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Students for Fair Admissions Through the Lens of Interest-Convergence Theory: Reality, Perception, and Fear

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STUDENTS FOR FAIR ADMISSIONS THROUGH THE LENS OF INTEREST-CONVERGENCE THEORY: REALITY, PERCEPTION, AND FEAR

Robert A. Garda, Jr.*

ABSTRACT

In two cases, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina (SFFA), the Supreme Court held that Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act in their use of race in their admissions process. This Article examines the SFFA decision through the lens of interest-convergence theory.

This Article is novel in three respects. It is the first article to explain the SFFA decision in-depth. The opaqueness of the decision has led to significant confusion between commentators, scholars, and universities about the impact of the decision. I conclude that the SFFA decision overturned prior precedent and ended affirmative action in higher education, no matter how carefully crafted the race-conscious admission plan. I also conclude that universities will not be able to ignore the decision, or use race-neutral alternatives, to maintain a critical mass of minority students.

Second, this Article is the first to explain the SFFA outcome using interest-convergence theory. I break down the separate interests of Black,¹ Hispanic,²

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1. I use the commonly followed practice of capitalizing the term Black. See Angela Onwuachi-Willig, Comment, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 195 n.20 (2023) (explaining history and reasons for using the term "Black").

2. I use the term Hispanic, instead of Latinx, because the Supreme Court used that racial category in the *SFFA* decision and UNC and Harvard use that racial category in their admissions policies. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 216 (2023). Latinx is a narrower term that refers to a person with origins from anywhere in Latin America. William Alexander, *Ask the OEDI: Hispanic, Latino, Latina, Latinx—Which is Best?*, DUKE UNIV. SCH. MED. (Sept. 8, 2022), <https://med-school.duke.edu/blog/ask-oedi-hispanic-latino-latina-latinx-which-best> [https://perma.cc/WY4B-6U XR].

White,³ and Asian-Americans.⁴ I find that Black and Hispanic interests remain served by race-conscious admission policies, but that shifting racial demographics and political power dynamics changed the decades-long White interest in supporting affirmative action. I further find that Asian-Americans have an interest in maintaining affirmative action, but that the *SFFA* outcome aligned with White interests because it permitted universities to continue “negative action” against Asian-Americans in favor of White students.

Third, this Article is the first to explain how the perceptions of White Americans about policies that benefit minorities overrides the significant benefits they receive from diverse educational environments. I conclude that the longstanding and concrete benefits that White students receive from a critical mass of minority students on campus has become less important than the perceived threat of such admission policies to the current societal hierarchy. I conclude that interest-convergence theory explains why the Supreme Court overturned decades of precedent and university admission practices: it served the perceived interests of White Americans.

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3. I will capitalize White because putting it in lowercase affirms that Whiteness is the norm when other racial categories are capitalized. Kristen Mack and John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), <https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity> [https://perma.cc/V9E2-ANWT].

4. I use the term Asian-American because the Supreme Court used the racial category in the *SFFA* decision and UNC and Harvard use the racial category in their admissions policies. See *SFFA*, 600 U.S. at 216.

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INTRODUCTION

THE Supreme Court ended affirmative action in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina (SFFA)*.⁵ Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett in ending decades of race-conscious admission practices at both public and private universities.⁶ The cases involved challenges to the race-conscious admission policies at the University of North Carolina under the Equal Protection Clause and at Harvard University under Title VI of the Civil Rights Act of 1964.⁷ The question this Article attempts to answer is, why now? Why, at this point in time, did the Court decide to overturn decades of jurisprudence and race-based admissions practices by private and public colleges and universities?

The most direct answer is that the composition of the Court changed. Affirmative action had always been upheld by a slender majority in prior cases.⁸ The recent replacement of Justices that supported affirmative action with Justices that oppose it provides the simplest answer for why the Court changed course.⁹ But I argue that more underlies the reversal. After all,

5. *Id.* at 231.

6. *Id.* at 188.

7. *Id.* at 197–98.

8. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (1978) (Powell, J., announcing the judgment of the Court) (one Justice holding that educational benefits of diversity were a compelling interest that could justify race-conscious admissions policies); *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003) (upholding Michigan Law School's affirmative action plan by a vote of 5–4); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 367 (2016) (upholding the University of Texas's affirmative action plan by a vote of 5–4).

9. See Amy Howe, *Supreme Court Strikes Down Affirmative Action Programs in College Admissions*, SCOTUSBLOG (June 29, 2023, 12:31 PM), <https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions> [https://perma.cc/JWY7-75FE].

conservative Justices have supported race-conscious admission policies in the past.¹⁰ The bigger change was that the interests of White Americans, which aligned with the interests of minorities in support of affirmative action for decades, now diverge.¹¹ Or, more accurately, White Americans perceive that those interests diverge. This perceived interest divergence underlies the Court's decision to end race-based admission practices at colleges and universities.

Over forty years ago, Professor Derrick Bell explained the “interest convergence dilemma.”¹² He argued that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”¹³ It is only when the interests of those in power (Whites) converge with the interests of those not in power (minorities) that benefits are bestowed to minorities.¹⁴ “Professor Bell applied his interest-convergence theory to argue that the Supreme Court ended ‘separate but equal’ schooling in *Brown v. Board of Education* not because it was the morally right thing to do or because jurisprudence compelled it, but because it served white interests.”¹⁵

Interest-convergence theory is widely accepted. Professor Bell's original fifteen-page essay has been cited nearly 1,200 times in law review articles and the term “interest convergence” appears in over 2,000 secondary sources on Westlaw.¹⁶ It has been used to explain the outcomes of Supreme Court cases, legislation, and the treatment of underprivileged groups such as Hispanics, Asian-Americans, people in poverty, and the disabled.¹⁷

10. For example, the majority opinion in *Grutter* was drafted by Justice O'Connor. *Grutter*, 539 U.S. at 311. Justice Kennedy found a compelling interest in ending racial isolation and creating diverse educational environments in the controlling opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring).

11. See Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 609 (2011).

12. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20, 22–24 (Kimberlé Crenshaw et al. eds., 1995) (detailing the phenomenon of “interest convergence”).

13. Bell, *supra* note 12, at 523; see also *id.* at 524 (arguing that material gains come to minority communities only when those gains serve White interests).

14. See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017).

15. Garda, *White Interest*, *supra* note 11, at 604–05; Bell, *supra* note 12, at 524 (arguing that *Brown* “cannot be understood without some consideration of the decision's value to whites . . . in policymaking positions able to see the economic and political advances at home and abroad” from desegregation).

16. WESTLAW, <https://lnext.westlaw.com/RelatedInformation/Ie2f46ad14a1111dba16d88fb847e95e5/kcCitingReferences.html> [<https://perma.cc/6E76-FHVJ>] (refer to “Citing References” tab); WESTLAW, <https://lnext.westlaw.com/Search/Home.html> [<https://perma.cc/BS3T-ABV7>] (search “interest convergence”).

17. See, e.g., Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 42–55 (2006) (arguing that the interest-convergence theory explains gains for Latinos in the Supreme Court); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PENN. L. REV. 839, 916–19 (2008) (explaining how advancing the rights of the disabled may require benefits to third parties to be advanced because of the interest-convergence principle); Sheryll D. Cashin, *Shall We Overcome?*

Interest-convergence theory is well-recognized as a valid means to explain judicial outcomes.¹⁸ This Article applies interest-convergence theory to the Supreme Court's decision in *SFFA* to end affirmative action in higher education.

This Article adds to analyses of the *SFFA* case and the broader discourse on affirmative action in higher education in three ways. First, it explores, in detail, the *SFFA* decision to ascertain its true holding(s) and impact on college admissions. The *SFFA* decision is opaque, and there is confusion in commentary and in college admissions offices about its true meaning. There is agreement that the Court “effectively” ended affirmative action in higher education. I conclude that it expressly did so.

More importantly, this is the first Article to explore the interest-convergence underpinnings of the *SFFA* decision and untangle the differing underlying interests by racial group. Unlike past affirmative action cases, which were brought by White applicants and focused on the benefits of affirmative action for White Americans vis-à-vis Black and Hispanic Americans, the *SFFA* case was brought by Asian-Americans and their interests were part of the litigation strategy and decision.¹⁹ This Article's second contribution is a detailed exploration of whether the interests of White Americans continue to align with the interests of Black and Hispanic-Americans as it has in past affirmative action cases. It looks at demographic and political shifts as well as recent findings in psychology to explain why interests that recently converged are now perceived to diverge. Finally, the Article makes a new contribution to the scholarship on interest convergence as applied to Asian-Americans. There is significant literature discussing whether the interests of Asian-Americans in fact align with anti-affirmative action groups, but this is the first article to explore whether their interests align with White Americans in general.

This Article proceeds in four parts. Part I explains the course and content of affirmative action jurisprudence through the lens of interest-convergence theory. I show how White interests, rather than minority interests, undergird the Court's decades-long acceptance of affirmative action. I next explore the continuing research showing the significant White interests in diverse educational environments. These interests have always been, and continue to be, improved academic outcomes, cross-cultural competence, military readiness, and a government that is legitimate in the eyes of the citizenry. Part I concludes by showing how these White interests were implicitly and expressly acknowledged in the *SFFA* decision.

Transcending Race, Class, and Ideology Through Interest Convergence, 79 ST. JOHN'S L. REV. 253, 281–85 (2005); Vinay Harpalani, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian-Americans*, 37 GA. ST. U. L. REV. 1361, 1374 (2021) (applying interest convergence to Asian-Americans); Julie J. Park, *Interest Convergence, Negative Action, and SFFA vs. Harvard*, 26 ASIAN AM. L.J. 13, 13–18 (2019) (same). See also Garda, *White Interest*, *supra* note 11, at 605–06 (summarizing academic use of interest convergence in different venues).

18. Garda, *White Interest*, *supra* note 11, at 606.

19. See Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 237 (2022).

Despite the significant benefits White students receive from educational diversity, the Court ended affirmative action. On its face, this appears to be an indictment of interest-convergence theory. The remaining Parts of the article explain why interest-convergence theory explains the *SFFA* outcome. Part II tackles the premise that the *SFFA* decision can be justified through interest-convergence theory because it will not change university admission practices. I explain how the *SFFA* decision will decrease racial diversity on college campuses. Through an in-depth analysis of the *SFFA* decision, I conclude that the Court more than “effectively” overturned affirmative action jurisprudence, it did so expressly. I next explain that colleges and universities will not be able to create meaningfully diverse educational environments after the *SFFA* decision—either through surreptitious end-runs or through race-neutral means.

After finding that White interests continue to be served by diverse educational environments and that the *SFFA* decision will reduce diversity, I explain why the *SFFA* outcome can still be explained through interest-convergence theory. Part III begins by explaining that Black and Hispanic interests are served by race-based admission policies. I reject arguments that academic mismatch, racial stigma, and the benefits of segregated schooling prove that Black and Hispanic Americans should not support affirmative action. I next explain that while diverse educational environments benefit White students, White Americans perceive that affirmative action threatens their societal status and existing racial hierarchy. I explain how recent racial demographic shifts combined with increased minorities in positions of power lead White Americans to oppose any policies that benefit minorities, such as affirmative action. This fear, and perceived threat to power, overrides any diversity benefits to White students and means White interests diverge from Black and Hispanic interests in affirmative action.

Finally, in Part IV, I explain the interest divergence of White and Asian-Americans in ending affirmative action. I begin by showing that Asian-Americans have an interest in continuing affirmative action but ending negative action—discriminatory admission practices disfavoring Asian-Americans. I show how the *SFFA* Court conflated affirmative and negative action, striking the former but leaving the latter intact, thus working against the interests of Asian-Americans. I next explain how the interests of White Americans, in relation to Asian-Americans, were served by the decision. I conclude that the threat to societal power is not as great from Asian-Americans as it is from other minorities due to their unique stereotypes, but that the threat still exists. I conclude by arguing that while White Americans are threatened by Asian-Americans in educational settings, the negative action left untouched by the Court will continue to serve White interests.

I. INTEREST CONVERGENCE AND AFFIRMATIVE ACTION

In this Part, I discuss how the interests of White Americans converged with the interests of minorities in the prior decisions that upheld affirmative action. The outcomes of those cases can be explained almost exclusively

by the benefits White Americans receive in diverse educational settings. I then discuss how those White interests *should* still result in White Americans supporting affirmative action. The primary interests White Americans receive in diverse educational settings—improved educational outcomes, cross-cultural competence, improved military readiness, and leadership that is legitimized in the eyes of the citizenry—remained unchanged through the *SFFA* decision in 2023. This Part concludes by discussing how White interests in affirmative action were acknowledged in the *SFFA* decision, despite it ending affirmative action.

A. INTEREST CONVERGENCE AND PRIOR AFFIRMATIVE ACTION DECISIONS

The Supreme Court upheld affirmative action in prior cases because it primarily served the interests of White Americans.²⁰ The strongest evidence that minority interests are *not* the key driver of outcomes in racial preference cases is the Court’s consistent rejection of remediating societal discrimination as a compelling interest. For decades after *Brown v. Board of Education*,²¹ the only compelling interest recognized by the Court to justify race-based student assignment policies, such as affirmative action or desegregation, was remedying past *de jure* discrimination.²² Designing a

20. See Evan Mandery, *How White People Stole Affirmative Action—and Ensured its Demise*, POLITICO (June 16, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/06/16/supreme-court-affirmative-action-college-00101963> [https://perma.cc/Q5YY-9CAG]; Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 948–53 (2008) (arguing that the societal benefit from affirmative action, not the benefit to minorities, drove the *Grutter* decision); Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1624–25, 1632 (2003) (concluding that interest convergence explains the *Grutter* decision); Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.U. L. REV. 1053, 1059–60 (2005) (same); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1205–07 (2010); Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 172–98 (2003) (arguing that *Gratz* shifted the focus from the benefits minorities receive from an integrated education to the benefits Whites receive); Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 723–24, 731 (2008) (“[T]he reason the Supreme Court found a compelling state interest in *Grutter* was that people of color could be used as a means to white ends.”); Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIA. L. REV. 507, 531–32 (2009) (same); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 211–13 (2004) (same); Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 795–96 (2006) (“[A]ffirmative action stands on an odd footing: racial preferences for underrepresented minorities are justified, not for their direct educational benefits to those underrepresented minorities, but because of the benefits that primarily accrue to white[s] . . . [D]iversity primarily benefits white students.”).

21. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

22. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722 (2007) (noting that race-based policies are supported by only two compelling interests: remedying the effects of past discrimination and increasing diversity in higher education); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300, 307–09 (1978) (Powell, J., announcing the judgment of the Court) (Distinguishing the race-based student assignment policies in desegregation cases from the affirmative action policy at issue because the desegregation cases “involved remedies for clearly [established] constitutional violations. Racial

race-based admission or student assignment plan to alleviate past societal discrimination was prohibited. The Court steadfastly rejected remediation of societal discrimination despite acknowledging that “[f]rom the standpoint of the victim . . . an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law.”²³

The *SFFA* Court reiterated that the “Court has long rejected” that “the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures.”²⁴ The majority did not dispute the existence and harm of past and current societal discrimination thoroughly laid out in the dissenting opinions.²⁵ Rather, it rejected remediating past discrimination as a compelling interest for the same reasons it has always done so: it is “amorphous,” it would disadvantage current generations that “bear no responsibility” for past societal discrimination, it would “open the door” to claims from every disadvantaged group, and it would destroy “[t]he dream of a Nation of equal citizens.”²⁶

These concerns are mere pretext for ignoring minority interests in favor of White interests. The Court has not expressed any of these apprehensions when upholding policies that benefit women to overcome past and current societal discrimination based on sex.²⁷ The different treatment of women from minorities and the acknowledgment of significant harm from societal racial discrimination is simply indefensible if minority interests are at stake. But it is completely understandable if emphasis is placed on the interests of White Americans.

After decades of accepting the remediation of *de jure* discrimination as the only governmental interest sufficient to justify racial classifications,

classifications thus were designed as remedies for the vindication of constitutional [rights].” (internal citations omitted)).

23. *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring); *id.* at 806–08, 838–40 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) (finding it “meaningless” to distinguish between *de jure* discrimination and societal discrimination); *see also Wygant*, 476 U.S. at 276 (finding that there has been “serious racial discrimination in this country” but holding that societal discrimination is insufficient “for imposing discriminatory *legal* remedies that work against innocent people”); *Fullilove v. Klutznick*, 448 U.S. 448, 477–78 (1980) (upholding plan because it had important purpose of overcoming effects of prior discrimination); *id.* at 518–20 (Marshall, J., concurring, joined by Brennan & Blackmun, JJ.).

24. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 226 (2023); *see also id.* at 209–11 (discussing rejection of eliminating societal discrimination in *Bakke*); *id.* at 226–29 (discussing cases rejecting the elimination of societal discrimination as a compelling interest); *id.* at 251 (Thomas, J., concurring) (noting that this history of the Fourteenth Amendment only “support[s] the kinds of discrete remedial measures that our precedents have permitted”); *id.* at 259 (arguing that the diversity interest is just an impermissible “remedial rationale in disguise”).

25. *See SFFA*, 600 U.S. at 333–37 (Sotomayor, J., dissenting); *id.* at 388–96 (Jackson, J., dissenting) (discussing history of inequality and current inequality between races).

26. *Id.* at 226–27 (alteration in original) (quoting *Bakke*, 438 U.S. at 307, 310; *Richmond v. Croson Co.*, 488 U.S. 469, 505–06 (1989)).

27. *See, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (noting that making up for past and current societal discrimination is an important governmental interest that *could* justify a preference for women); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (noting that the “[r]eduction of the disparity in economic condition” that has resulted from long history of wage discrimination is an important governmental objective).

the Court—or at least one Justice—accepted a new compelling interest: the diversity interest. In *Regents of the University of California v. Bakke*, a White applicant alleged that the University of California at Davis’s medical school violated the Fourteenth Amendment by setting aside a certain number of slots for minority medical students.²⁸ Justice Powell concluded that racial diversity can justify race-conscious admissions in higher education.²⁹ His opinion was not joined by any other justice, but it would come to “serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies.”³⁰

This new compelling interest—diversity—served only societal and White interests. Justice Powell found that diversity is a compelling governmental interest for two reasons: it improved academic outcomes for White students and better equipped them to practice medicine in a multicultural country. First, Justice Powell concluded that diverse educational environments lead to a better “quality” of education.³¹ He noted that the “[n]ation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”³² Justice Powell reasoned that “[p]eople do not learn very much when they are surrounded only by the likes of themselves.”³³

The academic benefit of diversity noted by Justice Powell was primarily, if not exclusively, for White students.³⁴ “There was no [danger] that minorities would ‘be surrounded only by the likes of themselves’ at the medical school; the only [threat] was that whites would be the [only] race present without an affirmative action policy.”³⁵ Justice Powell, in short, found diversity to be a compelling interest because White students’ academic performance would improve if White students were more widely exposed to minority views.³⁶

His second justification for finding that diversity was a compelling interest was the future workplace benefits to White students. He concluded that a racially diverse medical school would better prepare graduates to “serve a heterogeneous population.”³⁷ He reasoned that minorities “may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates

28. *Bakke*, 438 U.S. at 269–70 (Powell, J., announcing the judgment of the Court).

29. *Id.* at 311–15.

30. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

31. *Bakke*, 438 U.S. at 311–312.

32. *Id.* at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Justice Powell also noted that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body,” *id.* (citation omitted), and that “the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Id.* at 313 (quoting *Keyishian*, 385 U.S. at 603).

33. *Id.* at 312 n.48 (internal quotation marks and citation omitted).

34. Garda, *White Interest*, *supra* note 11, at 617.

35. *Id.*

36. *See id.*

37. *Bakke*, 438 U.S. at 314.

to render with understanding their vital service to humanity.”³⁸ In other words, minorities in the classroom better equip White students to practice medicine in a heterogeneous world.

Two other aspects of Justice Powell’s opinion show that White interests, not minority interests, underpinned his conclusion that diversity can justify race-based admissions. First, Justice Powell did not discuss, and expressly avoided, mentioning the benefit of affirmative action for minority students.³⁹ He “specifically rejected the university’s contention that reducing the historic deficit of minorities in medical school and in the medical profession and countering the effects of societal discrimination justified the consideration of race in admissions.”⁴⁰

Second, Justice Powell noted “that a significant number, or ‘critical mass,’ of minority students was necessary to attain the benefits of diversity.”⁴¹ He relied on Harvard’s admission policy, which he attached to his opinion, to conclude that “a significant number of [Black students] needed to be admitted because a token number ‘could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.’”⁴² A large number of Black students were desired not because their numbers assisted Black students, but because their presence better exposed White students to a variety of views, backgrounds, and experiences.⁴³

Twenty-five years later, a slim majority of Justices held that diversity is a compelling interest justifying race-based admission policies.⁴⁴ In *Grutter v. Bollinger*, a White applicant alleged that the University of Michigan Law School violated the Fourteenth Amendment by considering race in its admission decisions.⁴⁵ The Court adopted Justice Powell’s reasoning in upholding the race-conscious admission policy.⁴⁶ But what had to be inferred in *Bakke*—that affirmative action served the interests of White Americans—was made more express in *Grutter*.

Just like in *Bakke*, *Grutter* found that diversity improves academic outcomes and long-term employment success.⁴⁷ The Court first found that “diversity promotes learning outcomes” because “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when

38. *Id.*

39. Garda, *White Interest*, *supra* note 11, at 619.

40. *Id.*; *see Bakke*, 438 U.S. at 306–10.

41. Garda, *White Interest*, *supra* note 11, at 618; *see Bakke*, 438 U.S. at 315.

42. Garda, *White Interest*, *supra* note 11, at 618 (quoting *Bakke*, 438 U.S. at 323 (Appendix to Opinion of Powell, J.)). It is notable that “Harvard’s ‘holistic’ admissions policy began in the 1920s when it was developed to exclude Jews.” Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 600 U.S. 181, 257 (2023) (Thomas, J., concurring); *see also id.* at 261, 275 (discussing Harvard’s historical discrimination against Jews); *id.* at 298 (Gorsuch, J., concurring) (same).

43. Garda, *White Interest*, *supra* note 11, at 618.

44. *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

45. *Id.* at 316–17.

46. *Id.* at 325.

47. *See id.* at 330.

the students have ‘the greatest possible variety of backgrounds.’”⁴⁸ But the expert testimony at trial and in amicus briefs that underly this conclusion focused almost entirely on improved learning outcomes for White students.⁴⁹ In fact, some evidence at trial established that Black students have better educational outcomes at historically Black colleges than at predominantly White institutions.⁵⁰

The *Grutter* Court next found, just like *Bakke*, that diversity was a compelling governmental interest because it “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals . . . [T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”⁵¹ A diverse student body better prepares students because it “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races.”⁵² This improved cross-cultural competence serves White students because Whites, not minorities, lack exposure to other races prior to entering college.⁵³ Because Whites are the most socially isolated racial group, the socializing benefit of diverse educational environments inures primarily to White students.⁵⁴

The *Grutter* Court also articulated two new justifications for finding that diversity is a compelling governmental interest—both of which expressly show the White interest in affirmative action. The Court held that diversity in higher education is “essential to the military’s ability to fulfill its principle mission to provide national security.”⁵⁵ Professor Derrick Bell’s argument that unstated White interests in national security converged with

48. *Id.* (quoting Brief of Amicus Curiae the Michigan Ass’n of Scholars in Support of Petitioners at 14, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241), 2003 WL 164182).

49. *See* *Pidot*, *supra* note 20, at 794 (noting that very little of the empirical data submitted to the *Grutter* Court demonstrated a link between diversity and positive educational outcomes for minorities); David Kow, *The (Un)Compelling Interests for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*, 20 BERKELEY LA RAZA L.J. 157, 176–80 (2010).

