONITOR ON PSYCH. 60 (2006).