50. *Grutter v. Bollinger*, 539 U.S. 306, 364 (2003) (Thomas, J., concurring in part and dissenting in part) (noting “the growing [social science] evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students”); *Pidot*, *supra* note 20, at 775–776; *see also id.* at 794 (identifying other studies showing negative impacts of diversity policies on minorities); *id.* at 785–87 (discussing Professor Anthony Antonio’s experimental study focused on improved complex thinking for White students only in diverse educational settings).

51. *Grutter*, 539 U.S. at 330 (internal quotation marks and citation omitted).

52. *Id.* (alteration in original) (internal quotation marks and citation omitted).

53. Garda, *White Interest*, *supra* note 11, at 630.

54. *See* *Pidot*, *supra* note 20, at 766; Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1453 (2004) (stating that most of the benefits of diversity attend to Whites because of the disproportionate number of White students at institutions of higher education). Four Justices in *Parents Involved* recognized the socializing benefits to White students in diverse educational environments. *See* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 840–43 (2007) (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

55. *Grutter*, 539 U.S. at 331 (quotation omitted).

minority interests to explain the outcome in *Brown*,⁵⁶ was expressly relied on in *Grutter*.⁵⁷

The Court also found that race-based admission policies in law schools, which are “the training ground for a large number of our Nation’s leaders,” are necessary “to cultivate a set of leaders with legitimacy in the eyes of the citizenry.”⁵⁸ Professor Derrick Bell’s conclusion that the White interest in pacifying racial unrest by providing reassurance converged with minority interests to explain *Brown*,⁵⁹ was expressly relied on in *Grutter*.⁶⁰ “Minorities did not need to become leaders for their own or their races’ benefit They needed a pathway to leadership merely to [create confidence in] the multicultural [populace] . . . that democracy provides them a fair chance.”⁶¹ Preserving current governmental systems is a White interest.

The final indication that *Grutter* relied on White interests to uphold affirmative action is the method it approved to ensure diverse student bodies. “Michigan sought to enroll a ‘critical mass’ of minority students, which means ‘a number that encourages underrepresented minority students to participate in the classroom and not feel isolated . . . or like spokespersons for their race.’”⁶² “[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”⁶³ Put another way, schools may seek a critical mass of minorities “not for their own comfort or educational performance, but only to encourage their classroom participation” so that White students receive educational benefits.⁶⁴ The Court did not contend that a critical mass of minority students helps those minorities; the critical mass was “only discussed as a means to the end” of White societal benefit from diversity.⁶⁵

And finally, taking the lead from *Bakke* and other jurisprudence, “the University of Michigan specifically denied that their race-based admission

56. See Bell, *supra* note 12, at 524–25 (arguing that *Brown* served elite Whites by enabling the United States to win the propaganda battle during the Cold War with Russia); see also DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 105 (6th ed. 2008).

57. See *Grutter*, 539 U.S. at 331–32.

58. *Id.* at 332.

59. See Bell, *supra* note 12, at 524–25 (arguing that *Brown* benefited Whites by preventing racial unrest and the internal spread of communism because it provided “needed reassurance to American blacks” who had just returned from risking their lives in World War II and who were disillusioned by the separate but equal regime).

60. See *Grutter*, 539 U.S. at 332–33.

61. Garda, *White Interest*, *supra* note 11, at 608.

62. Garda, *White Interest*, *supra* note 11, at 619 (alteration in original) (quoting *Grutter*, 539 U.S. at 318–19).

63. *Grutter*, 539 U.S. at 319–20 (quotation omitted).

64. Garda, *White Interest*, *supra* note 11, at 619.

65. *Id.*

policy was designed to remedy past discrimination.”⁶⁶ It knew that the Court did not recognize these nonwhite interests as compelling.⁶⁷

A decade after *Grutter*, the Court again narrowly upheld affirmative action in a pair of cases. In *Fisher v. University of Texas at Austin* (*Fisher I* and *Fisher II*), a White applicant alleged that the University of Texas violated the Fourteenth Amendment by considering race in its admission decisions.⁶⁸ The Court reiterated the *Grutter* framework by holding that diversity is a compelling governmental interest and merely elaborating on the narrow tailoring standards.⁶⁹ The *Fisher I* Court cited *Bakke* to reaffirm that a diverse student body “serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”⁷⁰ The *Fisher II* Court cited to *Grutter* to emphasize that “a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’ Equally important, ‘student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.’”⁷¹ While the Court did not devote much time to the underpinnings of diversity as a compelling interest, there was significant evidence entered in the *Fisher* case that affirmative action benefits all racial groups, but primarily White students.⁷²

The *Fisher* cases were distinct from past affirmative action cases for two reasons. First, unlike past cases, the Court did note a minority interest in affirmative action—“minority students . . . experienced feelings of loneliness and isolation.”⁷³ But this was not the reason the Court found diversity to be a compelling interest—it was merely used to explain why the University of Texas needed race-conscious admissions in addition to its race-neutral plan to generate diverse student bodies.⁷⁴

Second, the interests of Asian-Americans were discussed for the first time. Justice Alito noted in his *Fisher II* dissent that the University of Texas plan discriminated against Asian-Americans and devalued their perspectives in the classroom.⁷⁵ He argued that the majority decision “act[s] almost

66. *Id.* (citing *Grutter*, 539 U.S. at 319 (citing testimony of Professor Richard Lempert and finding Michigan’s policy “did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been victims of such discrimination”).

67. *See id.*

68. *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 306–07 (2013); *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365, 375–76 (2016).

69. *Fisher I*, 570 U.S. at 303, 310–315; *Fisher II*, 579 U.S. at 379–81.

70. *Fisher I*, 570 U.S. at 308.

71. *Fisher II*, 579 U.S. at 381 (quoting *Grutter*, 539 U.S. at 330); *see also id.* at 381–82 (identifying Texas’s goals for its affirmative action program, which mirrored the goals identified in *Grutter*).

72. *See* AMY STUART WELLS, LAUREN FOX & DIANA CORDOVA-COBO, CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 8–9 (2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students> [<https://perma.cc/9HKY-U9PG>] (summarizing amicus briefs submitted in *Fisher* concluding that affirmative action benefits White Americans).

73. *Fisher II*, 579 U.S. at 384.

74. *See id.* at 383–84.

75. *See id.* at 410–14 (Alito, J., dissenting).

as if Asian-Americans do not exist” and that the university can “pick and choose which racial and ethnic groups it would like to favor.”⁷⁶ This acknowledgement of the interests of Asian-Americans, and how they align with the interests of opponents of affirmative action, laid the groundwork for the *SFFA* case.

In conclusion, while affirmative action has been neutered over the decades, the Court has steadfastly upheld diversity in higher education as a compelling governmental interest.⁷⁷ It has done so primarily because a critical mass of minority students on campus serves White Americans—by improving their academic outcomes, cross-cultural competence, military readiness, and by legitimizing leadership. To be sure, affirmative action benefits minority applicants, but those interests were not the crux of these decisions. Professor Bell’s interest-convergence theory nearly perfectly explains why, and how, the Court upheld university affirmative action policies for decades.

B. THE CONTINUING VITALITY OF THE WHITE INTEREST IN AFFIRMATIVE ACTION

The same White interests that underpinned the prior affirmative action cases still existed at the time of the *SFFA* decision in 2023. Research continues to show the significant benefits of racial diversity in higher education for the nation and for all racial groups, particularly White Americans.⁷⁸ As the Georgetown University Center on Education and the Workforce recently concluded:

The penalties for [failing to maintain diversity in higher education] will be numerous, severe, and felt throughout society. They include locking racial segregation into place; thwarting social mobility and failing to reap its associated benefits; the economic inefficiencies that come from failing to identify and promote talent, train people for good jobs to the fullest extent possible, and maintain sufficient diversity in various occupations and professions; and increased social tension as

76. *Id.* at 411–12.

77. See Stefan Lallinger, *Affirmative Action Isn't on Trial at the Supreme Court*, *Diversity Is.*, CENTURY FOUND. (June 15, 2023), <https://tcf.org/content/commentary/affirmative-action-isnt-on-trial-at-the-supreme-court-diversity-is> [<https://perma.cc/4CN9-F78S>].

78. See, e.g., Brief of Amici Curiae American Psychological Ass'n et al. at 14–28, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108813 (summarizing peer-reviewed research finding that campus diversity is a compelling interest that benefits all students); Cara McClellan, *What's Left, and What's Next, for Racial Diversity in College Admissions*, *REGUL. REV.* (July 17, 2023), <https://www.theregreview.org/2023/07/17/mcclellan-whats-left-and-whats-next-for-racial-diversity-in-college-admissions> [<https://perma.cc/5879-C6VL>]; Lallinger, *supra* note 77 (a “wide body of research” shows that diversity in higher education benefits all people); WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 2, 4–6 (same); Mandery, *supra* note 20 (“[I]f ‘educational’ benefits of diversity exist, they must principally have been for white people.”); Philip Lee, *Rejecting Honorary Whiteness: Asian Americans and the Attack on Race-Conscious Admissions*, 70 *EMORY L.J.* 1475, 1493–94 (2021) (explaining benefits of diverse student bodies for White students).

members of marginalized groups perceive a lack of opportunity to advance to positions of economic and social power.⁷⁹

The benefits of diverse educational environments for White Americans continue to be numerous, ranging from improved academic outcomes,⁸⁰ improved cross-racial understanding and racial harmony,⁸¹ preparing students for a diverse society and workforce,⁸² increased business innovation and technology,⁸³ preventing the erosion of faith in the government and

79. ANTHONY P. CARNEVALE, PETER SCHMIDT & JEFF STROHL, GEO. UNIV. CTR. ON EDUC. & WORKFORCE RACE, ELITE COLLEGE ADMISSIONS, AND THE COURTS: THE PURSUIT OF RACIAL EQUALITY IN EDUCATION RETREATS TO K–12 SCHOOLS 6 (2023), <https://cew.georgetown.edu/cew-reports/after-affirmative-action> [<https://perma.cc/72YB-D4V9>]; see also Cindy L. Davis, Book Review, *Our Compelling Interests: The Value of Diversity for Democracy and a Prosperous Society* by Earl Lewis & Nancy Cantor, 95 INT’L SOC. SCIENCE REV. 1 (2019).

80. See Anthony Carnevale & Nicole Smith, *The Economic Value of Diversity*, in OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 106, 107 (Earl Lewis & Nancy Cantor eds., 2016); Brief of the American Educational Research Ass’n et al. as Amici Curiae in Support of Respondents at 10–13, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108870; Brief of American Federation of Teachers as Amicus Curiae in Support of Respondents at 4–5, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130752; Brief of Amici Curiae Deborah Cohen et al. in Support of Respondents 10–13, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108853; Brief for Major American Business Enterprises as Amici Curiae Supporting Respondents at 22–23, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130774 (“Of the various diversity experiences at universities, interactions with peers of different races are more strongly linked with cognitive growth than are interactions with peers who exhibit other forms of diversity.”); WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 2.

81. See Brief of the American Educational Research Ass’n, *supra* note 80; Brief of American Federation of Teachers, *supra* note 80; Brief of Amici Curiae Deborah Cohen, *supra* note 80, at 11–12; WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 9.

82. See Brief of Amici Curiae National Women’s Law Center et al. Committed to Race & Gender Equality in Support of Respondents at 15–21, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108917; WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 2 (“Students can learn better how to navigate adulthood in an increasingly diverse society—a skill that employers value—if they attend diverse schools.”).

83. See Brief for Massachusetts Institute of Technology et al. as Amici Curiae in Support of Respondents at 19, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108891 (“American businesses at the cutting edge of advancements in STEM depend on the availability of a diverse pool of qualified graduates of elite institutions in these disciplines.”).

free market enterprises,⁸⁴ a “healthy democracy,”⁸⁵ a justice system with legitimacy,⁸⁶ and more effective state and federal governments.⁸⁷

Most notably, businesses and professions continue to strongly value diversity because it improves their competitiveness and bottom line.⁸⁸ “Ninety-six percent of major employers . . . say it is ‘important’ that employees be ‘comfortable working with colleagues, customers, and/or clients from diverse cultural backgrounds.’”⁸⁹ Amicus briefs in support of affirmative action were submitted by the American Bar Association,⁹⁰ the American Medical Colleges and forty-five other healthcare organizations,⁹¹ the National Association of Basketball Coaches,⁹² large corporations (including Microsoft,

84. See CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 7.

85. See Brief of Amici Curiae 25 Harvard Student and Alumni Organizations in Support of Respondent at 17, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 2987148.

86. See Brief for the American Bar Association as Amicus Curiae in Support of Respondents at 18, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108796; Brief of the Law Firm Antiracism Alliance as Amicus Curiae in Support of Respondents at 23, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108796.

87. See Brief for the United States as Amicus Curiae Supporting Respondent at 19, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3108833; Brief of Amicus Curiae Southern Governors in Support of Respondents at 5, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130764 (“Effective [s]tate [g]overnment [r]equires [l]eadership that is [b]roadly [r]epresentative of the [s]tate’s [p]opulation.”); Brief of Massachusetts et al. as Amici Curiae in Support of Respondents at 10–17, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3137391 (identifying the benefit of diverse leaders in their states’ workforces and communities).

88. See SCOTT E. PAGE, *THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY* 166 (2017); CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 23–24.

89. WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 2; *see also id.* at 10.

90. Brief for the American Bar Association, *supra* note 86.

91. See Brief for Amici Curiae Ass’n of American Medical Colleges et al. in Support of Respondents at 4, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3036400:

[I]n controlled studies, Black physicians are far more likely than others to accurately assess Black patients’ pain tolerance and prescribe the correct amount of pain medication as a result. And for high-risk Black newborns, having a Black physician is tantamount to a miracle drug: it more than doubles the likelihood that the baby will live.

See also Amna Nawaz, *Affirmative Action Ruling Raises Concerns Over Impact on Medical School Diversity*, PBS NEWSHOUR (July 10, 2023, 6:35 PM), <https://www.pbs.org/newshour/show/affirmative-action-ruling-raises-concerns-over-impact-on-medical-school-diversity> [<https://perma.cc/N46S-2GPT>]:

[D]iversity really does save lives. We have studies that show that having a doctor who looks like you, it makes you more likely to take preventive screenings such as flu vaccines, or more likely to go for more invasive procedures like heart catheterizations. And in a study published back in April, it showed that, for every 10 percent of increase in Black primary care doctors within a county, there’s a 30-day increase in life expectancy for Black individuals.

See also Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COLL. & U.L. 239, 261 (2023) (summarizing studies showing importance of diversity in medical schools).

92. Brief of the National Ass’n of Basketball Coaches et al. as Amici Curiae in Support of Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130684.

Verizon, DuPont, Mastercard, IBM, and Shell),⁹³ and media associations and foundations.⁹⁴ Their basic theme is that cross-cultural competence—a benefit received primarily by White students—improves corporate and professional performance. The reality is that the United States and White Americans continue to benefit from the diverse educational environments created through race-conscious admission plans. Whether these interests continue to outweigh independent concerns of White Americans is a different matter.

C. INTEREST CONVERGENCE IN THE *SFFA* DECISION

The interests of White Americans in upholding race conscious admissions in colleges and universities was implicitly and explicitly recognized in the *SFFA* decision. The dissenting opinions spent pages discussing the benefits of diverse educational environments, and even the majority implicitly acknowledged that White interests may converge with minority interests to support affirmative action, but only in limited circumstances.

The most obvious example of interest convergence at work in *SFFA* is the Court’s curious exemption of military academies from its ruling.⁹⁵ The United States, as amicus curiae, argued that based on “lessons from decades of battlefield experience,” it has been the “longstanding military judgment” across administrations that racial diversity “is essential to achieving a mission-ready” military and to ensuring the Nation’s “ability to compete, deter, and win in today’s increasingly complex global security environment.”⁹⁶ It argued that diversity was needed in the military because “the Nation’s military strength and readiness depend on a pipeline of

93. See Brief for Major American Business Enterprises, *supra* note 80, at 5 (“Numerous studies support the conclusion that cross-racial interactions and engagement during university contribute to essential job-related skills.”); Brief for Massachusetts Institute of Technology, *supra* note 83, at 19 (“American businesses at the cutting edge of advancements in STEM depend on the availability of a diverse pool of qualified graduates of elite institutions in these disciplines[.]”); Brief for Amici Curiae Applied Materials, Inc. et al. in Support of Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130694; Brief for Amicus Curiae HR Policy Ass’n in Support of Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3044749.

94. Brief in Support of Respondents of Amici Curiae Multicultural Media et al. at 3–6, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130660.

95. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 213 n.4 (2023). The Court recently denied certiorari to an independent challenge to the race-conscious admission policies of the military academies. See Amy Howe, *Justices Turn Away West Point Admissions Challenge*, SCOTUSBLOG (Feb. 2, 2024, 5:51 PM), <https://www.scotusblog.com/2024/02/justices-turn-away-west-point-admissions-challenge> [<https://perma.cc/DHA8-NJZS>]; Zach Schonfeld & Lexi Lonas, *Supreme Court Won’t Block West Point From Considering Race in Admissions*, THE HILL (Feb. 2, 2024, 5:07 PM), <https://thehill.com/regulation/court-battles/4440145-supreme-court-wont-block-west-point-race-admissions> [<https://perma.cc/KG7Y-XG4K>].

96. Brief for the United States, *supra* note 87, at 13 (citations omitted); see also Brief of Admiral Charles S. Abbot et al. as Amici Curiae in Support of Respondents at 25, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3137700 (“[I]gnoring race [in admissions] would impede our

officers who . . . have been educated in diverse environments that prepare them to lead increasingly diverse forces.”⁹⁷ Top former military leaders similarly argued that affirmative action “is essential to the continued vitality of the U.S. military.”⁹⁸

All the Justices agreed. The majority excluded military academies from its ban on affirmative action because they have “potentially distinct interests” from other universities.⁹⁹ The dissenters similarly recognized that “the compelling need for diversity in the military and the national security implications at stake” justify race-based admission in military academies.¹⁰⁰

This point of agreement between the majority and dissent displays interest convergence at work. The unique interest of military academies in diverse student bodies that does not exist for other universities is “national security imperative[s]”¹⁰¹—a concern of all Americans, including White Americans. This analysis mirrors the *Grutter* decision, which found diversity in higher education as “essential to the military’s ability to fulfill its principle mission to provide national security.”¹⁰²

The dissenters identified many other White interests in affirmative action. Justice Sotomayor noted that a “costly result” of the decision is the harm to “our institutions and democratic society [in general].”¹⁰³ She concluded that affirmative action results in better government services for all Americans, including K–12 education, healthcare, and the justice system.¹⁰⁴ She further identified improved business performance, increased innovation, and strengthening “the overall American economy.”¹⁰⁵ Finally, she warned about “the dangerous consequences of an America where its leadership does not reflect the diversity of the People.”¹⁰⁶ Citing *Grutter*, she recognized the importance of a government that is legitimate “in the eyes of the citizenry.”¹⁰⁷

Justice Jackson also highlighted that race-based admissions work “to the benefit of us all”¹⁰⁸ and provide “[u]niversal benefits.”¹⁰⁹ Her opinion focused on the inequitable results Black Americans endure due to their

military’s ability to acquire essential entry level leadership attributes and training essential to cohesion . . .”).

97. Brief for the United States, *supra* note 87, at 12.

98. Brief of Admiral Charles S. Abbot, *supra* note 96, at 3.

99. *SFFA*, 600 U.S. at 213 n.4.

100. *Id.* at 380 (Sotomayor, J., dissenting); *see also id.* at 355. But Justice Sotomayor believed the national security interest justified race-based admission in all universities because many officers come from Reserve Officer Training Corps programs at all universities. *Id.* at 379. She also highlighted that the “carveout only highlights the arbitrariness of [the majority’s] decision.” *Id.* at 356.

101. *Id.* at 379.

102. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing Consolidated Brief of Lieutenant General Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, *Grutter v. Bollinger* 539 U.S. 306 (Nos. 02-241 & 02-516), 2003 WL 1787554).

103. *SFFA*, 600 U.S. at 379 (Sotomayor, J., dissenting).

104. *See id.* at 380–81.

105. *Id.* at 381.

106. *Id.* at 382.

107. *Id.* at 382 (citing *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003)).

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

109. *Id.* at 406.

historic and long-standing disparate treatment by government entities.¹¹⁰ But she also noted that it is “[e]qually critical” to understand that a diverse educational environment “improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life”¹¹¹—the same White interests underlying the *Grutter* decision. Justice Jackson alerts the reader to “not miss the point that . . . a diverse student body in higher education helps *everyone*.”¹¹² Citing to economic studies, she concluded that the “economy benefits[] too” and diversity in higher education will “help save hundreds of billions of dollars annually (by conservative estimates).”¹¹³

Apart from excluding military academies from its holding, the *SFFA* majority opinion does not address the White interests advanced by race-based admission plans. Thus, it seems the majority, like *SFFA*, essentially conceded the point. Justice Thomas questioned the link between admission policies and these benefits, but not the benefits themselves.¹¹⁴ If White Americans and minority groups benefit from race-based admission policies, interest-convergence theory dictates that the Court should have upheld affirmative action. Why, then, did the Court depart from decades of precedent upholding affirmative action in university admissions? Answering that question is the subject of the next Sections.

II. THE *SFFA* DECISION WILL REDUCE DIVERSITY IN EDUCATIONAL ENVIRONMENTS

The first explanation for why the Supreme Court struck down affirmative action, despite its continued benefit to White Americans, is that the decision did not, or will not, change university admission practices. The interests of White Americans remain served if the Court did not actually end race-conscious admissions. Even if it did, White interests are still advanced if universities will continue to use race, or proxies for race, in admission decisions to create a critical mass of minorities on campus. But the apparent conflict between the outcome of the *SFFA* case and White interests cannot be explained by the assertion that the case did not in fact change anything. It did. The Court expressly overturned nearly fifty years of precedent finding that diversity in higher education is a compelling governmental interest, preventing all universities from considering the racial composition of their student bodies.¹¹⁵ While the Court permitted universities to consider the race of individual applicants, it prohibited universities from crafting diverse student bodies that would produce recognized benefits to White students.¹¹⁶ And universities will likely not be able to create adequately diverse educational environments using race-neutral measures.

110. *See id.* at 390–96.

111. *Id.* at 404–05.

112. *Id.* at 405.

113. *Id.* at 406.

114. *See id.* at 253–55 (Thomas, J., concurring).

115. *Id.* at 230–31 (majority opinion).

116. *Id.* at 230.

A. THE *SFFA* DECISION ENDS AFFIRMATIVE ACTION

The *SFFA* decision to end decades of affirmative action policies that benefitted White Americans may be explained through interest-convergence theory by claiming that it actually did not change anything: universities can still create diverse student bodies by considering race. In other words, interests continue to converge, despite the *SFFA* decision, because it did not overrule past precedent permitting race-based admission policies. A close analysis of the decision shows this conclusion is incorrect. The Court rejected diversity as a compelling interest and applied strict scrutiny in a way that precludes all future consideration of race to ensure a critical mass of minorities on campus.

The *SFFA* decision began by setting out the basic rule that racial classifications must survive strict scrutiny.¹¹⁷ This means first, that the classification must “further [a] compelling governmental interest[]” and, second, that the “use of race is ‘narrowly tailored’—meaning ‘necessary’—to achieve that interest.”¹¹⁸ The *SFFA* decision did not clearly identify which part of the strict scrutiny analysis the Harvard and UNC admissions policies failed—compelling interest or narrow tailoring—and it expressly permits applicants to discuss their race in application materials.¹¹⁹ This twin ambiguity—not expressly overruling prior precedent and permitting applicants to discuss race—could mean that affirmative action will survive the decision. This conclusion is wrong for several reasons.

The *SFFA* Court, without saying so expressly, definitively ended affirmative action in university admissions. The majority opinion is unclear about whether it struck down race-based admissions in *all* universities and colleges or *just* at UNC and Harvard. If the Court rejected diversity in higher education as a compelling interest, then race-based admissions cannot be used at any institution to create diversity. Many parts of the decision support the conclusion that the Court rejected diversity as a compelling interest.¹²⁰ If, on the other hand, Harvard’s and UNC’s policies fail the narrow tailoring element, it is *possible* for higher education institutions to properly craft race-based admission policies to ensure a critical mass of minorities on campus. Many parts of the decision indicate that the Court was rejecting UNC’s and Harvard’s admission policies on grounds of narrow tailoring.¹²¹

117. *Id.* at 206–07.

118. *Id.* at 207 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 311–12 (2013)).

119. *Id.* at 230–31.

120. *See, e.g., id.* at 214–15.

121. *See, e.g., id.; see also* Feingold, *supra* note 91, at 243, 256–57.

The opaqueness of the decision¹²² has led some commentators to conclude that the Court overturned affirmative action precedent¹²³ and others to conclude that it did not.¹²⁴ Everyone seems to agree that the *SFFA* decision “effectively ends affirmative action,”¹²⁵ but disagree on how it did so. In this Section, I describe how the *SFFA* decision expressly—not just effectively—ends affirmative action.

Many parts of the decision show that the Court expressly overturned the *Grutter*, *Bakke*, and *Fisher* holdings that diversity in higher education is a compelling governmental interest justifying affirmative action.¹²⁶ As noted above, the Court exempted military academies from its holding due to the fact these institutions have “distinct interests.”¹²⁷ By recognizing that military academies have interests apart from the traditional diversity interest, the Court rejected diversity as a sufficient interest for all other institutions. The Court never mentioned narrow tailoring in the context of military academies, further showing that they were exempted from the ruling because their compelling interest is something other than mere diversity.

122. See Mark Walsh, *Supreme Court Ends Affirmative Action in College Admissions in Decision Watched by K-12*, EDUC. WK. (June 29, 2023), <https://www.edweek.org/policy-politics/supreme-court-ends-affirmative-action-in-college-admissions-in-decision-watched-by-k-12/2023/06> [<https://perma.cc/TWN7-TAZ6>] (the Court “did not make crystal-clear pronouncements about the reach of the decision”).

123. See McClellan, *supra* note 78; David B. Owens, *The Equal Protection-Fourth Amendment Shell Game: An Essay on the Limited Reach of the 2023 Affirmative Action Cases, the Fourth Amendment, and Race Beyond Skin Color*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2024) (manuscript at 1), manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4514757 [<https://perma.cc/G5KV-LG5R>] (finding that the Court formally forbid the consideration of race in college admissions). But the author also concludes that a regime based on critical mass may survive scrutiny because it was not expressly overruled. See *id.* (manuscript at 17).

124. See Ilya Somin, “Diversity” House of Cards Collapses, WASH. EXAM’R (July 7, 2023, 5:29 PM), <https://www.washingtonexaminer.com/magazine-features/250543/diversity-house-of-cards-collapses> [<https://perma.cc/4CQF-CAUC>]; Feingold, *supra* note 91, at 241, 256–57.

125. See, e.g., Jay Caspian Kang, *Why the Champions of Affirmative Action Had to Leave Asian-Americans Behind*, NEW YORKER (June 30, 2023), <https://www.newyorker.com/news/our-columnists/why-the-champions-of-affirmative-action-had-to-leave-asian-americans-behind> [<https://perma.cc/WV4R-9WDJ>]; Andre M. Perry, Hannah Stephens & Manann Donoghoe, *The Supreme Court’s Decision to Strike Down Affirmative Action Means That HBCU Investment is More Important Than Ever*, BROOKINGS INST. (June 29, 2023), <https://www.brookings.edu/articles/the-supreme-courts-decision-to-strike-down-affirmative-action-means-that-hbcu-investment-is-more-important-than-ever> [<https://perma.cc/U4WL-QCJX>]; Devin Dwyer & Alexandra Hutzler, *Supreme Court Effectively Ends Affirmative Action at Colleges in Landmark Ruling*, ABC NEWS (June 29, 2023), <https://abcnews.go.com/Politics/supreme-court-sets-new-limits-affirmative-action-programs/story?id=99230954> [<https://perma.cc/N5BE-JJ3N>]; McClellan, *supra* note 78; Cass R. Sunstein, *The Invention of Colorblindness*, SUP. CT. REV. (forthcoming) (manuscript at 1), manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4498466 [<https://perma.cc/V34W-DC7F>] (*SFFA* “essentially overrules” prior precedent); Onwuachi-Willig, *supra* note 1, at 194 (finding the decision “reshaped nearly fifty years of precedent”).

126. See Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, CONVERSATION (Aug. 3, 2023, 8:22 AM), <https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647> [<https://perma.cc/WRR2-A35F>].

127. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 213 n.4 (2023).

Many other parts of the decision support the conclusion that the Court rejected diversity as a compelling interest. The legal analysis directly applicable to Harvard and UNC begins in Section IV.A of the opinion with a citation to *Fisher II* and *Parents Involved in Community Schools v. Seattle School District No. 1* for the proposition that race classifications must be “sufficiently measurable” and cannot have an “amorphous end.”¹²⁸ While the citations were to the portions of the prior decisions discussing the “necessity” requirement of the narrow tailoring element, the majority concluded that Harvard’s and UNC’s diversity “interests . . . cannot be subject[] to meaningful . . . review” and are “not sufficiently coherent for purposes of strict scrutiny.”¹²⁹ In concluding the first point of its analysis, the majority held that “[t]he interests that respondents seek, though plainly worthy, are inescapably imponderable.”¹³⁰ So while this analysis was arguably framed in the context of narrow tailoring, the Court concluded that seeking a diverse student body is not, and can never be, a compelling interest.

This is certainly how Justice Thomas understands the majority decision.¹³¹ In his section discussing compelling interests, he noted that “[t]he Court today finds that each of these interests are too vague and immeasurable to suffice.”¹³² And while Justice Thomas questioned the “link” between the admissions policies—a narrow tailoring issue—he also held that “surely [Harvard’s] interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness”¹³³ and that it is “a very high bar to show that their interest[s] [are] compelling.”¹³⁴ The dissent also read the majority as “[o]verruling decades of precedent . . . by holding that racial diversity is an ‘inescapably imponderable’ objective that cannot justify race-conscious affirmative action, even though respondents’ objectives simply ‘mirror the ‘compelling interest’ this Court has approved’ many times in the past.”¹³⁵ “At bottom . . . the Court overrides its longstanding holding that diversity in higher education is of compelling value.”¹³⁶

One argument that the Court did not overturn the prior precedents holding that diversity is a compelling interest is that the majority did not engage in any *stare decisis* analysis. As noted by the dissent, “the Court does not even attempt to make the extraordinary showing required by *stare decisis*.”¹³⁷ The lack of *stare decisis* analysis leads to one of two conclusions: either the majority did not actually overturn prior precedent, making the

128. *Id.* at 214 (citing *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381 (2016); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007)).

129. *Id.*; see also Owens, *supra* note 123 (manuscript at 11 n.66).

130. *SFFA*, 600 U.S. at 215.

131. See *id.* at 253–56 (Thomas, J., concurring).

132. *Id.* at 253.

133. *Id.* at 254.

134. *Id.* at 255.

135. *Id.* at 357 (Sotomayor, J., dissenting) (internal citation omitted).

136. *Id.*

137. *Id.* at 342; see also *id.* at 352–53 (noting the lack of *stare decisis* analysis).

analysis unnecessary, or the analysis was unnecessary because the prior precedent had simply expired. The latter conclusion is more defensible.

In her 2003 *Grutter* majority opinion, Justice O'Connor held that race-based admission policies must be "a temporary matter" and "limited in time."¹³⁸ She noted that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest[s] approved today."¹³⁹ The *SFFA* majority treats the twenty-five-year time period—and the diversity interest—as expired. After discussing the importance of an endpoint for affirmative action and noting Justice O'Connor's quote, the *SFFA* majority began its legal analysis by finding that "[t]wenty years later, no end is in sight."¹⁴⁰ And while the majority acknowledged that the expected twenty-five-year endpoint was not until 2028, it held "[t]hat expectation was oversold."¹⁴¹ The Court rejected the dissent's use of the reliance interest—a critical part of a *stare decisis* analysis—by concluding that "*Grutter* itself limited the reliance . . . by insisting . . . that race-based admissions programs be limited in time."¹⁴² The twenty-five-year time period "preclud[es] the . . . reliance interests."¹⁴³ The majority spent several pages discussing how there was no "permanent justification for racial preferences."¹⁴⁴ It apparently forewent a *stare decisis* analysis because the diversity interest had expired, or nearly expired.

Justice Kavanaugh's concurrence drove this conclusion home. He dedicated his entire opinion to explaining "why the Court's decision today is consistent with and follows from the Court's equal protection precedents,"¹⁴⁵ and the importance of temporal limits on affirmative action jurisprudence.¹⁴⁶ He concluded that race-based affirmative action jurisprudence was valid "only for another generation"¹⁴⁷ and that "the Court's decision . . . appropriately respects and abides by *Grutter's* express temporal limit[s]."¹⁴⁸

The analysis by the majority, and Justice Kavanaugh's concurrence, indicate that it believed affirmative action precedent had simply ended, rendering a *stare decisis* analysis moot. Combined with the rhetoric surrounding the "immeasurable," "amorphous," and "imponderable" nature of the diversity interest, it is clear the Court overturned prior precedent even without a formal *stare decisis* analysis.

138. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

139. *Id.* at 343.

140. *SFFA*, 600 U.S. at 213; *see also id.* at 221 ("If all this were not enough, respondents' admissions programs also lack a 'logical end point.'" (quoting *Grutter*, 539 U.S. at 342)).

141. *Id.* at 224.

142. *Id.* at 229 n.9.

143. *Id.*

144. *Id.* at 228–30.

145. *Id.* at 311 (Kavanaugh, J., concurring).

146. *See id.* at 311–17.

147. *Id.* at 313; *see also id.* at 317 ("The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation . . .").

148. *Id.* at 316.

Compounding the difficulty of ascertaining the precise holding, the *SFFA* Court did not conclude its analysis after holding that diversity is no longer a compelling interest. This holding *should* have ended the analysis because it is the only interest UNC and Harvard asserted to justify their race-based admission policies.¹⁴⁹ The fact that the Court discussed other aspects of the admission policies obfuscates the Court's holding.¹⁵⁰

But even if the Court ruled on exclusively narrow tailoring grounds, its analysis acts as a complete and total bar to all race-based admission plans designed to ensure a critical mass of minority students. After concluding that the diversity interest is “inescapably imponderable,” the majority noted, “Second, respondents’ admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue.”¹⁵¹ The “meaningful connection” argument is a classic narrow tailoring analysis.

The majority launched this “second” line of analysis by noting an inappropriate fit between the means and goals because the racial groups the universities tracked were “imprecise” and “opaque.”¹⁵² After finding that the racial classifications used by UNC and Harvard were ambiguous, crude, and unclear, the Court concluded that the admission policies were not sufficiently tied to creating racial diversity.¹⁵³ The policies were not narrowly tailored because there was “mismatch” and no “exact connection” between the compelling interest of racial diversity and the means used to achieve it.¹⁵⁴ Based on this analysis, Professor Bernstein argues that the *SFFA* decision is, at least in part, a narrow tailoring decision.¹⁵⁵

Even if the decision is exclusively based on the failure of Harvard and UNC to narrowly tailor their plans because the racial groups they employed are amorphous, this holding is a death knell for all university affirmative action plans. As Professor Bernstein explains, “Broad classifications like ‘Asian-American’ or ‘Hispanic’ combine people of wildly varied

149. *See id.* at 214 (majority opinion).

150. *See id.* at 215–16.

151. *Id.* at 215.

152. *Id.* at 216–17; *see also id.* at 291–94 (Gorsuch, J., concurring) (noting that said racial categories are “incoherent” and “irrational”).

153. *See id.* at 215–19. For a thorough discussion about the difficulties of categorizing applicants by race, see Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner at 5–16, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918957; Amicus Brief of the American Center for Law and Justice et al. in Support of Petitioner at 4–9, *Students for Fair Admissions v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918957; Brief of the Liberty Justice Center et al. as Amici Curiae in Support of Petitioner at 2, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918956; McClellan, *supra* note 78; Ilya Somin, *How America’s Growing Diversity Weakens the Case for Racial Preferences in Education*, *VOLOKH CONSPIRACY* (June 13, 2023, 4:17 PM), <https://reason.com/volokh/2023/06/13/how-americas-growing-diversity-weakens-the-case-for-racial-preferences-in-education> [https://perma.cc/3KL8-HZYE]; Somin, *supra* note 124.

154. *SFFA*, 600 U.S. at 217 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

155. *See* David E. Bernstein, *Racial Classifications in Higher Education Admissions Before and After SFFA*, 77 *SMU L. REV.* 263, 284 (2024); *see also* Mandery, *supra* note 20 (“[T]here’s hardly any objective definition of ‘race’ . . .”).

physiognomies, national origins, and cultural backgrounds. It is difficult to see how using such classifications will pass legal muster in future affirmative action and related litigation.”¹⁵⁶

The attack on Harvard’s and UNC’s admission plans does not end there. The decision launches into an entirely different line of analysis in Section IV.B, concluding that the admission policies “fail to comply with the twin commands . . . that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”¹⁵⁷ In prior university affirmative action cases, these “twin commands” were considered in the narrow tailoring element of strict scrutiny.¹⁵⁸ In those cases, universities complied with these “twin commands” by using holistic review—a review where race is considered as one of many factors for admission and never a dispositive factor.¹⁵⁹ But the *SFFA* majority held, apparently as a matter of law, that any consideration of the racial composition of a class is based on stereotypes and works as a negative in the zero-sum admissions process, both of which make consideration of the racial composition of admitted classes unconstitutional.¹⁶⁰ This narrow tailoring failure is an absolute bar to all race-based admission policies. As Cass Sunstein notes, the Court’s “stereotype” and “race . . . used as a negative” analysis would have rendered the programs in *Grutter* and *Bakke* unconstitutional and, therefore, “essentially overrules them.”¹⁶¹

Despite the lack of clarity in the majority decision about whether it was ruling on compelling interest or narrow tailoring, it certainly overruled past precedent permitting affirmative action in higher education. Justice Thomas noted that “*Grutter* is, for all intents and purposes, overruled.”¹⁶² The dissenters also noted that the majority “rolls back decades of precedent” and “holds that race can no longer be used in a limited way in college admissions.”¹⁶³ The dissent explained that while the Court’s “supposed issues” with the UNC’s and Harvard’s policies was that they were “insufficiently narrow under the strict scrutiny framework[,] . . . [i]n reality, . . . the Court . . . overrules its higher-education precedents.”¹⁶⁴

Even though the *SFFA* Court ended affirmative action in higher education, its concluding paragraphs appear to allow admission officers to consider the race of applicants to achieve the benefits of diversity.¹⁶⁵ If this is the case then the decision does not, in fact, change the interest-convergence equation. But while the Court permitted colleges and universities to consider the race of an applicant, it expressly prohibited institutions from

156. Bernstein, *supra* note 155, at 284.

157. *SFFA*, 600 U.S. at 218.

158. See, e.g., *Fisher v. Univ. of Tex. at Austin* (Fisher II), 579 U.S. 365, 375–76 (2016); *Gratz v. Bollinger*, 539 U.S. 244, 270–72 (2003).

159. See, e.g., *Fisher II*, 579 U.S. at 375; *Gratz*, 539 U.S. at 271–72.

160. See *SFFA*, 600 U.S. at 218–21.

161. Sunstein, *supra* note 125 (manuscript at 1, 3).

162. *SFFA*, 600 U.S. at 287 (Thomas, J., concurring).

163. *Id.* at 318 (Sotomayor, J., dissenting).

164. *Id.* at 352 (internal quotation marks and citations omitted).

165. See *id.* at 230–31 (majority opinion).

considering the racial composition of the entire class to achieve the benefits of diversity.¹⁶⁶

The parties and Justices agreed 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.”¹⁶⁷ Applicants are permitted to discuss “racial discrimination” and “heritage or culture” but only if they are “tied to *that student’s* courage and determination” or “*that student’s* unique ability to contribute to the university.”¹⁶⁸

While this language permits admissions offices to consider the race and heritage of individual applicants, so long as it is tied to traits the university seeks, it does not allow institutions to consider the overall racial composition of the class, or classes. As noted in *Bakke*, *Grutter*, and *Fisher*, it is this overall racial composition—or critical mass—that is essential to obtaining the benefits of a diverse educational environment.¹⁶⁹ So even though the *SFFA* decision authorizes schools to consider the race of applicants if it is tied to a desirable trait, it prohibits institutions from attempting to secure a critical mass of minorities, which ensures benefits to White students.¹⁷⁰

In sum, the *SFFA* decision overturned the jurisprudence permitting race-conscious admission policies and does not leave the door open for universities to practice affirmative action in the manner they have done so for decades. The Court rejected diversity as a compelling interest and applied narrow tailoring in a manner that precludes all future consideration of the racial composition of an incoming class. Its permission of applicants to discuss race and heritage in admission essays does not allow schools to create a critical mass of minorities on campus that benefit White students. Because the *SFFA* decision ends affirmative action as it has been practiced, it appears to act against White interests.

B. INSTITUTIONS WILL NOT BE ABLE TO CREATE DIVERSE EDUCATIONAL ENVIRONMENTS THROUGH RACE-NEUTRAL ALTERNATIVES

Another explanation for why the Court ended affirmative action, despite its benefit to White students, is that college and universities can achieve the benefits of diversity without considering race in admissions. In other words, the *SFFA* decision did not impact the interests of White students because they will still benefit from diverse educational environments.

166. *See id.* at 230.

167. *Id.*

168. *Id.* at 231.

169. *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., announcing the judgment of the Court); *Grutter v. Bollinger*, 539 U.S. 306, 318, 340 (2003); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310–11 (2013).

170. *See Bakke*, 438 U.S. at 315; *Grutter*, 539 U.S. at 318–19, 330, 335–36; *Fisher I*, 570 U.S. at 297; *see also* Garda, *White Interest*, *supra* note 11, at 618–19 (discussing the tie between a critical mass of minorities and the benefits to White students).

Numerous race-neutral alternatives have been suggested to ensure colleges and universities remain diverse. These include, but are not limited to, eliminating legacy preferences,¹⁷¹ eliminating reliance on standardized tests such as the SAT and ACT,¹⁷² eliminating athletic preferences,¹⁷³ and engaging in race-targeted recruitment¹⁷⁴ and socio-economic diversity initiatives.¹⁷⁵ However, none of these race-neutral alternatives will create a sufficiently diverse student body to benefit White students. Even if they do, these race-neutral alternatives will be subject to legal attack.

171. See Raj Chetty, David J. Deming & John N. Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges 1* (Nat'l Bureau Econ. Rsch., Working Paper No. 31492, 2023) (finding that students from the richest 1% of American families are more than twice as likely to attend the nation's most elite private colleges as kids from middle-class families with similar SAT scores due primarily to legacy and athletic preferences), <https://www.nber.org/papers/w31492> [<https://perma.cc/87SF-6LFK>]; Niha Masih, *The Tradition of "Legacy" College Admissions is Under Fire. Here's Why.*, WASH. POST (July 28, 2023, 6:23 AM), <https://www.washingtonpost.com/education/2023/07/28/legacy-admissions-explained-harvard-lawsuit> [<https://perma.cc/C7CY-XHTX>] (discussing Office of Civil Rights investigation into legacy preferences due to disparate impact on minority students); CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 78–84; Greg Rosalsky, *Affirmative Action for Rich Kids: It's More Than Just Legacy Admissions*, NPR (July 24, 2023, 6:01 AM), <https://www.npr.org/sections/money/2023/07/24/1189443223/affirmative-action-for-rich-kids-its-more-than-just-legacy-admissions> [<https://perma.cc/B6BM-WH3L>]; David Leonhardt, *Behind the Scenes of College Admissions*, N.Y. TIMES (July 24, 2023), <https://www.nytimes.com/2023/07/24/briefing/college-admissions-elite-students.html> [perma.cc/T2VJ-M5R7]; Nick Anderson & Susan Svrluga, *Without Affirmative Action, How Will Colleges Seek Racial Diversity?*, WASH. POST (July 5, 2023, 3:18 PM), <https://www.washingtonpost.com/education/2023/07/01/affirmative-action-colleges-racial-diversity> [<https://perma.cc/CFQ8-QFE9>] (discussing recently filed lawsuit regarding legacy preferences); Emil Guillermo, *Ending the Snowblind Admission of Legacies and Admitting the Legacies of Affirmative Action*, DIVERSE (July 28, 2023), <https://www.diverseeducation.com/opinion/article/15543284/ending-the-snowblind-admission-of-legacies-and-admitting-the-legacies-of-affirmative-action> [<https://perma.cc/44X2-92WL>].

172. See Anderson & Svrluga, *supra* note 171.

173. See Uma Mazyck Jayakumar, William C. Kidder, Eddie Comeaux & Sherod Thaxton, *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Cases*, 70 UCLA L. REV. DISCOURSE 230, 237–240, 244, 257–258, 263 (2023) (identifying significant benefits athletic scholarships provide to privileged White students); Chetty, Deming & Friedman, *supra* note 171; Uma Mazyck Jayakumar & Ibram X. Kendi, “Race Neutral” Is the New “Separate but Equal”, ATLANTIC (June 29, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-action-race-neutral-admissions/674565> [<https://perma.cc/BF8P-A7VA>].

174. See Anderson & Svrluga, *supra* note 171.

175. See Michael Dannenberg, *The Path Forward in a Post-Affirmative Action World*, POLITICO (June 13, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/06/13/post-affirmative-action-world-scotus-00101524> [<https://perma.cc/A29X-GWRN>]; Anderson & Svrluga, *supra* note 171; Denise A. Smith, *How Can We Promote Diversity and Help Students if Affirmative Action Falls?*, CENTURY FOUND. (June 14, 2023), <https://tcf.org/content/commentary/how-can-we-promote-diversity-and-help-students-if-affirmative-action-falls> [<https://perma.cc/8XS9-Y6YG>]; Brief of Amici Curiae Asian American Legal Defense and Education Fund et al. in Support of Respondents at 34–36, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108862; John McWhorter, *On Race and Academia*, N.Y. TIMES (July 4, 2023), <https://www.nytimes.com/2023/07/04/opinion/race-academia-preferences.html> [<https://perma.cc/NX6E-N2KY>]; Wai Wah Chin, *The Next Battle Over Racial Preferences*, CTRY J. (June 29, 2023), <https://www.city-journal.org/article/supreme-court-ends-affirmative-action-will-universities-defy-the-ruling> [<https://perma.cc/3MKN-KV9W>]; Richard D. Kahlenberg, *What Biden Should Do About Affirmative Action*, LIBERAL PATRIOT (June 6, 2023), <https://www.liberalpatriot.com/p/what-biden-should-do-about-affirmative> [<https://perma.cc/NEW2-LCR3>].

The *SFFA* briefs debated at length whether race-neutral alternatives were an adequate substitute for race-based admissions.¹⁷⁶ The *SFFA* majority largely ignored the issue. Justice Gorsuch noted the dispute in his concurrence and concluded that it raises “some hard-to-answer questions.”¹⁷⁷ But Justice Thomas, in his concurrence, found that “universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means.”¹⁷⁸ After noting the experiences in the California and Michigan university systems, he concluded that “[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality.”¹⁷⁹

But overwhelming authority shows that the *SFFA* decision will make student bodies less diverse.¹⁸⁰ The University of California System filed an amicus brief explaining how it has served as a “laborator[y] for experimentation” for race-neutral measures since California banned race-conscious admissions in 1996.¹⁸¹ These measures have failed to enroll a sufficiently diverse student body to see the educational benefits of diversity.¹⁸² The same is true for the Michigan university system after affirmative action was banned.¹⁸³ Indeed, “[n]o college barred from using race-conscious admissions has found alternatives that staved off declines in enrollments of students from underrepresented racial/ethnic minority groups relative to their share of the population.”¹⁸⁴ The race-neutral alternatives for achieving diversity are simply not practical, workable, or palatable to universities.¹⁸⁵ Universities will not be able to use race-neutral measures to achieve sufficiently diverse student bodies to benefit White students to the same extent as before the *SFFA* decision.

176. See CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 44, 47–50.

177. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 299–301 (2023) (Gorsuch, J., concurring).

178. *Id.* at 284 (Thomas, J., concurring).

179. *Id.*

180. See CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 2; Lallinger, *supra* note 77; Anderson & Svrluga, *supra* note 171.

181. Brief for the President and Chancellors of the University of California as Amici Curiae in Supporting Respondents at 4, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108901.

182. *Id.*; see also Emma Bowman, *Here's What Happened When Affirmative Action Ended at California Public Colleges*, NPR (June 30, 2023, 5:01 AM), <https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges> [<https://perma.cc/QP6U-6GZZ>].

183. See Brief for the University of Michigan as Amicus Curiae in Support of Respondents at 3, 11–12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130736; Anderson & Svrluga, *supra* note 171.

184. CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 51; Anderson & Svrluga, *supra* note 171 (race-neutral alternatives in states that ban affirmative action have “fallen short of their diversity goals”); Smith, *supra* note 175.

185. See Anderson & Svrluga, *supra* note 171; CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 3–4, 54–60; Smith, *supra* note 175; Brief of Amici Curiae Asian American Legal Defense and Education Fund, *supra* note 175, at 34–36 (explaining why class based admission systems will not create diversity); Lee, *supra* note 78, at 1490–91 (arguing that there will be a reduction of Black and Latino students if affirmative action is overturned); *but see* Feingold, *supra* note 91, at 266–78 (identifying race-neutral alternatives available to universities).

Even if race-neutral admission practices are effective, they will soon be subject to legal attack. Organizations are threatening to challenge what have historically been acceptable alternatives to race-conscious admissions to achieve racial diversity. All previous race-based practices are already being discontinued. For example, financial aid tied to a student's race is subject to legal challenge and many states are already banning, or considering banning, such financial aid.¹⁸⁶ Race-based scholarships, a critical tool to attract diverse students, are also threatened.¹⁸⁷ And the Court may strike down previously accepted race-targeted recruitment—an important tool for achieving diverse educational environments without race-conscious admissions.¹⁸⁸ As noted by the former President of Dillard University, “The assault on affirmative action was simply the foundation to go after everything.”¹⁸⁹

Race-neutral practices designed to create diverse student environments will also be subject to legal attack. While Justice Kavanaugh reiterated in his concurrence that colleges and universities can still use race-neutral strategies to advance the educational benefits of diversity,¹⁹⁰ the majority held, “[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,” and the prohibition against racial discrimination is “levelled at the thing, not the name.”¹⁹¹

Many commentators are concerned that race-neutral alternatives designed to increase racial diversity will be subject to legal attack post-*SFFA*.¹⁹² As Professor Cashin explains, the colorblind absolutism of the *SFFA* decision will lead to legal challenges of race-neutral methods designed to increase racial diversity at institutions.¹⁹³ Indeed, “race-neutral strategies for cultivating racial diversity and pursuing equity are [already]

186. See Alia Wong, *After Supreme Court's Affirmative Action Ruling, Race-Based Scholarships Under Scrutiny*, USA TODAY (July 7, 2023, 4:47 PM), <https://www.usatoday.com/story/news/education/2023/07/06/after-supreme-court-affirmative-action-ruling-scholarships-targeted/70388058007> [<https://perma.cc/3DE9-ECNE>].

187. See Tessa Stuart, *Republicans Target Minority Scholarships After Supreme Court's Affirmative Action Ruling*, ROLLING STONE (July 5, 2023), <https://www.rollingstone.com/politics/politics-features/supreme-court-affirmative-action-minority-scholarships-republicans-1234783254> [<https://perma.cc/W4TY-QWDA>].

188. See Ayesha Rascoe, *After the Supreme Court Decision on Affirmative Action, Are College DEI Offices in Danger?*, NPR (July 9, 2023), <https://www.npr.org/2023/07/09/1186674951/after-the-supreme-court-decision-on-affirmative-action-are-college-dei-offices-i> [<https://perma.cc/H8FY-RA8K>].

189. Wong, *supra* note 186; see also Feingold, *supra* note 91, at 247–48.

190. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 317 (2023) (Kavanaugh, J., concurring).

191. *Id.* at 230 (majority opinion) (alteration in original) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

192. See Aaron Sibarium, *Law School Administrators Huddle to Circumvent Affirmative Action Ban*, FREE BEACON (Aug. 23, 2023), <https://freebeacon.com/campus/law-school-administrators-huddle-to-circumvent-affirmative-action-ban> [<https://perma.cc/XA76-TQML>]; John O. McGinnis, *How Students for Fair Admissions Will Improve Legal Ed*, L. & LIBERTY (Aug. 10, 2023), <https://lawliberty.org/how-students-for-fair-admission-will-improve-legal-ed> [<https://perma.cc/XV7T-U9BP>]; Mandery, *supra* note 20; Kahlenberg, *supra* note 175.

193. See Sheryll Cashin, *The Risk of “Colorblind Absolutism”*, POLITICO (June 14, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/06/14/colorblind-absolutism-affirmative-action-00101754> [<https://perma.cc/F5DT-9QKA>].

under attack.”¹⁹⁴ Three high schools have been sued for using race-neutral admission criteria in an effort to create diverse educational environments.¹⁹⁵ Professor Jeannie Suk Gersen predicts that the constitutionality of race-neutral admission alternatives designed to create a diverse student body “will almost certainly be the next big question about admissions.”¹⁹⁶ Universities simply cannot create sufficiently diverse educational environments to benefit White students post-*SFFA*. Even if they could, such practices will be subject to lawsuits.

It is also possible that universities will continue to create diverse educational environments by simply ignoring the mandates of the *SFFA* decision. Universities may

more or less carry on their diversity missions, albeit with even less transparency than before[,] . . . which means that despite winning a multiyear lawsuit in the highest court in the land, S.F.F.A and its supporters may actually find themselves in an even more opaque and arbitrary admissions climate than before.¹⁹⁷

Because the majority decision left the door open for applicants to discuss how their experiences based on race relate to university admission criteria, universities may end-run the *SFFA* decision through their essay prompts.¹⁹⁸ As Professor Sander notes, “a very plausible outcome of this will be that

194. McClellan, *supra* note 78; see also Cara McClellan, *When Claims Collide: Students for Fair Admissions v. Harvard and the Meaning of Discrimination*, 54 *LOY. U. CHI. L.J.* 1, 18, 35 (2023); CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 47–50; see also Lallinger, *supra* note 77.

195. Wah Chin, *supra* note 175; see also Erin Wilcox, *The Messenger: High School Lawsuit Offers Preview of Life After Affirmative Action*, PAC. LEGAL FOUND. (July 7, 2023), <https://pacificlegal.org/themessenger-high-school-lawsuit-offers-preview-of-life-after-affirmative-action> [https://perma.cc/3CE7-S3PW]; 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/YH3T-MBFY] (discussing the Thomas Jefferson High School lawsuit); Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate Over Standardized Entrance Exams*, 73 *S.C. L. REV.* 759, 761, 773–87 (2022) (discussing recent challenges to eliminating standardized testing for selective high school admissions).

196. Gersen, *supra* note 195; see also Vinay Harpalani, *The Need for an Asian American Supreme Court Justice*, 137 *HARV. L. REV. F.* 23, 44 (2023) (identifying race-neutral admission practices at magnet high schools as the “next battleground”). The Supreme Court recently denied certiorari in the Thomas Jefferson High School case, with dissents filed by Justices Alito and Thomas. See Amy Howe, *Justices Decline to Intervene in Another Dispute Over Race and School Admissions*, SCOTUSBLOG (Feb. 20, 2024, 10:48 AM), <https://www.scotusblog.com/2024/02/justices-decline-to-intervene-in-another-dispute-over-race-and-school-admissions> [https://perma.cc/7W8G-KN9W].

197. Kang, *supra* note 125; see also Anemona Hartocollis, *With Supreme Court Decision, College Admissions Could Become More Subjective*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/06/29/us/affirmative-action-college-admissions-future.html> [https://perma.cc/7RM7-6GHA] (explaining how colleges will shift from objective measures); Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your “Identity”*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html> [https://perma.cc/9NF8-HMJK] (noting that “this is the year of the identity-driven essay” for college applicants).

198. See Mark Walsh, *Biden Administration Outlines How Colleges Can Pursue Racial Diversity After Court Ruling*, EDUC. WEEK (Aug. 14, 2023), <https://www.edweek.org/policy-politics/biden-administration-outlines-how-colleges-can-pursue-racial-diversity-after-court-ruling/2023/08> [https://perma.cc/3A63-89YQ]; see also Wah Chin, *supra* note 175; Wilcox, *supra* note 195.

schools will just cheat and say, ‘Let’s see who gets sued.’”¹⁹⁹ Many universities have already changed their essay questions and begun emphasizing recommendation letters and essay answers over objective measures.²⁰⁰

But any attempts to end-run the *SFFA* decision will almost certainly come under legal attack. Chief Justice Roberts warned that “universities may not simply establish through application essays or other means [what] we hold unlawful today.”²⁰¹ Conservative groups are already gearing up to challenge any attempted end-runs around the *SFFA* decision.²⁰²

There is at least a colorable argument that the *SFFA* decision ending affirmative action is consistent with the White interest in diverse educational environments because the decision will not change any admission practices or impact overall student diversity. But the data, and the legal threats to admission practices designed to create diverse educational environments, make this conclusion tenable at best.

In summary, the *SFFA* decision ended affirmative action as it has been practiced by universities for decades, even though those practices benefit White students. Educational institutions can no longer craft racially diverse environments that ensure better academic outcomes, increased cultural competence, a strengthened military, or leadership that is legitimate in the eyes of the citizenry. The ending of affirmative action, contrary to these White interests, seems to impugn interest-convergence theory. If both White and minority students benefit from diverse educational environments, interest convergence dictates that affirmative action should be upheld. But as the next Sections explains, there is a large gap between actual and perceived interests in maintaining affirmative action.

III. THE INTEREST CONVERGENCE OF WHITE, BLACK, AND HISPANIC-AMERICANS

If the *SFFA* outcome harms White interests in attending diverse universities, and there is no viable alternative means to achieve educational diversity, how can the *SFFA* decision be explained through interest-convergence theory? This Section discusses the interest convergence between White, Black, and Hispanic-Americans, and the next Section will discuss interest convergence between White and Asian-Americans.

The Court may have struck down affirmative action, despite the overwhelming evidence that it serves White Americans, for two reasons. First, it is possible that White, Black, and Hispanic interests no longer converge

199. Hartocollis, *College Admissions Could Become More Subjective*, *supra* note 197 (explaining how colleges will shift from objective measures).

200. *See id.*; Liam Knox, *The Common App Enters an Uncommon Era*, INSIDE HIGHER ED (Aug. 2, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/08/02/colleges-change-essay-prompts-after-affirmative-action> [https://perma.cc/Y87J-HVAW] (discussing changes to essay questions asked by universities and on the common application); Hartocollis & Edmonds, *Colleges Want to Know More About You*, *supra* note 197 (identifying new essay prompts that focus on identity).

201. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 230 (2023).

202. *See* Hartocollis, *College Admissions Could Become More Subjective*, *supra* note 197.

because it is not in Black or Hispanic interests to attend diverse educational institutions. In other words, the White interest has not changed, but the minority interest has, leading to diverging interests. Justice Thomas has argued this perspective for decades—minorities are harmed, not benefited, by affirmative action.²⁰³ In the next Section, I argue that this conclusion is incorrect, and that Black and Hispanic-Americans continue to have a strong interest in affirmative action.

Second, even if Black and Hispanic-Americans benefit from affirmative action, White Americans may now *perceive* that diverse universities no longer benefit them. The significant demographic shifts in the United States, combined with the increased power and leadership roles of minorities, lead many White Americans to fear diversity and oppose providing any benefits to minorities. It is the perceived threat to White empowerment, rather than the concrete benefits of diverse educational environments, that causes White interests to diverge from Black and Hispanic interests and explains the *SFFA* result.

A. THE INTERESTS OF BLACK AND HISPANIC-AMERICANS IN AFFIRMATIVE ACTION

One simple explanation for the *SFFA* decision is that interest convergence no longer exists because Black and Hispanic-Americans oppose affirmative action. Simply put, race-based admissions no longer serve their interests as they have in the past. The polling data in support for affirmative action is convoluted but seemingly supports this conclusion. One poll conducted around the time of the *SFFA* decision shows that a majority of Americans support diversity in educational institutions and the general concept of “affirmative action,” but 82% are opposed to admission decisions based on race.²⁰⁴ 81% percent of Hispanics and 71% of Black Americans oppose making admission decisions based on race.²⁰⁵ Another poll conducted prior to the *SFFA* decision showed that 74% percent of all

203. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

204. *U.S. Adults Who Have Heard of Affirmative Action Are More Likely to Say It is Good than Bad; Still, 82% of All Adults Say College Admissions Shouldn't Consider Race*, PEW RSCH. CTR. (June 8, 2023), https://www.pewresearch.org/race-ethnicity/2023/06/08/asian-americans-hold-mixed-views-around-affirmative-action/re_2023-06-08_asian-americans-affirmative-action_0-05 [<https://perma.cc/9E5H-CP4V>]; see also Jack Elbaum, *Of Course Affirmative Action Harms Asian-Americans*, WASH. EXAM'R (June 15, 2023, 5:53 PM), <https://www.washingtonexaminer.com/?p=1236719> [<https://perma.cc/5SEF-SY2V>] (discussing Pew Research Center findings); Robby Soave, *How Affirmative Action Lost at the Supreme Court*, REASON MAG. (Oct. 2023), <https://reason.com/2023/09/07/affirmative-action-loses-in-court> [<https://perma.cc/9Z22-T68U>] (discussing polling data regarding affirmative action).

205. *82% of All Adults Say College Admissions Shouldn't Consider Race*, *supra* note 204; see also *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admission Decisions*, PEW RSCH. CTR. (June 8, 2023), <https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions> [<https://perma.cc/6H8V-C8Z4>] (finding that 29% of Blacks, 39% of Hispanics, 52% of Asians, and 57% of Whites disapprove of selective colleges considering race and ethnicity in admission decisions, and that by more than 2 to 1, Americans say considering race and ethnicity makes college admissions less fair rather than more fair).

Americans, 59% of Black/African-Americans, and 68% of Hispanic/Latinos said race and ethnicity should not factor into admission decisions.²⁰⁶

The polls do not explain *why* Black and Hispanic-Americans oppose race-conscious admissions, despite the policies increasing their college admission chances.²⁰⁷ But Justice Thomas and a handful of scholars have argued for decades why minorities *should* oppose affirmative action.²⁰⁸ They conclude that race based admissions harm Black and Hispanic students because of academic mismatch, stigma, and racial resentment, and find that minorities learn better in segregated environments such as Historically Black Colleges and Universities (HBCUs).²⁰⁹

Justice Thomas noted in his *SFFA* concurrence that affirmative action does not increase “the overall number of blacks and Hispanics able to access a college education,” as it simply redistributes them into institutions “more competitive . . . than they otherwise would have attended.”²¹⁰ He urged that this “mismatch” between Black and Hispanic students leads to academic underperformance, poor grades, and high dropout rates.²¹¹ Justice Thomas concluded that affirmative action means Black and Hispanic students are “overmatched throughout all levels of higher education.”²¹²

This is incorrect: Black and Hispanic students are not overmatched at colleges due to affirmative action. Citing numerous studies, Justice Sotomayor concluded that mismatch theory was “debunked long ago.”²¹³ She

206. CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 23.

207. See Harpalani, *supra* note 19, at 261 (“The use of race-conscious admissions primarily works to boost the enrollment of underrepresented minority groups—particularly Black, Latina/o, and Native American students.”).

208. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 600 U.S. 181, 284–86 (2023) (Thomas, J., concurring); Thomas Sowell, *Affirmative Action Around the World*, HOOVER DIG. (Oct. 30, 2004), <https://www.hoover.org/research/affirmative-action-around-world> [<https://perma.cc/8NCU-TEXW>] (arguing that affirmative action policies have, at best, a negligible impact on the groups they intend to assist); see also Bertrand Cooper, *The Failure of Affirmative Action*, ATLANTIC (June 19, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/failure-affirmative-action/674439> [<https://perma.cc/F6LH-34DD>] (arguing that affirmative action does not benefit Black Americans because so few are able to attend college).

209. See, e.g., *SFFA*, 600 U.S. at 285–86 (Thomas, J., concurring).

210. *Id.* at 268 (citing THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD* 145–46 (2004)); see also Glenn Loury & John McWhorter, *Affirmative Action's Parasitic Elitism*, GLENN LOURY SUBSTACK (July 11, 2023), <https://glennloury.substack.com/p/affirmative-actions-parasitic-elitism> [<https://perma.cc/QN5G-T4ZT>] (arguing that ending affirmative action simply means that Black students will attend other schools).

211. *SFFA*, 600 U.S. at 268–71 (Thomas, J., concurring); see also *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 332 (2013) (Thomas, J., concurring) (the use of race in holistic admissions leads to the “inevitable” “underperformance” by Black and Latino students at elite universities “because they are less academically prepared than the white and Asian students with whom they must compete”); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 460 (2004); Thomas Sowell, *Affirmative Action Is a Wrong Answer*, ST. AUGUSTINE REC. (Dec. 16, 2015, 9:27 PM), <https://www.staugustine.com/story/opinion/2015/12/17/thomas-sowell-affirmative-action-wrong-answer/16256078007> [<https://perma.cc/H8UA-GPWM>]; McGinnis, *supra* note 192.

212. *SFFA*, 600 U.S. at 269–270 (Thomas, J., concurring) (quoting THOMAS SOWELL, *RACE AND CULTURE* 176–77 (1994)).

213. *Id.* at 371, 381 (Sotomayor, J., dissenting) (citing Brief of Amici Curiae Individual Scientists in Support of Respondent 3, 7–25, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707),

critiqued the decades old studies by a handful of scholars cited by Justice Thomas as having “major methodological flaws.”²¹⁴ Citing an “extensive body of research,” she proved that “attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch.”²¹⁵ Significant scholarship supports this conclusion and shows that claims of mismatch are “false or overblown.”²¹⁶

Justice Thomas also concluded that Black and Hispanic students are harmed by affirmative action because “racial preferences in college admissions ‘stamp [Blacks and Hispanics] with a badge of inferiority.’”²¹⁷ Affirmative action “taint[s] the accomplishments of all” Black and Hispanic students.²¹⁸ This is also incorrect. Justice Sotomayor noted that Justice Thomas lacked any supporting evidence and cited to “[s]tudies [that] disprove this sentiment.”²¹⁹ She found the “badge of inferiority” argument offensive because it echoes “‘tropes of stigma’ that ‘were employed to oppose Reconstruction policies.’”²²⁰

It is telling that mismatch and stigma are only discussed for Black and Hispanic minorities and not other preferential admits, such as White athletes, legacies, and children of donors or faculty (ALDC).²²¹ Evidence in the *SFFA* case established that ALDC applicants are almost 70% White, and while they make up only 5% of applicants to Harvard, they constitute 30% of the applicants admitted each year.²²² One expert found that 43% of White students admitted to Harvard received ALDC preferences and that three-quarters of these would have been rejected absent their ALDC

2022 WL 3157696); *see also* Brief of the American Educational Research Ass’n, *supra* note 80, at 22–26.

214. *SFFA*, 600 U.S. at 371–72 (Sotomayor, J., dissenting) (citation omitted).

215. *Id.* (citation omitted).

216. CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 46–47; *see also* Lee, *supra* note 78, at 1491.

217. *SFFA*, 600 U.S. at 270 (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring)); *see also* *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 333 (2013) (Thomas, J., concurring); *Gutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part); Renu Mukherjee, *Soft Bigotry*, CITY J. (July 13, 2023), <https://www.city-journal.org/article/the-soft-bigotry-of-affirmative-action> [<https://perma.cc/MM9X-ZEGF>] (arguing that affirmative action stigmatizes Black and Hispanic students).

218. *SFFA*, 600 U.S. at 270 (Thomas, J., concurring).

219. *Id.* at 372 (Sotomayor, J., dissenting).

220. *Id.* (quoting Angela Onwuachi-Willig Emily Hough & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1323, 1343–44 (2008)).

221. *Cf.* Jerusalem Demsas, *No One Deserves to Go to Harvard*, ATLANTIC (July 27, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/harvard-admissions-affirmative-action-elite-colleges/674837> [<https://perma.cc/7LTN-BBQ6>] (explaining how questions of “deserve,” stigma, and mismatch are reserved for racial minorities and not other special admits).

222. *SFFA*, 600 U.S. 359–60 (Sotomayor, J., dissenting); *see also id.* at 299–300 (Gorsuch, J., concurring) (noting that some universities increase racial diversity by eliminating legacy admissions); Anna Gorman-Huang & Peter Henry Huang, *After the Demise of Affirmative Action, Ensuring Equitable Access to Educational Opportunities*, 21 U.C. L.J. RACE & ECON. JUST. 123, 128–29 (2024); *see also* Kang, *supra* note 125.

status.²²³ Similarly, 79% of recruited athletes (which were 70% White) in the second lowest overall rating score were admitted compared to 0.02% of other applicants with the same rating.²²⁴ If mismatch and stigma means affirmative action harms minorities, the preferences that help lower-qualified students should similarly harm these White students. But that argument is never advanced to end ALDC preferences like it is to end affirmative action.²²⁵ The ALDC preferences were not challenged in the *SFFA* lawsuit²²⁶ or by Justice Thomas despite ALDC admits “undoubtedly benefit[ing] white and wealthy applicants the most.”²²⁷ Put in terms of interest-convergence theory—Black and Hispanic students are not harmed by any alleged mismatch or stigma, or at least not harmed more than White ALDC admits.

Justice Thomas’s final argument for why affirmative action harms minorities is that it increases “tribalism,” “risk[s] creating new prejudices and allowing old ones to fester,” leads to racial resentment of perceived “favored races,” and “encourage[s] our Nation’s youth to view racial differences as important.”²²⁸ He essentially argues that recognizing race in admissions harms racial minorities by creating racial resentment. Justice Jackson dedicated nearly her entire dissent to explaining why recognizing race in fact benefits minorities—because race still matters in society and to individual applicants.²²⁹

The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation’s full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of “social racism” and “government-imposed racism,” thereby deterring our collective progression toward becoming a society where race no longer matters.²³⁰

In a similar vein, Dean Onwuachi-Willig explains why a colorblind admission process “is more likely to lead to increased harms from racial

223. Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133, 133 (2022).

224. *SFFA*, 600 U.S. at 300 n.5 (Gorsuch, J., concurring); Arcidiacono, Kinsler & Ransom, *supra* note 223, at 141 n.20.

225. See Demsas, *supra* note 221.

226. See *SFFA*, 600 U.S. at 359–60 (Sotomayor, J., dissenting).

227. *Id.* at 301 (Gorsuch, J., concurring).

228. *Id.* at 274–76 (citations omitted).

229. See *id.* at 385–98 (Jackson, J., dissenting); see also *id.* at 397–98:

To demand that colleges ignore race in today’s admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who “merits” admission.

See also *id.* at 363 (Sotomayor, J., dissenting) (noting “the inevitable truth that race matters in students’ lives”); *id.* at 364 (“It is not a stereotype to acknowledge the basic truth that young people’s experiences are shaded by a societal structure where race matters.”).

230. *Id.* at 408 n.103 (Jackson, J., dissenting) (internal citation omitted).

bias, both explicit and implicit, rather than decreased racial bias and discrimination.”²³¹

Justice Thomas concludes by noting the success of HBCUs and Black students at HBCUs, to argue that affirmative action is “[n]ot for the betterment of . . . black students.”²³² In this he is correct—affirmative action is primarily for the benefit of White students. But this does not mean that affirmative action harms Black and Hispanic students. There is, and always has been, significant debate within the Black community about whether all Black educational environments are good for Black youth.²³³ Professor Bell long ago noted the “inherent, educational advantages in black schools, particularly for poor, ghetto blacks.”²³⁴

But the success of HBCUs is not an indictment of affirmative action or its benefits to Black and Hispanic students. The fact that Black students perform well at HBCUs does not mean affirmative action is contrary to their interests. Affirmative action and HBCUs have coexisted for generations.²³⁵ More importantly, as noted above, affirmative action benefits Black and Hispanic students. This is the primary foundation of the dissenting opinions in *SFFA*, and a conclusion that no Justice refutes except Justice Thomas.²³⁶

Despite the polling data and the arguments that affirmative action harms Black and Hispanic students, such students still have a strong interest in maintaining race-conscious admissions.²³⁷ The Black and Hispanic interests in affirmative action have remained mostly unchanged since the Court’s initial acceptance of the diversity interest in *Bakke*, though they were never the focus of the decisions. The *SFFA* majority decision presumed that affirmative action benefitted Black and Hispanic applicants.²³⁸

231. Onwuachi-Willig, *supra* note 1, at 217.

232. *SFFA*, 600 U.S. at 286 (Thomas, J., concurring).

233. See, e.g., Stefan Lallinger, *Is the Fight for School Integration Still Worthwhile for African Americans?*, CENTURY FOUND. (Jan. 12, 2023), <https://tcf.org/content/report/is-the-fight-for-school-integration-still-worthwhile-for-african-americans> [<https://perma.cc/WP9C-SFD2>] (“Positive, strong, all-Black spaces are key to success for African Americans, and especially for African American children—a fact that Black Americans have known for a long time.”); see also THOMAS SOWELL, *EDUCATION: ASSUMPTIONS VERSUS HISTORY* 7–38 (1986); Garda, *White Interest*, *supra* note 11, at 652–53 (discussing whether integrated school environments are in the best interest of Black students).

234. *Bell Calls for a Reassessment of Separate But Equal Schools*, HARV. CRIMSON (May 17, 1974), <https://www.thecrimson.com/article/1974/5/17/bell-calls-for-a-reassessment-of> [<https://perma.cc/WHS3-QQPP>]; DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 24, 161 (2004) (advocating for separate but truly equal schools).

235. See Lallinger, *supra* note 233 (“Segregation has never served Black people, and it never will.”).

236. See Harpalani, *supra* note 196, at 23–24 (noting that the decision focused primarily on affirmative action with respect to Black and Hispanics).

237. See Lallinger, *supra* note 233 (noting that minority support for integrated educational environments has waned, but it is primarily because minorities were not properly supported in those environments rather than an opposition to the concept of integration).

238. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 195 (2023) (“In the Harvard admissions process, ‘race is a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’” (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019), *aff’d sub nom.*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023))).

Harvard admitted that its race-conscious admissions policies benefitted Black and Hispanic applicants.²³⁹ While several groups representing the interests of Black Americans filed amicus briefs in *SFFA* opposing affirmative action,²⁴⁰ many more filed briefs in support of affirmative action.²⁴¹ They noted the significant benefits affirmative action provides to Black and Hispanic students.²⁴² Leading civil rights activists believe that ending affirmative action will harm, not benefit, racial minorities.²⁴³

If nothing else, “affirmative action counters concrete and quantifiable racial advantages that flow to white applicants during the admissions process.”²⁴⁴ As Dean Onwuachi-Willig explains, “race-conscious admissions enable ‘fair[er] [and more accurate] appraisal[s] of each individual’s academic promise’ precisely because of the many race-related disadvantages that Black students face in our society.”²⁴⁵ She establishes the negative racial bias in placement of Black and Hispanic students in honors courses,²⁴⁶ teachers’ evaluations of work product and grade point averages,²⁴⁷ and praise in letters of recommendation²⁴⁸—all critical in the admissions process. Put simply, without consideration of race, there is discrimination in admissions against Black and Hispanic applicants.²⁴⁹ As Justice Sotomayor summarized in her dissent, “race is one small piece of a

239. See Harpalani, *supra* note 19, at 291 (noting that Harvard admitted to using race to help Black, Latina/o, and Native American applicants).

240. See, e.g., Brief of Amicus Curiae Project 21 in Support of Petitioner at 1–4, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2919656 (a national leadership network of Black conservatives arguing that affirmative action stigmatizes minorities for the rest of their lives).

241. See Brief for Amici Curiae HBCU Leaders and National Ass’n for Equal Opportunity in Higher Education in Support of Respondents at 1–2, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108910; Amici Curiae Brief of the NAACP Legal Defense and Educational Fund, Inc. et al. in Support of Respondents at 1–4, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3359707; Brief of Amici Curiae National Black Law Students Ass’n in Support of Respondents at 1, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3130647.

242. See sources cited *supra* note 241.

243. See Annie Ma & Aaron Morrison, *In Student Loan and Affirmative Action Rulings, Advocates Fear Losses for Racial Equality*, ASSOCIATED PRESS (June 14, 2023), <https://apnews.com/article/supreme-court-student-loans-affirmative-action-1d6f123e7a9b6d756bd8235be9522a3b> [<https://perma.cc/RN7H-Y8KY>]; Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205, 213–19 (2023) (arguing, from the perspective of a Black Yale graduate, that affirmative action helps Black students and society as a whole).

244. Jonathan P. Feingold, *Colorblind Capture*, 102 B.U.L. REV. 1949, 1994 (2022); see also *id.* 1957 (explaining how consideration of race helps overcome “the over-representation of white (and often wealthy) students in elite institutions”); *id.* at 1993–2001 (explaining how mere “merit” criteria discriminate against subordinated racial groups).

245. Onwuachi-Willig, *supra* note 1, at 210 (alterations in original) (quoting Devon W. Carbado, Essay, *Footnote 43: Recovering Justice Powell’s Anti-preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1121–22 (2019)); see also *id.* at 210–12 (explaining built-in advantages for White applicants); Feingold, *supra* note 244, at 1957, 1992–2001.

246. See Onwuachi-Willig, *supra* note 1, at 221–22.

247. See *id.* at 223–25.

248. See *id.* at 219.

249. See *id.* at 210–11; see also *id.* at 218–35 (explaining built-in White advantage in admissions); *id.* at 236–43 (explaining how implicit bias disadvantages Black and Hispanic applicants); Feingold, *supra* note 91, at 246, 262–64.

much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities.”²⁵⁰ Maintaining affirmative action serves Black and Hispanic interests.²⁵¹

In summary, the decision to end affirmative action cannot be explained by Black and Hispanic Americans no longer benefitting from race-conscious admission policies. Rather, the *SFFA* decision must be explained by White Americans no longer believing affirmative action is in their best interest, despite the evidence to the contrary. This is discussed in the next Section.

B. THE INTERESTS OF WHITE AMERICANS IN AFFIRMATIVE ACTION IN RELATION TO BLACK AND HISPANIC-AMERICANS

All the evidence and prior jurisprudence points to the conclusion that White Americans benefit from the racially diverse educational environments created by affirmative action. White Americans, and the country, continue to benefit from race-based admissions at universities and no race-neutral alternatives achieve those same benefits. However, perception is quite different from reality, and fear often overrides logic. Both worked together to end affirmative action.

The *perceived* interests of White Americans diverge from minorities because White Americans are concerned about the threat to their societal status due to several changes since the 2003 *Grutter* decision. White Americans believe that demographic and political power shifts are threatening their perch atop the racial hierarchy and are ending support for all types of measures that benefit minorities, including affirmative action.

The year 2008 was pivotal for race relations—or more precisely, White Americans’ perception of race relations. The first dramatic change was the election of the first Black president, Barack Obama. “[S]ome white voters . . . [became] resentful of a Black man ascending to the highest political office.”²⁵² But much more important than the express White backlash against President Obama’s election was the effect his election had on White Americans’ unconscious racial bias. The mere existence of President Obama changed racial attitudes.²⁵³ Rather than usher the United States into

250. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 360 (2023) (Sotomayor, J., dissenting).

251. See Angelica S. Gutierrez, *Harvard and Other Wealthy Schools’ Legacy Admissions Policies Draw Support From People Who Want to Keep a “Racial Hierarchy,” Research Shows*, FORTUNE (July 13, 2023, 5:34 PM), <https://fortune.com/2023/07/13/harvard-legacy-admissions-support-racial-hierarchy-social-dominance-academic-research> [<https://perma.cc/ELU9-GKGT>] (“Policies like affirmative action can level the playing field and increase access to college for historically excluded groups.”).

252. Alex Samuels & Neil Lewis Jr., *How White Victimhood Fuels Republican Politics*, FIVETHIRTYEIGHT (Mar. 21, 2022, 1:19 PM), <https://fivethirtyeight.com/features/how-white-victimhood-fuels-republican-politics> [<https://perma.cc/7ACU-HFLC>].

253. See MICHAEL TESLER, *POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA* 30–32, 40–43 (2016) (arguing that following the election of President Obama, racial considerations have increasingly influenced political decision making).

a post-racial world as hoped, the election of President Obama increased racial resentment.²⁵⁴ The election of a Black president activated dormant, or subconscious, racial attitudes.²⁵⁵

The reason is that shifting power to minorities leads to racial resentment and feelings of injustice by the empowered. As Roger Peterson explained after examining ethnic violence in Eastern Europe, the privileged portion of society feels there is an injustice when it sees power shifting into the hands of a previously subordinated group.²⁵⁶ Using social psychology research, he concluded that a change in the political status between majority and ethnic groups leads to a sense of resentment.²⁵⁷ The majority group believes they deserve to be the dominant force and resent challenges to that position.²⁵⁸

The election of President Obama presented a threatening change to the political and legal status of White Americans. Based on social science research, it is no surprise that before the election of President Obama, White Americans believed there to be some discrimination against White people, but that number rose dramatically by the end of President Obama's first term.²⁵⁹

In the same year as President Obama's election, the United States Census Bureau projected, for the first time, that White Americans would lose their majority status by 2050.²⁶⁰ The mere knowledge of this change in racial demographics made White interests diverge from minority interests. Recent social science research shows that the simple awareness of an impending minority-majority demographic shift greatly impacts White Americans' views of race and racial policies.²⁶¹ "Initial research examining reactions to majority-minority racial demographic shifts revealed

254. See Zack Beauchamp, *White Riot*, Vox (Jan. 20, 2017, 10:18 AM), <https://www.vox.com/2016/9/19/12933072/far-right-white-riot-trump-brexit> [<https://perma.cc/7MFR-VAVH>].

255. See Lee Drutman, *How Race and Identity Became the Central Dividing Line in American Politics*, Vox (Aug. 30, 2016, 10:40 AM), <https://www.vox.com/polyarchy/2016/8/30/12697920/race-dividing-american-politics> [<https://perma.cc/TFD3-QGNX>].

256. See ROGER D. PETERSEN, UNDERSTANDING ETHNIC VIOLENCE: FEAR, HATRED, AND RESENTMENT IN TWENTIETH-CENTURY EASTERN EUROPE 256–70 (2002).

257. *Id.* at 256.

258. See *id.*; see also Lars-Erik Cederman, Andreas Wimmer & Brian Min, *Why Do Ethnic Groups Rebel? New Data and Analysis*, 62 WORLD POLS. 87 (2010) (finding that ethnic violence is likely when majorities start to be excluded from state power).

259. See Samuels & Lewis, *supra* note 252; Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), <https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory> [<https://perma.cc/84AR-NCA4>] ("Obama's election and the strength of the Black electorate that helped him win are central factors in the current tide of white nationalism and voter suppression."); Ezra Klein, *White Threat in a Browning America*, Vox (July 30, 2018, 6:00 AM), <https://www.vox.com/policy-and-politics/2018/7/30/17505406/trump-obama-race-politics-immigration> [<https://perma.cc/5A3P-BALK>] ("Obama himself was a symbol of a changing America, of white America's loss of power . . .").

260. *Minorities Expected to be Majority in 2050*, CNN (Aug. 13, 2008), <https://www.cnn.com/2008/US/08/13/census.minorities/#:~:text=But%20by%202042%2C%20they%20are,reach%20that%20milestone%20even%20sooner> [<https://perma.cc/KYF8-NEGV>]; see also Klein, *supra* note 259 (explaining racial demographic shifts in the United States).

261. See Maureen A. Craig & Jennifer A. Richeson, *On the Precipice of a "Majority-Minority" America: Perceived Status Threat From the Racial Demographic Shift Affects White Americans' Political Ideology*, 25 PSYCH. SCI. 1189, 1189 (2014).

that Whites considering a future White minority perceived the shift as a threat to their racial group's societal status, and this perception led them to express more negative racial attitudes and emotions.²⁶² Mere exposure “to the changing demographics evokes the expression of greater explicit and implicit racial bias” due to the perceived threat to societal status.²⁶³ Knowing about impending demographic shifts increases sympathy among White Americans for other Whites and increases feelings of fear and anger towards minorities.

And it is irrelevant which minority group is growing—Whites retrench against all minority groups. Maria Abscal found that when White participants are exposed to information about Hispanic population growth, they contribute less money to Black Americans.²⁶⁴ When racial demographic shifts occur, “zero sum competition between groups is activated.”²⁶⁵ This directly mirrors the sentiment in the *SFFA* majority that “[c]ollege admissions are zero-sum.”²⁶⁶

This demographic threat to societal status increases resentment against minorities and leads to changing attitudes about government policies.²⁶⁷ “Even gentle, unconscious exposure to reminders that America is diversifying—and particularly to the idea that America is becoming a

262. *Id.* at 1190; *see also* H. Robert Outten, Michael T. Schmitt, Daniel A. Miller & Amber L. Garcia, *Feeling Threatened About the Future: Whites' Emotional Reactions to Anticipated Ethnic Demographic Changes*, 38 PERSONALITY & SOC. PSYCH. BULL. 14, 14–15 (2012) (noting that exposure to demographic change increases fear and anger towards minorities); Jennifer A. Richeson & Maureen A. Craig, *Intra-minority Intergroup Relations in the Twenty-First Century*, 140 DAEDALUS 166, 172 (2011) (noting that demographic shifts make White Americans “acknowledge that they do indeed have a racial group membership and that they should work on behalf of it”); Amy R. Krosch, Suzy J. Park, Jesse Walker & Ari R. Lisner, *The Threat of a Majority-Minority U.S. Alters White Americans' Perception of Race*, 99 J. EXPERIMENTAL SOC. PSYCH. 1, 1 (2022) (“[W]hite people who are made aware of this impending demographic shift experience more anger and fear toward minorities, express more explicit and implicit anti-outgroup attitudes, show greater support for anti-minority policies, donate more to white than minority recipients, and report a greater willingness to move away from diversifying neighborhoods.”).

263. Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans' Racial Attitudes*, 40 PERSONALITY & SOC. PSYCH. BULL. 750, 750 (2014); *see also* Ashley E. Jardina, *Demise of Dominance: Group Threat and the New Relevance of White Identity for American Politics* 4 (2014) (Ph.D. dissertation, University of Michigan), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/109013/ajardina_1.pdf?sequence=1 [<https://perma.cc/XM5F-25EX>] (“When whites perceive their group's dominant status is threatened or their group is unfairly disadvantaged, however, their racial identity may become salient and politically relevant.”).

264. Maria Abascal, *Us and Them: Black-White Relations in the Wake of Hispanic Population Growth*, 80 AM. SOCIO. REV. 789, 789 (2015); *see also* Krosch et al., *supra* note 262, at 1 (summarizing the research regarding White fears of demographic shifts).

265. Brian Resnick, *White Fear of Demographic Change is a Powerful Psychological Force*, Vox (Jan. 28, 2017, 12:30 PM), <https://www.vox.com/science-and-health/2017/1/26/14340542/white-fear-trump-psychology-minority-majority> [<https://perma.cc/J2VV-QMM3>].

266. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 218 (2023); *see also id.* at 272 (Thomas, J., concurring) (discussing the “zero-sum nature of college admissions”).

267. *See* Beuachamp, *supra* note 254; Resnick, *supra* note 265 (noting that the prospect of losing majority status makes White people uneasy, threatened, and fearful); Jardina, *supra* note 263, at 4–5 (“[W]hen whites perceive that their status as the dominant group in the nation is in jeopardy, white racial identity significantly informs their political attitudes.”).

majority-minority nation—pushes whites toward more conservative policy opinions”²⁶⁸ One such policy is affirmative action because it benefits racial minorities. As shown in one study, awareness of racial demographic shifts leads to decreased support for affirmative action from White Americans.²⁶⁹

The combination of the election of President Obama with the news of impending demographic shifts dramatically changed White Americans’ perceptions of Black and Hispanic-Americans, and the policies designed to benefit them. Both Republicans and Democrats’ “warmness” towards Black and Hispanic-Americans decreased significantly after 2008.²⁷⁰ Conversely, feelings of White victimhood rose in the late 2000s.²⁷¹ In short, there was significant White fear—both conscious and unconscious—about the perceived loss of power and status.²⁷² In response, the number of states that banned affirmative action doubled after 2008.²⁷³

The sense of White victimhood continued to rise well after 2008.²⁷⁴ Recent public opinion polling shows that many White Americans see themselves as victims of discrimination *more* than Hispanic or Black Americans.²⁷⁵ Roughly half of White Americans agree that discrimination against White people has become as big of a problem as discrimination against Black Americans.²⁷⁶ “[W]hite Americans say they have seen an increase in discrimination against other whites,” and “at the same time[,] . . . Black and Latino Americans[] have been less discriminated

268. Klein, *supra* note 259.

269. Craig & Richeson, *supra* note 261, at 1191–92; *see also* Resnick, *supra* note 265. This is particularly true when White enrollment at universities drop. Ma & Morrison, *supra* note 243.

270. Beuachamp, *supra* note 254; *see also* Drutman, *supra* note 255.

271. Samuels & Lewis, *supra* note 252.

272. *See* Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022, 6:00 AM), <https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too> [<https://perma.cc/2NRJ-XYQJ>]; Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 22, 2020, 10:41 AM), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914> [<https://perma.cc/B4QF-K97A>] (arguing that there is always White backlash to perceived loss of power and status); Ma & Morrison, *supra* note 243.

273. *See* Dominique J. Baker, *Why Might States Ban Affirmative Action?*, BROOKINGS (Apr. 12, 2019), <https://www.brookings.edu/articles/why-might-states-ban-affirmative-action> [<https://perma.cc/2YZL-HBKV>].

274. *See* Samuels & Lewis, *supra* note 252.

275. *Id.*; Stella Rouse & Shibley Telhami, *Poll Reveals White Americans See an Increase in Discrimination Against Other White People and Less Against Other Racial Groups*, CONVERSATION (July 1, 2022, 8:16 AM), <https://theconversation.com/poll-reveals-white-americans-see-an-increase-in-discrimination-against-other-white-people-and-less-against-other-racial-groups-185278> [<https://perma.cc/8G2N-EGAM>].

276. Samuels & Lewis, *supra* note 252.

against.”²⁷⁷ “[T]hese perceptions persist even in the face of extraordinary evidence to the contrary.”²⁷⁸

To be sure, none of these polls indicate that most White Americans feel discriminated against. But they portend a rising tide of concern over the increasing political power of minorities. White opposition to affirmative action “is indicative of a larger fantasy percolating throughout society: that white Americans, who, on average, stand at the more advantageous end of nearly every racial inequity, are the primary victims of racism.”²⁷⁹

Based on the psychological studies, it is no surprise that by the time of the *SFFA* decision, a significant portion of White Americans no longer perceived affirmative action as a benefit. Affirmative action is viewed by many White Americans as racist against Whites.²⁸⁰ Instead of interest convergence, the *SFFA* decision represents, in the words of Derek Bell, a “silent covenant” or “racial-sacrifice covenant.”²⁸¹ The *SFFA* Court made a policy decision that “sacrifice[d] the freedom interests of blacks to resolve differences of policy making whites.”²⁸² These silent covenants not only harm racial minorities but also disadvantage large groups of Whites. This is precisely the impact of the Court ending affirmative action.

Until White Americans “see people of color ascending to higher political offices and an increasingly multiracial nation as a win for *all* of America,” they will see “these things as a personal attack and view it as a loss of their *own* status at the top of America’s racial hierarchy.”²⁸³ This shift in perception is unlikely to occur because, as social science indicates, White Americans’ changed racial attitudes are an automatic psychological reaction to the times.²⁸⁴ Maureen Craig and Jennifer Richeson, two researchers in the

277. Rouse & Telhami, *supra* note 275; *see also id.* (notably, in 2022, “nearly a third of white Americans say they have seen ‘a lot more’ discrimination against white people in the past five years”). White Americans also now believe that too much attention is paid to race and racial issues. Democratic strategists and pundits “decry what they perceive to be an over-emphasis on race and identity” in order to “win the white working class voters.” Jefferson & Ray, *supra* note 272.

278. Samuels & Lewis, *supra* note 252; *see also* Ayaan Hirsi Ali, *Affirmative Action’s Fatal Flaw*, UNHERD (June 30, 2023), <https://unherd.com/2023/06/affirmative-actions-fatal-flaw> [<https://perma.cc/V997-QVVJ>] (providing data showing how Black Americans are not faring as well as White Americans); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 388–96 (Jackson, J., dissenting) (explaining current racial disparities in the United States).

279. Jayakumar & Kendi, *supra* note 173; *see also* Demsas, *supra* note 221 (explaining how White Americans see affirmative action as a barrier to their success despite significant unearned access to elite institutions that are not based on race—“we accept some forms of unearned advantage but not others”).

280. Lee Bebout, *Trump Tapped Into White Victimhood—Leaving Fertile Ground for White Supremacists*, CONVERSATION (Jan. 6, 2021), <https://theconversation.com/trump-tapped-into-white-victimhood-leaving-fertile-ground-for-white-supremacists-150587> [<https://perma.cc/3AH4-2T6U>]; *see also* Loury & McWhorter, *supra* note 210; Jayakumar & Kendi, *supra* note 173 (“Americans who oppose affirmative action have been misled into believing that the regular admissions metrics are fair for everyone—and that affirmative action is unfair for white and Asian American applicants.”).

281. BELL, *supra* note 234, at 29–30.

282. *Id.* at 38.

283. Samuels & Lewis, *supra* note 252.

284. *See id.*; *see also* Klein, *supra* note 259 (“Change of this magnitude acts on us psychologically”); Resnick, *supra* note 265 (“The point is that people who think of themselves as not prejudiced (and liberal) demonstrate these threat effects”).

field, conclude that increasing diversity will likely not lead to interracial harmony—it “may instead yield intergroup hostility.”²⁸⁵

In summary, White Americans long understood that the diverse educational spaces generated by affirmative action benefitted them. The cases upholding affirmative action were underpinned by this understanding and research shows that those interests continue in full force today. But White Americans now perceive, and fear, that any advantages given to minorities threaten their political and societal power. This perceived threat explains why the interests of White Americans diverge from Hispanic and Black Americans and the outcome of the *SFFA* case. It does not, however, fully explain whether the interests of White Americans converge with the interests of Asian-Americans to end affirmative action, which is the subject of the next Section.

IV. THE INTEREST CONVERGENCE OF WHITE AND ASIAN-AMERICANS

In past affirmative action cases, showing that White, Black, and Hispanic interests converged was sufficient to explain the outcomes because that was the focus of each case. White applicants were the perceived victims of race-conscious admission policies and less qualified Black and Hispanic applicants were the purported beneficiaries.²⁸⁶ The interest convergence equation was simple—if White, Black, and Hispanic interests converged in support of affirmative action, the policies would be upheld. This is precisely what happened until the *SFFA* decision. But the *SFFA* case changed the interest convergence calculus.²⁸⁷ For the first time, Asian-American plaintiffs were the alleged victims of race-conscious admissions and less qualified Black, Hispanic, and White applicants were the purported beneficiaries.²⁸⁸ The interests of Asian-Americans in affirmative action—long ignored by the Court—came to the fore in the *SFFA* case.²⁸⁹

Interest-convergence theory is flipped on its head when applied to White and Asian-Americans. That is because ending affirmative action will reduce Black and Hispanic enrollment at universities but *should* increase Asian-American enrollment. With the perceived Asian-American “cap” or

285. Craig & Richeson, *supra* note 263, at 750–61.

286. See Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 713–14 (2019) (noting that historically, the “common portrayal” and “prevailing narrative” is that affirmative action preferences Black applicants to the detriment of White applicants).

287. See generally *id.* (discussing affirmative action versions based on different beneficiaries and victims).

288. The plaintiff is a group representing Asian-American students, but the Asian-Americans it represented remained anonymous. The organization was founded by long-time opponent of affirmative action, and its front person was Amy Fisher, a White woman who had previously lost her affirmative action challenge at the Supreme Court. For a discussion of the background of *SFFA*, see McClellan, *supra* note 194.

289. See *supra* text accompanying notes 75–76 (as noted above, Justice Alito’s dissent in *Fisher II* was the only decision to note Asian-American interests).

quota²⁹⁰ lifted from university admissions,²⁹¹ Asian-Americans should see a rise in acceptance rates because they “have indisputably attained higher standardized test scores and grades than all other groups, including White Americans.”²⁹² Ending race-conscious admissions policies that discriminated against Asian-Americans was the purported point of the lawsuit.²⁹³

This potential opening of university doors to Asian-Americans threatens White applicants. Maintaining affirmative action made White students the “victims” in relation to Black and Hispanic applicants, but ending affirmative action turns White students into “victims” of admissions processes that focus on objective criteria in relation to Asian-Americans. White applicants were “displaced” by lower credentialed Black and Hispanic applicants under affirmative action, but will now fear being “displaced” by better credentialed Asian-Americans without affirmative action to limit their enrollment numbers. The tables are indeed turned for White Americans.

This Section first analyzes the interests of Asian-Americans in maintaining affirmative action. It explains why Asian-Americans have an interest in maintaining affirmative action despite it slightly impacting their college acceptance rates. The next Section analyzes the White interest in maintaining affirmative action in relation to Asian-Americans. It concludes that, just like with Black and Hispanic-Americans, the *SFFA* outcome serves their interests, but for different reasons.

A. THE INTERESTS OF ASIAN-AMERICANS IN AFFIRMATIVE ACTION

Asian-Americans have a “complicated relationship with affirmative action.”²⁹⁴ The Asian-American population and Asian-American scholars are divided on the subject.²⁹⁵ Polling on the issue is conflicted. In one poll, 63% of Asian-Americans said race and ethnicity should not factor into college admission decisions.²⁹⁶ Another poll indicated that 76% of Asian-Americans oppose making admission decisions based on race.²⁹⁷ But yet another poll shows that 70% of Asian-Americans support affirmative action,²⁹⁸ and many commentators, scholars, and amici in *SFFA* rely

290. See ASIAN ADVANTAGE COLL. CONSULTING, <http://www.asianadvantage.net> [<https://perma.cc/SZQ6-DPK7>] (noting the racial quotas that limit Asian-American admissions).

291. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 298 (2023) (Gorsuch, J., concurring) (noting *SFFA*'s contention that Harvard's admission policies are designed to “limit the number of Asian Americans it admits”).

292. Harpalani, *supra* note 19, at 238.

293. See Complaint at 4–6, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176).

294. Stewart Kwoh & Connie Chung Joe, *How the Supreme Court's Affirmative Action Decision Affects the AAPI Community*, TIME (June 29, 2023, 10:27 AM), <https://time.com/6288939/supreme-court-affirmative-action-aapi-community> [<https://perma.cc/C488-ZCU2>].

295. CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 38; Kwoh & Joe, *supra* note 294; Harpalani, *supra* note 17, at 1383.

296. CARNEVALE, SCHMIDT & STROHL, *supra* note 79, at 23.

297. *82% of All Adults Say College Admissions Shouldn't Consider Race*, *supra* note 204.

298. Jennifer Lee, Janelle Wong & Karthick Ramakrishnan, *Asian Americans Support for Affirmative Action Increased Since 2016*, DATA BITS BLOG (Feb. 4, 2021), <https://aapidata.com/blog/affirmative-action-increase> [<https://perma.cc/L5LW-MCHJ>].

on even different data to conclude that “[t]he reality is that a majority of Asian Americans support affirmative action.”²⁹⁹

The Asian-American civil rights organizations typically support affirmative action, but the “rank-and-file Asian American community organizations have taken the opposite positions on these issues.”³⁰⁰ Asian-American groups have filed amicus briefs in support of affirmative action³⁰¹ and opposed to affirmative action,³⁰² each time the issue has come before the Court.

The differing opinions within Asian American communities on affirmative action is partially due to the complicated difference between affirmative action and negative action. There is significant debate, and confusion, about whether ending affirmative action, but not negative action, will benefit Asian-Americans. I explain the difference between affirmative and negative action in the first Part of this Section. I conclude that Asian-Americans benefit greatly from ending negative action but are harmed from ending affirmative action. In the next Part of the Section, I explain how the Court ended affirmative action but left negative action untouched. I conclude that the *SFFA* decision did not serve the interests of Asian-Americans.

1. Untangling Affirmative Action from Negative Action

Nearly three decades ago, Professor Kang distinguished affirmative action from negative action.³⁰³ Affirmative action policies are designed to improve opportunities for marginalized groups such as Blacks, Hispanics,

299. Kwoh & Chung Joe, *supra* note 294; *see also* Brief of Amici Curiae National Asian Pacific Bar Ass’n et al. in Support of Respondents at 5–7, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108804 (noting that a majority of Asian-Americans support race-conscious admissions and value the benefits of diversity); Jayakumar & Kendi, *supra* note 173 (discussing Asian-Americans’ support for affirmative action); Park, *supra* note 17, at 19 (concluding that support for affirmative action remains “widespread within the Asian American population” and a “majority of the Asian American community recognizes that race-conscious policies continue to benefit both society and our community”); Janelle Wong & Viet Thanh Nguyen, *Affirmative Action Isn’t Hurting Asian Americans. Here’s Why That Myth Survives*, L.A. TIMES (June 14, 2023, 3:05 AM), <https://www.latimes.com/opinion/story/2023-06-14/affirmative-action-supreme-court-harvard-case-asian-americans> [<https://perma.cc/W2SJ-66MG>] (concluding that Asian-Americans support affirmative action); Harpalani, *supra* note 19, at 264 (“Many Asian Americans support affirmative action, at least nominally, if not strongly, but they also believe that favoring White applicants over them is unfair and unjustified.”).

300. Harpalani, *supra* note 195, at 761; *see also* Harpalani, *supra* note 19, at 324.

301. Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 1; Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as Amici Curiae in Support of Respondent at 1–2, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3044833. For a summary of briefs filed by Asian-Americans in prior Supreme Court cases, *see* Harpalani, *supra* note 17, at 1384–85.

302. Brief Amicus Curiae of the Louis D. Brandeis Center for Human Rights Under Law et al. in Support of Petitioner at 1–2, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 291897; Brief of Amici Curiae the Asian American Coalition for Education et al. in Support of Petitioner at 1–2, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2919694; *see also* Harpalani, *supra* note 17, at 1384–85.

303. *See* 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, 3–4 (1996). For a

and Native-Americans in college admissions and other areas.³⁰⁴ These policies may marginally affect Asian-American enrollment, but they do so to aid other marginalized groups, not White Americans.³⁰⁵

The conclusion seems counterintuitive because affirmative action is viewed as admitting less qualified applicants at the expense of more qualified Asian-American applicants.³⁰⁶ But eliminating affirmative action results in only a slight rise in Asian-American students because there are so few Black, Hispanic, and Native-American students under the status quo.³⁰⁷ As Goodwin Liu illustrated, race-conscious university admissions policies have a negligible impact on the admission of Asian-American and White applicants.³⁰⁸ Most importantly, he established that race-conscious admissions do not lead to a disfavoring of Asian-Americans vis-à-vis White applicants.³⁰⁹

Many scholars and Asian-American advocacy groups argue that this marginal impact on admissions is outweighed by the benefits Asian-Americans receive from the diverse educational environments created by affirmative action policies.³¹⁰ The reasons provided boil down to increased cross-cultural competence and academic outcomes.³¹¹ “An established body of work addresses the educational benefits that Asian American students experience from engaging in a diverse student body, and such campus communities are only possible via race-conscious admissions.”³¹² Numerous current and former Asian-American students testified on behalf of Harvard in the *SFFA* case that they benefitted from its affirmative action policy.³¹³ The Asian American Legal Defense and Education Fund similarly argued that Asian-Americans benefit from race-conscious admissions policies and diverse campuses.³¹⁴

The primary benefit Asian-Americans receive is cross-cultural competence. But unlike the White interest in cross-cultural competence, which

discussion of the difference between affirmative action and negative action, see Harpalani, *supra* note 19, at 260–65.

304. Harpalani, *supra* note 19, at 261; *see also* Harpalani, *supra* note 196, at 31–32 (discussing the difference between negative action and affirmative action).

305. *See* Kang, *supra* note 303, at 3.

306. *See, e.g.*, Ilya Somin, *How America’s Growing Diversity Weakens the Case for Racial Preferences in Education*, VOLOKH CONSPIRACY (June 13, 2023, 4:17 PM), <https://reason.com/volokh/2023/06/13/how-americas-growing-diversity-weakens-the-case-for-racial-preferences-in-education> [<https://perma.cc/C6NA-T7G3>] (concluding that affirmative action harms Asian-Americans).

307. *See* Harpalani, *supra* note 196, at 37–38 (describing the “incidental burden” of affirmative action on Asian-Americans).

308. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002); *see also* Harpalani, *supra* note 19, at 324 (“[R]ace-conscious admissions policies have a very small impact on [Asian-American] representation.”).

309. *See* Liu, *supra* note 308, at 1064.

310. *See, e.g.*, Lee, *supra* note 78, at 1491.

311. *See id.* at 1501–03.

312. Park, *supra* note 17, at 18–19; *see also* Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 22–26.

313. *See* McClellan, *supra* note 194, at 30–32 (summarizing testimony at trial).

314. *See* Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 4–26.

assists Whites in navigating a diverse marketplace, Asian-Americans get the benefit of other students understanding them better. “Black and Latino/a students who interacted with students of different races actually had more favorable attitudes toward Asian Americans as college seniors.”³¹⁵ This cross-cultural competence—reduction of stereotypes and increased understanding—is critical during a time of increased anti-Asian-American sentiment in the United States.³¹⁶

Other scholars argue that Asian-Americans should look beyond “self-interest”³¹⁷ and support affirmative action for racial “solidarity.”³¹⁸ As Professor Kang explained, the small benefit of striking down affirmative action to Asian-Americans is not worth the cost to underrepresented minorities.³¹⁹ While admirable, this is not a direct interest for Asian-Americans to maintain affirmative action.

For all of these reasons—marginal decrease in admissions, improved race relations, and benefits to other minority groups—“Asian Americans *should* emphatically support affirmative action.”³²⁰ Professor Park concludes that “there is ultimately interest divergence between the anti-affirmative action movement and the broader Asian American community, wherein the system proposed by the anti-affirmative action movement (i.e., race-neutral admissions) is at odds with the interest of Asian Americans.”³²¹ Instead, Asian-American interests converge with the interests of other minorities to maintain affirmative action.³²²

But identifying Asian-American interests in maintaining affirmative action paints only half the picture. The more harmful admission practices

315. Julie J. Park, *Asian Americans And The Benefits Of Campus Diversity: What The Research Says*, NAT'L COMM'N ON ASIAN AM. & PAC. ISLANDER RSCH. IN EDUC., http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf [<https://perma.cc/FHY9-5DGR>]; see also Harpalani, *supra* note 196, at 40 (arguing that diverse classrooms “break down the perpetual foreigner stereotype—reflecting the hallmark benefit of diversity that *Grutter* put forth”).

316. See generally U.S. COMM'N ON C.R., *THE FEDERAL RESPONSE TO ANTI-ASIAN RACISM IN THE UNITED STATES* (2023), <https://www.usccr.gov/reports/2023/federal-response-anti-asian-racism-united-states> [<https://perma.cc/86SD-RKJS>] (discussing the rise of anti-Asian-American racism).

317. See 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, 129 (1996); see also Harpalani, *supra* note 19, at 308 (“Asian Americans should . . . support affirmative action. Even if that means a slight decrease in the number of Asian Americans at elite universities, it is important for Asian Americans to look ‘[b]eyond self interest.’” (quoting Chin et al., *supra*, at 129)).

318. See Harpalani, *supra* note 196, at 42–43 (arguing that Asian-Americans should support affirmative action for racial “solidarity”).

319. Kang, *supra* note 126.

320. Harpalani, *supra* note 19, at 240 (emphasis added).

321. Park, *supra* note 17, at 18; see also Julie J. Park & Amy Liu, *Interest Convergence or Divergence? A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. HIGHER EDUC. 36, 42 (2014) (same).

322. Lee, *supra* note 78, at 1500; see also *id.* at 1501 (“Asian American interests are more strongly aligned with other people of color in the fight to support race-conscious admissions”); *id.* at 1503 (“[T]here is a common interest between all racial minority groups—including Asian Americans—in learning about and disrupting the vicious legacy of white supremacy and advocating for policies that do just this—policies including race-conscious admissions.”).

are what Professor Kang identified as negative action—admission policies or practices that disadvantage Asian-American applicants in comparison to privileged, White Americans.³²³ He identified “negative action” as the phenomenon where White Americans were more likely to get into elite schools than Asian-Americans despite near identical academic credentials.³²⁴ He explained that “a university could employ affirmative action while simultaneously engaging in negative action against Asian Americans (to the benefit of Whites).”³²⁵

Negative action has a long history that continues today. Asian-Americans have alleged the existence of negative action in college admissions for decades.³²⁶ More recently, Professor Feingold cataloged the allegations made by SFFA (discussed below) to find that Harvard’s “Asian penalty” accrues to the benefits of Whites.³²⁷ He concluded that “affirmative action is not the source of the alleged Asian penalty.”³²⁸ Instead, SFFA’s most “potent charge” was that “Harvard intentionally suppress[ed] Asian admissions to preserve White market share.”³²⁹

Asian-Americans have a strong interest in ending negative action because it “accounts for any discrimination that occurs against Asian Americans.”³³⁰ As Professor Lee explains, “if negative action is remedied in the admissions process, all Asian Americans will directly benefit because they will no longer be subjected to an admissions goal of ‘preserving the traditional White character of an elite institution.’”³³¹ Ending negative action is a clear example of interest divergence from White Americans.³³²

Both negative action and affirmative action were at issue in the Harvard lawsuit, but these issues were conflated by SFFA and, later, the Supreme Court. SFFA’s six counts against Harvard can be summarized as two basic claims: one challenging Harvard’s use of affirmative action and one

323. Kang, *supra* note 303, at 3.

324. *Id.*; see also Adrian Liu, *Affirmative Action & Negative Action: How Jian Li’s Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391, 404 (2008) (describing the phenomenon of negative action); Harpalani, *supra* note 19, at 240 (explaining negative action as discrimination against Asian-Americans in favor of White Americans); LILIANA M. GARCES & OIYAN POON, C.R. PROJECT, ASIAN AMERICANS AND RACE-CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION’S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION 9 (2018) (“[N]egative action takes place when an Asian American applicant would have been admitted had the individual been a white applicant . . .”); Harpalani, *supra* note 19, at 263 (stating that negative action “refers to policies or practices which disadvantage Asian Americans in elite school admissions in comparison specifically to White Americans”).

325. Feingold, *supra* note 286, at 725 (citing Kang, *supra* note 303, at 4).

326. See Harpalani, *supra* note 19, at 267–73.

327. Feingold, *supra* note 286, at 719.

328. *Id.* at 724.

329. *Id.* at 712.

330. Harpalani, *supra* note 19, at 240.

331. Lee, *supra* note 78, at 1503 (quoting William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 610 (2006)).

332. See Park & Liu, *supra* note 321, at 45.

claiming Harvard specifically discriminated against Asian-Americans (negative action).³³³

SFFA linked the negative action claim with the affirmative action claims despite *admitting* that Harvard's affirmative action plan did not lead to discrimination action against Asian-Americans.³³⁴ SFFA essentially argued that affirmative action discriminated against Asian-Americans.³³⁵ Professor Harpalani called it a bait-and-switch—the bait was negative action against Asian-Americans, and the switch was alleging that affirmative action was the cause of the discrimination.³³⁶

Professor Liu describes this as “causation fallacy”—conflating negative action with affirmative action.³³⁷ Treating Asian-Americans as the victims of affirmative action when the harms they suffer are a result of negative action is a longstanding practice in litigation challenging race-based admission practices.³³⁸ SFFA followed this playbook and argued that holistic admissions permit consideration of applicant traits other than objective criteria—standardized test scores and grade point averages.³³⁹ Because Asian-Americans excel on objective measures, the argument goes, affirmative action discriminates against Asian-Americans.³⁴⁰

Conflating affirmative action with negative action serves several purposes. First, it creates an apparent alignment between the interests of White and Asian-Americans—the high achieving applicants being displaced by lower qualified Black and Hispanic applicants. “[B]y conflating affirmative action and negative action, White conservatives have tried to create the illusion that their interests converge with those of Asian Americans.”³⁴¹

The SFFA certainly took advantage of this perceived interest alignment. It strategically aligned the interests of Asian-Americans with the conservative anti-affirmative action movement.³⁴² In the lawsuit, Asian-Americans

333. Feingold, *supra* note 286, at 709–10; *see also* Harpalani, *supra* note 19, at 291 (“By linking the claim of intentional discrimination against Asian Americans (Count I) with claims about the weight and manner in which race is used in holistic admissions (Counts II–IV), SFFA combined allegations of negative action with a challenge to affirmative action.”); Harpalani, *supra* note 196, at 33 (summarizing the SFFA claims).

334. *See* Feingold, *supra* note 286, at 711, 720; *see also id.* at 725 (explaining that even SFFA acknowledges that “Harvard’s affirmative action policy is not the source of Harvard’s negative treatment of Asian Americans”).

335. *See id.* at 709–10; *see also* Harpalani, *supra* note 19, at 265–66; *id.* at 282 (“SFFA devised a comprehensive strategy to link allegations of negative action to challenges of affirmative action. It contends that Harvard’s race-conscious admissions policies, and other evaluations used by admissions reviewers, all discriminate against Asian American applicants.”); Harpalani, *supra* note 17, at 1387.

336. Harpalani, *supra* note 196, at 32–33 (identifying the SFFA strategy as bait and switch between affirmative and negative action).

337. *See* Liu, *supra* note 308, at 1063–64. Professor McClellan explains the recent scholarship regarding causation fallacy in detail. *See* McClellan, *supra* note 194, at 7 n.22.

338. *See* Harpalani, *supra* note 19, at 273–81.

339. *See id.* at 284.

340. *See id.* at 267–73; *see also id.* at 278 (“This is easier to do with holistic admissions policies, where the explicit and implicit biases of admissions reviewers already come into play, than it would be with fixed point systems based on numerical formulas.”).

341. Harpalani, *supra* note 17, at 1390.

342. *See* Lee, *supra* note 78, at 1500–01 (“SFFA’s lawsuit against Harvard presents a situation in which some members of the majority are offering an alignment of their interests with

were “valorized as model minorities and cast as victims of affirmative action[;] . . . this narrative seemingly brought together the interests of white conservatives and Asian Americans and pitted them against other people of color.”³⁴³ This perceived interest convergence made Asian-Americans the poster child of the anti-affirmative action movement.³⁴⁴ But as explained by negative action, “The purported interest-convergence between white conservative opponents of affirmative action and high-achieving Asian Americans is . . . an illusion.”³⁴⁵ It is for this reason that many commentators believed that SFFA simply used Asian-Americans as “pawns” for its conservative anti-affirmative action crusade.³⁴⁶

The second benefit of advancing causation fallacy is that it “obscures the actual beneficiaries of Harvard’s Asian penalty: Harvard’s White students.”³⁴⁷ Professor Feingold explained that the *SFFA* lawsuit is actually about White beneficiaries and Asian-American victims.³⁴⁸ Alleging that affirmative action is the source of decreased Asian-American enrollment hides the “white advantage” or “white bonus” derived from negative action.³⁴⁹ This obfuscation leads Asian-Americans to believe that ending affirmative action is in their best interest, when, in fact, negative action is the primary enemy.

Finally, conflating negative action with affirmative action ensures competition and disharmony between Asian-Americans and other racial minorities rather than acrimony directed at White Americans. When Asian-Americans perceive affirmative action—a policy designed to help underrepresented minorities—as the bogeyman and ignore the real threat of negative action, other minorities are looked at as the enemy rather than White Americans. “The conflation of affirmative action and negative action is part of a larger ideology that sustains America’s racial hierarchy by pitting Asian Americans against other people of color.”³⁵⁰

those of the model minority in order to pursue an anti-civil rights agenda—couched in the name of ‘equality’—of eradicating race-conscious admissions in higher education.”).

343. Harpalani, *supra* note 17, at 1377.

344. Park, *supra* note 17, at 14; Harpalani, *supra* note 17, at 1401; Harpalani, *supra* note 196, at 36 (“[Asian-Americans] were weaponized to dismantle affirmative action.”).

345. Harpalani, *supra* note 17, at 1401.

346. Kang, *supra* note 125; *see also* Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 3; Harpalani, *supra* note 195, at 762 (stating that the SFFA plaintiffs “capitalized” on Asian-American opposition to affirmative action).

347. Feingold, *supra* note 286, at 710 (emphasis omitted); *see also* Lee, *supra* note 78, at 1488 (arguing that SFFA is using Asian-Americans to attack affirmative action, which merely “seek[s] to preserve whiteness as an access card to education”).

348. *See* Feingold, *supra* note 286, at 724 (explaining how the *SFFA* case is really about negative action).

349. *See* Kimberly West-Faulcon, *Obscuring Asian Penalty With Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590, 628 n.151 (2017) (“Scholars have used the term ‘negative action’ to describe what I describe as ‘white advantage.’”); Feingold, *supra* note 286, at 710 (arguing that negative action means White applicants “effectively reap a ‘White bonus’ at the expense of their Asian-American counterparts”).

350. Harpalani, *supra* note 19, at 308.; *see also id.* at 282; Feingold, *supra* note 286, at 710.

The *SFFA* lawsuit is a perfect example of how causation fallacy drives a “harmful wedge” between Asian-Americans and other minority groups.³⁵¹ The lawsuit casts Asian-Americans as the victims of affirmative action with Black and Hispanic Americans as the beneficiaries. “White applicants are, in effect, rendered disinterested witnesses and third-party bystanders to a policy that presumptively pits different groups of color against one [an] other.”³⁵² This pitting of Asian-Americans against other minorities is an “age-old tactic.”³⁵³

Understanding the Asian-American interest in maintaining affirmative action is complicated by the fact that negative action plays such a meaningful role in their admissions process. Asian-Americans have an interest in maintaining affirmative action but an even stronger interest in eliminating negative action. The Court’s conflation of these separate admissions practices—and the resulting harm to Asian-American interests—is discussed in the next Section.

2. *The Court Struck Down Affirmative Action but Left Negative Action Intact*

The *SFFA* decision did not serve Asian-American interests. It ended affirmative action, which benefits Asian-Americans, and left negative action untouched. Both affirmative action and negative action were at issue in the *SFFA* case—at least in the trial and circuit courts. With respect to the affirmative action claims, the trial court ruled that Harvard’s admissions policies were consistent with affirmative action jurisprudence.³⁵⁴ The First Circuit Court of Appeals affirmed.³⁵⁵

With respect to *SFFA*’s negative action claims, the trial court and circuit court found that Harvard did not intentionally discriminate against Asian-Americans.³⁵⁶ The parties, and the courts, recognized that “Harvard’s affirmative action policy [was] not the source of . . . [disparate] treatment

351. Kwoh & Joe, *supra* note 294; *see also* Harpalani, *supra* note 17, at 1364 (explaining that the *SFFA* lawsuit pitted “Asian Americans against Black, Latina/o, and Native American applicants”).

352. Feingold, *supra* note 286, at 719; *see also* Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, *NEW YORKER* (Aug. 8, 2023), <https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access> [<https://perma.cc/2767-KP95>] (explaining that the *SFFA* lawsuit pits Asian-Americans against other minorities).

353. Jayakumar & Kendi, *supra* note 173; *see also* Harpalani, *supra* note 196, at 29 (stating that “conservatives have employed the model minority stereotype to pit Asian Americans against Black, Latina/o, and Native Americans”); Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *POL. & Soc’y* 105, 122 (1999) (noting that, in context of affirmative action, “conservatives have . . . manufactured conflicts between Blacks and Asian Americans”); Wong & Nguyen, *supra* note 299.

354. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 397 F. Supp. 3d 126, 191–201 (D. Mass. 2019), *aff’d sub nom.*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

355. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 980 F.3d 157, 184–95 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

356. *SFFA*, 397 F. Supp. 3d at 201–04; *SFFA*, 980 F.3d at 195–204. For an in-depth discussion of *SFFA*’s allegations of discrimination against Asians (negative action), *see* Harpalani, *supra* note 19, at 286–96; Feingold, *supra* note 286, at 724–27.

of Asian American[] [applicants].”³⁵⁷ Because Harvard’s affirmative action plan did not result in discrimination against Asian-Americans, SFFA produced indirect evidence of intentional discrimination against Asian-Americans for its negative action claim. It relied on statistical and anecdotal evidence—primarily surrounding the lower “personal ratings” Harvard assigned Asian-American applicants—to show that Harvard’s facially neutral admission policies were applied with discriminatory intent.³⁵⁸ The courts rejected these arguments and ruled that Harvard did not intentionally discriminate against Asian-Americans with respect to either White or underrepresented groups.³⁵⁹ While Harvard’s race-neutral policy of considering personal ratings disparately impacted Asian-American applicants, SFFA could not establish that Harvard considered personal ratings for all students with the intent to discriminate.

Most importantly, the trial judge noted that the implicit bias of admission officers likely explained the negative action against Asian applicants.³⁶⁰ But this was not evidence of intent to discriminate.³⁶¹ The trial judge found the “disparity in personal ratings between Asian American and other minority groups is considerably larger than between Asian American and white applicants” and concluded this “might have” been the result of subconscious bias.³⁶² She also noted that it was “possible, although unsupported by any direct evidence” that implicit bias “disadvantaged Asian American applicants in the personal rating relative to white applicants.”³⁶³

In other words, there was insufficient evidence to establish negative action because implicit bias is not actionable³⁶⁴ and there was no evidence of intentional discrimination. The U.S. Court of Appeals for the First Circuit affirmed and adopted the trial court’s conclusion that Harvard did not intentionally discriminate against Asian-Americans.³⁶⁵ It noted that implicit bias against Asian-Americans was “possible” but not likely.³⁶⁶ But

357. Feingold, *supra* note 286, at 725; *see also id.* at 725–27 (explaining the testimony, party arguments, and trial court holding regarding discrimination against Asian-Americans); *SFFA*, 397 F. Supp. 3d at 194–95; *SFFA*, 980 F.3d at 183, 188–95. Professor McClellan explains in detail the statistical battle underlying the findings of non-discrimination. *See* McClellan, *supra* note 194, at 8–12.

358. Feingold, *supra* note 286, at 725–27.

359. *SFFA*, 397 F. Supp. 3d at 203–04. For an in-depth discussion of the trial court ruling, *see* Harpalani, *supra* note 19, at 296–98; Feingold, *supra* note 286, at 725–26. *See also* Harpalani, *supra* note 196, at 30–35.

360. *See SFFA*, 397 F. Supp. 3d at 170–71.

361. *See id.*

362. *Id.* at 171.

363. *Id.*; *see also id.* at 204 (concluding that Harvard could improve its admissions process by conducting implicit bias training).

364. *See* *Washington v. Davis*, 426 U.S. 229, 240–42 (1976) (holding that equal protection applies only to intentional discrimination).

365. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 980 F.3d 157, 203–04 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

366. *Id.* at 203 (noting that even if implicit bias “caused a statistically significant effect” it was not error to find that “there was no ‘intent . . . to discriminate based on racial identity’” (citation omitted)).

“the First Circuit also left open the possibility that Asian Americans were disadvantaged by racial stereotypes.”³⁶⁷

While the lower courts untangled the affirmative action claim from the negative action claim, the Supreme Court conflated them. SFFA focused its attention on overturning affirmative action and essentially dropped its negative action claim at the Supreme Court.³⁶⁸ The Court summarized the long and complex rulings from below as simply concluding that “Harvard’s admission program comported with our precedents on the use of race in college admissions.”³⁶⁹ Justice Thomas was the only Justice in the majority to even acknowledge the claim of racial discrimination against Asian-Americans.³⁷⁰

But the Court conflated the affirmative and negative action findings from the lower courts and adopted the incorrect and unproven narrative that affirmative action harmed Asian-Americans. The Court cherry-picked quotes from the lower courts to conclude that the affirmative action plans impermissibly used race as a “negative” and decreased White and Asian-American enrollment.³⁷¹ This finding is directly contrary to the admissions by SFFA and the factual findings of the trial court, which the Court never examined or found to be clearly erroneous. The Court made no findings or holdings regarding the claims of intentional discrimination against Asian-Americans. It merely struck down affirmative action. “Chief Justice Roberts subtly conflated negative action and affirmative action: he equated the incidental burden motivated by diversity with intentional discrimination motivated by racial animus.”³⁷²

Justice Sotomayor recognized this intentional mixing of claims and supporting evidence in her dissent. She highlighted SFFA’s allegations of intentional discrimination against Asian-Americans “through the use of the personal rating[s].”³⁷³ She agreed that personal ratings were “highly subjective” and “susceptible to stereotyping and bias.”³⁷⁴ But she explained, as did the lower courts, that the use of personal ratings are facially neutral and deferred to the trial court’s factual conclusion that there was no intent to discriminate against Asian-Americans.³⁷⁵ “[T]here was a lengthy trial to test those allegations, which SFFA lost. Justice THOMAS points to no legal or factual error below, precisely because there is none.”³⁷⁶ More importantly

367. Harpalani, *supra* note 19, at 298.

368. See Harpalani, *supra* note 196, at 34 (identifying the intentional discrimination claim as “long gone” and “no longer legally relevant” at the Supreme Court level).

369. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 198 (2023).

370. See *id.* at 271–72 (Thomas, J., concurring).

371. *Id.* at 218 (majority opinion); see also Harpalani, *supra* note 196, at 24 (explaining how the Justices in the majority used the “narrative of Asian Americans as victims of affirmative action”).

372. Harpalani, *supra* note 196, at 35.

373. SFFA, 600 U.S. at 374 (Sotomayor, J., dissenting).

374. *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 980 F.3d 157, 196 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023)).

375. See *id.*

376. *Id.*

for interest convergence analysis, she found that even if there was negative action, “there is no connection between . . . the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process.”³⁷⁷

In sum, the *SFFA* Court ended affirmative action—a practice that may marginally decrease Asian-American enrollment but creates a net benefit³⁷⁸—and left negative action untouched—practices that are clearly against the interests of Asian-Americans. Eliminating affirmative action simply does not remedy the harms of negative action.³⁷⁹ The appropriate remedy for negative action is race-conscious admissions favoring Asian-Americans—the exact opposite of the Court’s holding.³⁸⁰ Therefore, the *SFFA* decision did not benefit Asian-Americans and harmed them by implicitly accepting negative action. Asian-Americans continue to have an interest in maintaining affirmative action, but White Americans do not, particularly with respect to Asian-Americans, which is discussed next.

B. THE INTERESTS OF WHITE AMERICANS IN RELATION TO ASIAN-AMERICANS

Much like the complicated interests of Asian-Americans in affirmative action, the interests of White Americans in maintaining affirmative action vis-à-vis Asian-Americans is nuanced. White Americans *should* want Asian-American diversity on college campuses for the same reason they *should* want Black and Hispanic diversity—it benefits them educationally and socially. But, as noted above, White Americans perceive a threat to their societal status from shifting demographics and political power dynamics, leading to perceived interest divergence. However, unlike the societal hierarchy danger posed by Black and Hispanic Americans, the threat from Asian-Americans is simultaneously heightened and lessened due to stereotypes about Asian-Americans.

In this Section, I first explain why White Americans should support maintaining affirmative action in relation to Asian-Americans. The White interest is less than it is for Black and Hispanic-Americans because Asian-Americans do not need affirmative action to ensure a critical mass that benefits White students. But the interest still exists. I will next explain why White Americans no longer perceive that affirmative action benefits them, particularly with respect to Asian-Americans. This is partly due to threats to White Americans’ societal status but much more is attributable to threats to White students in schools.

377. *Id.*; see also *id.* at 346 n.26.

378. See *id.* at 375–76 (explaining how eliminating considerations of race may harm some Asian-American applicants).

379. See Feingold, *supra* note 286, at 729.

380. See *id.* at 732 (“Rather than colorblindness, a responsive remedy would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA’s discrimination claim.”); see also Feingold, *supra* note 91, at 246.

White Americans should support any policies that ensure a critical mass of Asian-Americans on campus. Asian-American diversity benefits White Americans for the same reasons overall diversity benefits White Americans: improved academic outcomes, increased cross-cultural competence with the fastest-growing minority group,³⁸¹ improved competitive advantage economically and technologically in a global market, and a leadership more legitimate in the eyes of the citizenry.³⁸²

Interest convergence has long played a role in the treatment of Asian-Americans in the United States. Professor Harpalani explains immigration policies, university admission policies, and stereotypes of Asian-Americans through interest-convergence theory.³⁸³ As just one example:

Interest-convergence is equally applicable to the resurgence of immigration from Asian countries to America during the Cold War. The U.S. government needed scientifically trained immigrant professionals from Asian countries to build America's technological infrastructure. The government opened immigration to such professionals when they served the government's interests and then curbed their immigration later.³⁸⁴

The same could be said today for college enrollment. The benefits of increased Asian-American enrollment may even be stronger for White Americans than with respect to other minorities because Asian countries have become the United States' largest trading partners and biggest economic rivals.³⁸⁵ Countries like China, Japan, and South Korea have emerged as global economic powerhouses, fostering technological innovation and efficient production capabilities. The strong economic ties, and competition, with Asian countries elevates the importance of cross-cultural competence with Asians.³⁸⁶

381. See William Frey, *Mapping America's Diversity With the 2020 Census*, BROOKINGS (Sept. 21, 2021), <https://www.brookings.edu/articles/mapping-americas-diversity-with-the-2020-census> [<https://perma.cc/E3SF-BDVS>] (stating that the Asian-American population grew at a rate of 35.6% from 2010–2020).

382. See *supra* Section I.B.

383. See Harpalani, *supra* note 17, at 1361–62; see also Harpalani, *supra* note 196, at 28–29 (same).

384. Harpalani, *supra* note 17, at 1370; see also *id.* at 1374, 1377, 1401 (explaining how interest-convergence theory explains the increase in educated Asian immigrants during the Cold War and less educated Asian immigrants thereafter); *id.* at 1371–72, 1375–76 (explaining historical and interest convergence origins of the model minority stereotype); Harpalani, *supra* note 195, at 764; Harpalani, *supra* note 19, at 246–47 (explaining how the United States needed scientists due to the Cold War so it opened immigration policy to welcome educated Asians).

385. See Dennis Limmer, *Mexico Overtakes China to Become the No. 1 US Trade Partner*, RETAILWIRE (Sept. 5, 2023), <https://retailwire.com/discussion/mexico-overtakes-china-to-become-the-no-1-us-trade-partner> [<https://perma.cc/GF7X-X2LT>]; *Countries & Regions*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions> [<https://perma.cc/MZR4-TAJ5>] (establishing that Japan and China are in the top five of goods suppliers to the United States); *Top Trading Partners—January 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/toppartners.html> [<https://perma.cc/J689-STUW>] (showing that five of the U.S.'s top trading partners are in Asia).

386. See Garda, *White Interest*, *supra* note 11, at 630–36 (explaining the importance of cross-cultural competence in a global marketplace).

But ending affirmative action will have little impact on Asian-American enrollment in higher education. As noted above, eliminating affirmative action will slightly increase Asian-American enrollment. Asian-American enrollment in higher education roughly matches their overall population. Asian-Americans make up around 6% of the nation's population,³⁸⁷ and roughly 6% of the students in secondary and postsecondary institutions.³⁸⁸ They constitute 7% of the enrollment at public, four-year institutions.³⁸⁹ Asian-Americans are “over-represented” at Harvard, where they constitute about 20% of the student population.³⁹⁰

These numbers should not change significantly with the banning of affirmative action. Race-conscious admission policies are unnecessary to maintain a critical mass of Asian-Americans on campus, unlike with Hispanic and Black Americans, because they excel on objective admission criteria. Because universities will likely enroll a critical mass of Asian-Americans with or without affirmative action, White interests were neither advanced nor hindered by the *SFFA* holding.

But this simple analysis does not capture the complicated and nuanced racial hierarchy between White and Asian-Americans. Asian-Americans suffer from a variety of stereotypes that dramatically impact how White Americans perceive them. As Justice Sotomayor noted, “There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society.”³⁹¹ On the one hand, Asian-Americans are looked at as the “model minority.”³⁹² They are “viewed as more educationally and economically successful than other minority groups because of [their] work ethic and perseverance.”³⁹³ The model minority myth has persisted for decades and continues to this day.³⁹⁴

387. See Lindsay M. Monte & Hyon B. Shin, *Broad Diversity of Asian, Native Hawaiian, Pacific Islander Population*, U.S. CENSUS BUREAU (May 25, 2022), <https://www.census.gov/library/stories/2022/05/aanhpi-population-diverse-geographically-dispersed.html> [<https://perma.cc/287J-2HK9>] (Asian-Americans constitute “6.2%” of U.S. population); *Asian-American Health*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://minorityhealth.hhs.gov/asian-american-health> [<https://perma.cc/Q4F5-JYTE>] (stating that Asian-Americans make up 5.7% of U.S. population); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 375 n.39 (Sotomayor, J., dissenting) (stating that Asian-Americans make up 6% of U.S. population).

388. Jane Nam, *AANHPI in Higher Education: Facts and Statistics*, BEST COLLS. (May 3, 2023), <https://www.bestcolleges.com/research/aanhpi-asian-student-statistics> [<https://perma.cc/A63M-PP5J>].

389. *Id.*

390. *SFFA*, 600 U.S. at 222; see also *id.* at 297 (Gorsuch, J., concurring).

391. *Id.* at 375 (Sotomayor, J., dissenting); see also *id.* at 272–74 (Thomas, J., concurring) (discussing historical discrimination against Asian-Americans).

392. See Harpalani, *supra* note 196, at 28–29 (explaining history and impact of the model minority stereotype).

393. Harpalani, *supra* note 19, at 244; see also *id.* at 248 (“Rather than acknowledging structural factors, the model minority attributes the success of Asian Americans to cultural upbringing and work ethic.”); Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 10–11 (explaining how SFFA’s legal argument hinges on the model minority myth); Harpalani, *supra* note 195, at 763.

394. See Lee, *supra* note 78, at 1494–96 (providing a history of the model minority myth); Harpalani, *supra* note 17, at 1371–72, 1375–76 (explaining historical origins of model minority stereotype); Harpalani, *supra* note 19, at 245–49 (same); Feingold, *supra* note 286, at 717

Asian-Americans are also perceived as “passive nerd[s].”³⁹⁵ Under this stereotype, Asian-Americans are viewed as “socially awkward, passive, and lacking in leadership skills.”³⁹⁶

While Asian-Americans are valorized with the model minority stereotype, they are also saddled with the “perpetual foreigner” stereotype.³⁹⁷ They are viewed as “forever foreigners” that are “unassimilable into American culture or ideals.”³⁹⁸ Asian-Americans can never be truly “American” because they are seen as more connected to their ancestral homeland than the United States.³⁹⁹ The United States Commission on Civil Rights recently reported on both the history and continued prevalence of the forever foreigner stereotype.⁴⁰⁰

While these stereotypes seem to contradict, they fit together in what Professor Claire Jean Kim described as racial triangulation.⁴⁰¹ Racial triangulation positions racial groups relative to each other on a scale of relative valorization and civic ostracism.⁴⁰² Asian-Americans are ostracized as perpetual foreigners and simultaneously valorized as model minorities.⁴⁰³

These stereotypes complicate how White Americans perceive their interests in university admission policies vis-à-vis Asian-Americans. The societal threat White Americans perceive from changing political power and racial demographics certainly exists for Asian-Americans much as it does from Black and Hispanic-Americans. This threat is simultaneously heightened due to the “model minority” stereotype and reduced due to the “perpetual foreigner” and “passive nerd” stereotypes. Put another way, White Americans oppose policies that benefit Blacks and Hispanics due

(explaining how Asian-Americans are viewed as “‘superminorities’ whose success is rooted in a culture that prioritizes hard work and education”). Professor Harpalani explains that systemic and historical advantages explain the different outcomes between minority groups and why the model minority stereotype is a myth. *See* Harpalani, *supra* note 19, at 247–48, 312; *see also* Harpalani, *supra* note 196, at 36–37 (explaining why the model minority stereotype is a myth).

395. Harpalani, *supra* note 19, at 260.

396. *Id.*

397. *Id.* at 240; *see also* Harpalani, *supra* note 17, at 1365 (“Asian Americans are not ‘real Americans’ but rather perpetual, menacing foreigners.”); Harpalani, *supra* note 196, at 29–30 (explaining history and impact of the perpetual foreigner stereotype).

398. U.S. COMM’N ON C.R., *supra* note 316, at 37; *see also id.* at 4, 6, 37, 39, 42–43, 213–214, 263 (discussing that Asian-Americans are viewed as perpetual foreigners).

399. *See* Harpalani, *supra* note 19, at 240; *see also id.* at 249–54 (explaining the history of the perpetual foreigner stereotype); Harpalani, *supra* note 17, at 1371–74 (explaining the historical origins of the perpetual foreigner stereotype).

400. *See* U.S. COMM’N ON C.R., *supra* note 316, at 4, 6, 37, 39, 42–43, 213–214, 263 (discussing that Asian-Americans are viewed as perpetual foreigners).

401. *See* Kim, *supra* note 353, at 107. For an in-depth discussion and application of racial triangulation, *see* Jun Xu & Jennifer C. Lee, *The Marginalized “Model” Minority: An Empirical Examination of the Racial Triangulation of Asian Americans*, 91 Soc. FORCES 1363, 1364 (2013); OiYan Poon, Dian Squire, Corinne Kodama & Ajani Byrd, *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. EDUC. RSCH. 469, 473–74 (2016); Harpalani, *supra* note 196, at 28–29; Harpalani, *supra* note 195, at 762–63 (explaining racial triangulation).

402. Kim, *supra* note 353, at 107.

403. *See* Harpalani, *supra* note 19, at 309–10 (explaining racial triangulation theory).

to the threat they pose to White societal status, but view Asian-Americans quite differently in this regard.

But White students have a significant interest in reducing competition with Asian-Americans on college campuses. White students are threatened by the model minority Asian-American presence in schools. This means White Americans should oppose any measures that increase Asian-American enrollment. The elimination of affirmative action will slightly increase Asian-American enrollment, but the retention of negative action ensures that White interests will still be served. Put simply, the *SFFA* outcome nearly perfectly aligns with White interests by permitting schools to maintain the critical mass of Asian-Americans on campus without overwhelming White students. Furthermore, one benefit White Americans receive from this delicate balance is the maintenance of the model minority stereotype, which drives a wedge between Asian-Americans and other racial minorities and helps to maintain White Americans at the top of the societal structure.

1. *The Asian-American Threat to White Americans' Societal Status*

As discussed in Section III.B, demographic shifts and increased minorities in positions of power threaten the societal power of White Americans. This threat decreases White support for policies that benefit minorities, such as affirmative action. But because of stereotypes about Asian-Americans, this societal status threat is quite different than that posed by Black and Hispanic Americans.

Asian-Americans are increasing in population and in positions of power. The Asian-American population is expected to double by 2060, and they are the fastest growing minority in the United States.⁴⁰⁴ Asian-Americans will be the largest immigrant group by the middle of the century, surpassing Hispanics.⁴⁰⁵ And they are becoming more visible in positions of power. In its amicus brief in the *SFFA* case, the Asian American Legal Defense and Education Fund noted,

Congress has the highest ever number of Asian American members, and Vice President Kamala Harris is the first Asian American vice president. In the judicial branch, Presidents Obama and Trump appointed a combined 35 Asian American judges—jumpstarting a significant increase in Asian American representation on the bench that President Biden has continued. And beyond the political arena, the number of Asian American CEOs of Fortune 500 companies has “more than tripled” since 2004, “increasing from 12 to 40 over the same period.”⁴⁰⁶

404. See Klein, *supra* note 259; Frey, *supra* note 381 (explaining that the Asian-American population grew at a rate of 35.6% from 2010–2020); 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/J5ZG-E9L6>] (stating that the Asian-American population doubled between 2000 and 2019 and will double again by 2060).

405. Budiman & Ruiz, *supra* note 404.

406. Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 28–29 (citation omitted).

And while no Asian-American has won the presidency like Barack Obama in 2008, several have run for president: Bobby Jindal, Nikki Haley, Andrew Yang, and Tulsi Gabbard.⁴⁰⁷

This rise in population and power certainly threatens White Americans. Two decades ago Professor Vijay Prashad coined the term “peril of the mind” to explain how Asian-American success is unacceptable to nativism.⁴⁰⁸ The model minority and perpetual foreigner stereotypes work together to both exalt Asian-Americans while at the same time viewing them as “a foreign invading threat.”⁴⁰⁹ “Asian Americans threaten White dominance precisely because of their high academic achievement Due to their educational and occupational success, Asian Americans have often been ‘seen as too competent, too ambitious, [and] too hardworking.’”⁴¹⁰

But these same stereotypes reduce the threat Asian-Americans pose to the societal status of White Americans. Because Asian-Americans are “perpetual foreigners” and “passive nerds” they are perceived as less of a threat to White societal status. Stated crassly, from the White perspective, Asian-Americans will occupy the science, technology, engineering, and math positions necessary to advance the interests of the United States and its corporations, but they will not threaten White societal status or interests in leadership and political power.

Up to this point in time, that perception has proven true. Stereotypes about Asian-Americans have significantly limited their job and leadership opportunities.⁴¹¹ Because Asian-Americans are viewed as passive nerds, they are not looked at as “equipped for leadership positions and other forms of professional advancement”⁴¹² and are “bound to technical positions rather than leadership roles.”⁴¹³ The perpetual foreigner stereotype

407. See Vinay Harpalani, *Racial Stereotypes, Respectability Politics and Running for President: Examining Andrew Yang’s and Barack Obama’s Presidential Bids*, RACE & L. PROFESSOR BLOGS NETWORK (June 14, 2020), <https://lawprofessors.typepad.com/racelawprof/2020/06/racial-stereotypes-respectability-politics-and-running-for-president-examining-andrew-yangs-and-bara.html?fbclid=IwAR257U3b9UcWIXy6VJBnjgXhGrgO8CsdeVWxW274TVZfiSR4vqE2n5vRO84> [<https://perma.cc/UP2F-RMDE>] (discussing history of Asian-Americans running for president); Zohreen Shah, *Nikki Haley’s South Asian Heritage Is Historic Part of Her Presidential Campaign*, ABC NEWS (Feb. 15, 2023, 3:40 PM), <https://abcnews.go.com/Politics/nikki-haleys-south-asian-heritage-historic-part-presidential/story?id=97013821> [<https://perma.cc/FN68-WTDJ>].

408. VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* 107 (2000); see also Harpalani, *supra* note 196, at 30 (discussing the peril of the mind phenomenon at university campuses).

409. Harpalani, *supra* note 19, at 254.

410. *Id.* (alteration in original) (citation omitted); see also GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* 141 (2014):

[T]he model minority fortifies white dominance, or the status quo, but it also poses a challenge to the relationship of majority over minority. The very indices of Asian American “success” can imperil the good order of race relations Asians can work too hard, study overmuch, . . . and thereby . . . “flood” our schools and displace students

411. See Feingold, *supra* note 286, at 717 (stating that Asian-American success in society has “not . . . translated to commensurate levels of representation in positions of privilege and prestige”).

412. Harpalani, *supra* note 19, at 257, 315.

413. *Id.* at 310.

similarly disqualifies Asian-Americans from positions of power and ostracizes them from meaningful political participation.⁴¹⁴

Both stereotypes combined have led to discrimination against Asian-Americans in employment⁴¹⁵ and the exclusion of Asian-Americans from positions of power.⁴¹⁶ Asian-Americans are less likely to obtain high-level professional jobs than White Americans with similar qualifications⁴¹⁷ and are the least likely racial group to be promoted to management.⁴¹⁸ Asian-Americans are the most likely to be hired into high-tech jobs but the least likely to be promoted to executive and management positions.⁴¹⁹ A “bamboo ceiling” prevents Asian-Americans from reaching the highest levels of leadership within their organizations.⁴²⁰

In sum, White Americans perceive a societal status threat from Asian-Americans, but less so than with Black and Hispanic-Americans. Therefore, White Americans should oppose any policies that benefit Asian-Americans, like ending affirmative action. This equation may change in the future as Asian-Americans break the “bamboo ceiling” and gain more positions of power and prestige. The equation is already dramatically different in educational settings.

2. *The Threat of Asian-Americans in Educational Settings*

Any policies that increase the number of Asian-Americans in educational settings threaten White Americans. The peril of the mind works most strongly in educational settings and is highly visible today. The original White flight in primary and secondary school was to avoid integrating with Black and Brown children⁴²¹—the new White flight is to avoid schools with large populations of Asian-Americans.⁴²² “White Americans often move away from school districts once the percentage of Asian Americans

414. See Kim, *supra* note 353, at 106–07; Harpalani, *supra* note 195, at 763.

415. See Harpalani, *supra* note 19, at 314–15.

416. See Xu & Lee, *supra* note 401, at 1364; Poon et al., *supra* note 401, at 473–74.

417. Van C. Tran, Jennifer Lee & Tiffany J. Huang, *Revisiting the Asian Second-Generation Advantage*, 42 *ETHNIC & RACIAL STUD.* 2248, 2266 (2019).

418. Buck Gee & Denise Peck, *Asian Americans Are the Least Likely Group in the U.S. to be Promoted to Management*, *HARV. BUS. REV.* (May 31, 2018), <https://hbr.org/2018/05/asian-americans-are-the-least-likely-group-in-the-u-s-to-be-promoted-to-management> [<https://perma.cc/2XKU-NA9Y>] (“Asian Americans are the forgotten minority in the glass ceiling conversation.”).

419. See BUCK GEE & DENISE PECK, *THE ILLUSION OF ASIAN SUCCESS: SCANT PROGRESS FOR MINORITIES IN CRACKING THE GLASS CEILING FROM 2007–2015*, at 4, <https://aapidata.com/wp-content/uploads/2017/10/TheIllusionofAsianSuccess.pdf> [<https://perma.cc/8NF9-7EHK>].

420. Helen H. Yu, *Revisiting the Bamboo Ceiling: Perceptions from Asian Americans on Experiencing Workplace Discrimination*, 11 *ASIAN AM. J. PSYCH.* 158, 158 (2020).

421. See, e.g., CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 81–138, 181–85 (2004) (describing “white flight” and factors determining parents’ school choice).

422. See Suein Hwang, *The New White Flight*, *WALL ST. J.* (Nov. 19, 2005), <https://www.wsj.com/articles/SB113236377590902105> [<https://perma.cc/45JB-MWDC>] (reporting on the decline of White students in schools with large populations of Asian-Americans); see also Harpalani, *supra* note 19, at 269–73 (explaining concerns at colleges and universities of the rising number of Asian-American students); Harpalani, *supra* note 196, at 39 (discussing the new White flight).

reaches a certain point.”⁴²³ White students do not want to compete with Asian-American students in K-12 education.

The same peril of the mind is apparent on college campuses.⁴²⁴ Universities have been concerned about rising Asian-American enrollment for decades. Professor Harpalani laid out the long history of universities’ concerns over too many Asian-Americans on campus,⁴²⁵ which led to significant backlash against rising enrollment in the 1980s.⁴²⁶ White students continue to react negatively when Asian-American enrollment rises at colleges and universities.⁴²⁷

This peril of the mind—fear of competition against Asian-American students—means the interests of White students are best served by policies that limit Asian-American enrollment. White interests nearly perfectly align with the *SFFA* outcome with respect to Asian-Americans. The Court banned marginally impactful affirmative action but left untouched the negative action practices, which are the true source of White benefit in relation to Asian-Americans in college admissions.⁴²⁸

As noted above, negative action rather than affirmative action is the primary limiting factor of Asian American enrollment. “[M]any admissions factors other than race work to the disadvantage of Asian Americans vis-à-vis White applicants and have a larger effect on Asian American enrollment than affirmative action.”⁴²⁹ Because the *SFFA* decision ignored negative action, universities are free to continue practices that harm Asian-Americans for the benefit of White students.

There is significant evidence that universities will continue negative action to ensure Asian-American enrollment does not increase.⁴³⁰ The reasons are twofold: first, negative action will continue to limit Asian-American enrollment because of the peril of the mind to White Americans and, second, because Asian-Americans are seen as “interlopers in elite White

423. Harpalani, *supra* note 19, at 255; *see also id.* at 255–56 (explaining White flight from schools with high Asian-American populations); Harpalani, *supra* note 195, at 765.

424. *See* Linda Mathews, *When Being Best Isn't Good Enough: Why Yat-pang Au Won't Be Going to Berkeley*, L.A. TIMES (July 19, 1987), <https://www.latimes.com/archives/la-xpm-1987-07-19-tm-4573-story.html> [<https://perma.cc/RV6L-6ML8>] (stating that Asian-Americans “have become victims of their own academic success” and are “viewed as a threat,” and university administrators are “worrying about Caucasians becoming ‘underrepresented’ and about how to curb the decline of white students in the UC system”); *see also* Harpalani, *supra* note 196, at 29–30 (discussing backlash on college campuses to increased Asian-American enrollment).

425. *See* Harpalani, *supra* note 17, at 1378–82.

426. *See* Harpalani, *supra* note 195, at 764–65, 767; Harpalani, *supra* note 196, at 29–31.

427. *See* Harpalani, *supra* note 19, at 256.

428. *See supra* Section IV.A.1.

429. Harpalani, *supra* note 196, at 38; *see also* Kevin Drum, *A Raw Look at Harvard's Affirmative Action for White Kids*, MOTHER JONES (Sept. 23, 2019), <https://www.motherjones.com/kevin-drum/2019/09/a-raw-look-at-harvards-affirmative-action-for-white-kids> [<https://perma.cc/3HNX-V4JT>]; Aaron Mak, *Harvard Isn't Off the Hook*, SLATE (Oct. 3, 2019, 2:18 PM), <https://slate.com/news-and-politics/2019/10/harvard-affirmative-action-case-legacies-athletes-aldc.html> [<https://perma.cc/FHZ3-UQEX>].

430. *See* Michael Poliakoff, *Ending Affirmative Hypocrisy*, FORBES (July 11, 2023, 8:00 AM), <https://www.forbes.com/sites/michaelpoliakoff/2023/07/11/ending-affirmative-hypocrisy/?sh=1e5075ba32d9> [<https://perma.cc/V824-V723>] (identifying the significant discrimination against Asian-Americans at universities).

spaces.”⁴³¹ “Despite the fact that Asian Americans are stereotyped as model minorities, the assumption that they do not belong in elite settings remains prevalent in American society”⁴³² White backlash will almost certainly occur to any rise in Asian-American enrollment—just as it did in the 1980s—and there will be demand to ensure Asian-American enrollments do not rise.

Negative action will continue to occur in multiple ways. First, universities will continue to consider the race of applicants and be implicitly biased against Asian-Americans. While the *SFFA* majority was heavy on its colorblind rhetoric, it required only that universities be colorblind to the racial composition of the class, not to each individual applicant.⁴³³ The continued use of personal ratings infected by implicit bias—noted by the lower courts and Justice Sotomayor—will continue unabated to the detriment of Asian-Americans.⁴³⁴ Asian-Americans’ concerns about implicit bias and other negative actions “should be taken seriously.”⁴³⁵

The second negative action—or White bonus⁴³⁶—that will persist is preferences for recruited athletes, legacies, those on the dean’s interest list (donors), and children of faculty (ALDC).⁴³⁷ Significant research finds that ALDC preferences disproportionately reward White privileged applicants.⁴³⁸ This White bonus is often at the expense of Asian-Americans. As noted above, roughly 70% of ALDC applicants at Harvard are White compared to only about 11% of Asian-Americans.⁴³⁹ From a different angle, four times as many White applicants claimed ALDC status compared to Asian-American applicants, which was the lowest ALDC status of any racial group.⁴⁴⁰ And while ALDCs made up less than 5% of applicants, they constituted around 30% of the admitted class.⁴⁴¹

Legacy preferences, which are used at over 700 universities, undoubtedly benefit White applicants.⁴⁴² At Harvard, White students make up 70% of the legacy applicant pool and are significantly more likely to gain

431. Harpalani, *supra* note 196, at 29.

432. McClellan, *supra* note 194, at 33.

433. *See supra* Section II.A.

434. *See* Harpalani, *supra* note 19, at 320.

435. *See* Harpalani, *supra* note 196, at 38.

436. *See* Harpalani, *supra* note 19, at 240, 240 n.21 (identifying scholars that argue White bonus accounts for “negative action” discrimination against Asian-Americans).

437. *See* Park, *supra* note 17, at 18 (explaining that negative action is occurring at elite universities “via special consideration given to legacies and recruited athletes”).

438. *See, e.g.*, Gorman-Huang & Huang, *supra* note 222, at 128–29; Kang, *supra* note 126.

439. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 359–60 (2023) (Sotomayor, J., dissenting).

440. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 397 F. Supp. 3d 126, 138 n.16 (D. Mass. 2019) (“ALDCs are disproportionately white, with 8% of white applicants being ALDCs compared to 2.7% of African American, 2.2% of Hispanic, and 2% of Asian-American applicants.”), *aff’d sub nom.*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 600 U.S. 181 (2023).

441. *SFFA*, 600 U.S. at 301 (Gorsuch, J., concurring); *id.* at 360 (Sotomayor, J., dissenting).

442. *See* Feingold, *supra* note 286, at 729; Emily Cochrane, Amy Harmon, Anemona Hartocollis & Anna Betts, *The Legacy Dilemma: What to Do About Privileges for the Privileged?*, N.Y. TIMES (July 30, 2023), <https://www.nytimes.com/2023/07/30/us/politics/legacy-admissions-college-alumni.html> [<https://perma.cc/9TE9-PNKU>]; Gersen, *supra* note 352.

admission.⁴⁴³ Admission rates for non-legacies was 6% compared to an admission rate for legacies of 34%.⁴⁴⁴ Data from several elite institutions showed that children of alumni were “four times [more] likely to be admitted [than] other applicants with the same test scores.”⁴⁴⁵ It is no surprise that studies indicate that “those who support legacy admissions do so in part because they want to maintain a racial hierarchy. In this hierarchy, white Americans are the dominant group, and ethnic minorities are subordinates.”⁴⁴⁶

Legacy preferences strongly favor White applicants over Asian-American applicants.⁴⁴⁷ Removing legacy preferences would increase Asian-American admission rates.⁴⁴⁸ The fact SFFA never attacked legacy preferences “reaffirms that its mission has never been about eliminating the vulnerabilities that Asian Americans experience within Harvard’s admissions regime.”⁴⁴⁹

While legacy admission practices are under attack, they will likely persist. Civil rights activists challenged Harvard’s legacy admission policy with the Department of Education under Title VI of the Civil Rights Act of 1964.⁴⁵⁰ But the challenge will likely fail.⁴⁵¹ There are also legislative steps being taken to end legacy admissions,⁴⁵² but they are also unlikely to succeed.⁴⁵³ Through the lens of interest convergence, measures intended to end legacy admissions will almost certainly fail because they would harm the interests of White Americans, particularly vis-à-vis Asian-Americans.

443. Complaint Under Title VI of the Civil Rights Act of 1964 at 2, *Chica Project v. President & Fellows of Harvard Coll.*, U.S. Dep’t of Educ., No. 01-23-2231 (filed July 3, 2023).

444. Onwuachi-Willig, *supra* note 1, at 235.

445. Cochrane et al., *supra* note 442; *see also* Gersen, *supra* note 352 (noting that legacies at Harvard were six times more likely to be admitted).

446. Gutierrez, *supra* note 251.

447. *See* Joshua Grossman, Sabina Tomkins, Lindsay C. Page & Sharad Goel, *The Disparate Impacts of College Admissions Policies on Asian American Applicants* 1, 6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 31527, 2023); *see also* Gorman-Huang & Huang, *supra* note 222, at 128–29.

448. Arcidiacono et al., *supra* note 223, at 5 n.8; *see also* Complaint Under Title VI, *supra* note 443, at 22 (predicting an increase of admission rates of 4–5% for Asian-Americans by elimination of legacy preferences).

449. Feingold, *supra* note 286, at 729.

450. Complaint Under Title VI, *supra* note 443, at 2–5.

451. *See* Gersen, *supra* note 352; Erik Larson & Janet Lorin, *Harvard Legacy Admissions Targeted After Supreme Court Ruling on Affirmative Action*, BLOOMBERG (July 6, 2023), <https://www.bloomberg.com/news/articles/2023-07-03/harvard-legacy-admissions-targeted-in-minority-groups-complaint> [<https://perma.cc/3SWV-JBJT>] (discussing complaint filed with the Department of Education); Stephanie Saul, *Harvard’s Admissions is Challenged for Favoring Children of Alumni*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/03/us/harvard-alumni-children-affirmative-action.html> [<https://perma.cc/FT4P-YT34>] (same).

452. *See* Liam Knox, *Legislating an End to Legacy Preferences*, INSIDE HIGHER ED (Aug. 14, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/08/14/breathing-new-life-legacy-admissions-legislation> [<https://perma.cc/88BP-WFZT>] (highlighting recent state legislation promulgated to end legacy preferences); Chad Marzen, *The Conservative Case Against Legacy Preferences in College and University Admissions*, SYRACUSE L. REV. (forthcoming 2024) (discussing pending federal legislation prohibiting legacy admissions).

453. *See* Gersen, *supra* note 352; Knox, *supra* note 452 (cataloging state legislation aimed at ending legacy preferences but noting skepticism that they will pass).

Recruited athlete preferences also benefit White applicants over Asian-American applicants. Recruited athletes are predominantly White.⁴⁵⁴ A recent study showed that at six Ivy League schools, White students make up 71% of athletes compared to 5% Asian-Americans.⁴⁵⁵ At Harvard, recruited athletes make up 1% of applicants but 10% of the admitted class.⁴⁵⁶ Based on a thorough statistical analysis, one study concluded that “at elite institutions like Harvard and University of North Carolina, well-resourced white students receive considerable cumulative benefits from athletics which do not extend to Asian American applicants.”⁴⁵⁷ Removing preferences for recruited athletes would increase Asian-American admission rates,⁴⁵⁸ but there is no push to do so. Justice Gorsuch implicitly recognized the importance of athletes by concocting methods that would purportedly create a diverse class but “would not require Harvard to end tips for recruited athletes.”⁴⁵⁹

Donor-related admissions also strongly favor White applicants over Asian-American applicants. At Harvard, Whites make up 70% of the donor-related applicants.⁴⁶⁰ In contrast, only 12% of Asian-American applicants are donor-related.⁴⁶¹ Donor-related applicants were seven times more likely to be admitted than non-donor related applicants.⁴⁶² Most telling, White donor-related applicants were almost three times more likely to be admitted than Asian-American donor applicants.⁴⁶³ But this negative action has only small impacts on overall enrollment.

In sum, the Court’s decision to end affirmative action but leave negative action untouched aligns with White interests. As argued by the Asian Legal Defense and Education Fund, “SFFA has brought this case to make it easier for white students to get into the college of their choice.”⁴⁶⁴ Put another way, White interests diverged from the interests of Asian-Americans, which explains why the Court overruled affirmative action but left negative action untouched. There is a strong argument that retaining both affirmative action and negative action would benefit White interests even more, because both decrease Asian-American enrollment and reduce the

454. Onwuachi-Willig, *supra* note 1, at 233–34.

455. Jayakumar et al., *supra* note 173, at 243–44.

456. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 300 n.5 (Gorsuch, J., concurring).

457. Jayakumar et al., *supra* note 173, at 230; *see also id.* at 244 (“The relative advantage of being an athlete as a white applicant is astounding compared to the relative disadvantage for Asian Americans and other ethnic groups.”).

458. Arcidiacono et al., *supra* note 223, at 5 n.8; *see also* Gorman-Huang & Huang, *supra* note 222, at 123 (arguing that Asian-American diversity can only be achieved by eliminating legacy and athletic preferences).

459. *SFFA*, 600 U.S. at 300 (Gorsuch, J., concurring).

460. Complaint Under Title VI, *supra* note 443, at 2.

461. *Id.* at 20 n.88.

462. *Id.* at 15.

463. *Id.* at 21 (explaining that 13% of White students admitted received a donor preference compared to 5% of Asian-American admitted students).

464. Brief of Amici Curiae Asian American Legal Defense, *supra* note 175, at 30; *see also id.* at 11 (arguing that abolishing affirmative action will hurt Asian-Americans but benefit White students); Feingold, *supra* note 286, at 709–10.

peril of the mind. But as explained in the next Section, White Americans benefit by elevating Asian-Americans in educational settings—but not too much.

3. *The White Benefit of Racial Hierarchy*

Marginally increasing Asian-American enrollment by eliminating affirmative action, while ensuring Asian-Americans do not dominate admissions by retaining negative actions, may serve one final White interest—racial hierarchy. Even if ending affirmative action slightly benefits Asian-Americans to the detriment of White Americans, their interests may still align. Any policy outcome that reinforces the model minority stereotype benefits White Americans by ensuring the continued racial hierarchy.

The model minority stereotype of Asian-Americans is far from benign. It has been used historically, and recently, to pit Asian-Americans against other minorities.⁴⁶⁵ The model minority myth is used to drive a wedge between Asian-Americans and other racial minorities by “touting the success of the former in comparison to the latter.”⁴⁶⁶ Indeed, opponents of race-conscious policies have often used the model minority stereotype to argue that other minority groups “simply need to work harder to attain social and economic mobility.”⁴⁶⁷

Professor Lee concludes that the model minority myth “serves as nothing more than legitimizing myth that positions minority groups in opposition to one another and preserves both the benefits and disadvantages of the existing racial hierarchy.”⁴⁶⁸ He continues, “Proponents of the model minority narrative are not interested in challenging and transforming the racial hierarchies in American society; instead, their aim is to preserve them.”⁴⁶⁹

465. See Harpalani, *supra* note 19, at 245–48; Harpalani, *supra* note 196, at 29 (“[C]onservatives have employed the model minority stereotype to pit Asian Americans against Black, Latina/o, and Native Americans.”). The model minority myth is also harmful because it masks intragroup disparities between Asian-Americans. See Lee, *supra* note 78, at 1498–1500; Harpalani, *supra* note 17, at 1376; Harpalani, *supra* note 195, at 763.

466. Lee, *supra* note 78, at 1496; see also Harpalani, *supra* note 195, at 763 (explaining the weaponization of the model minority myth against other minorities); Harpalani, *supra* note 19, at 310–11 (“Conservatives have employed the model minority stereotype to argue that Black Americans, Latina/os, and Native Americans simply need to work harder to attain social and economic mobility, rather than relying on affirmative action and other government policies.”); Feingold, *supra* note 286, at 717 (stating that the “model minority myth facilitates countervailing negative stereotypes about other groups of color”).

467. Harpalani, *supra* note 19, at 310; see also *id.* at 248 (“Rather than acknowledging structural factors, the model minority attributes the success of Asian Americans to cultural upbringing and work ethic.”); Wong & Nguyen, *supra* note 299 (“[T]he model minority stereotype has long been used to undermine demands for equality for all.”); Samuel D. Museus & Peter N. Kiang, *Deconstructing the Model Minority Myth and How It Contributes to the Invisible Minority Reality in Higher Education Research*, 142 *NEW DIRECTIONS INST. RSCH.* 5, 6 (2009).

468. Lee, *supra* note 78, at 1475.

469. *Id.* at 1497; see also *id.* (“[T]he model minority narrative was a tool created by those in positions of privilege and power who are vested in the unjust racial order of America.”); JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL*

By making admissions “colorblind” and focusing more on objective criteria such as test scores and grade point averages, White Americans are more easily able to elevate Asian-Americans as the model minorities. Once race is taken out of the admission equation and Asian-Americans are admitted at increasing rates compared to other minorities, the model minority myth is strengthened. When Black and Hispanic enrollment decline under the new regime and Asian-American enrollment rises or remains the same—as is expected to happen—White Americans have an even stronger argument that the former are simply not working hard enough. The racial division this strengthened model minority stereotype creates serves White interests, particularly in a country where White Americans will soon only be a plurality.

CONCLUSION

The Supreme Court ended affirmative action in higher education because it no longer served the *perceived* interests of White Americans. Every racial group benefits from race-conscious admissions policies, but White Americans fear that policies benefitting minorities threaten the current racial hierarchy, so the practices were ended. But there was one large exception: negative action against Asian-Americans that benefits White students was left intact. The *SFFA* decision re-affirms the accuracy of interest-convergence theory in predicting when empowered Whites will cede power to disempowered minorities. Those interests aligned for decades but had diverged by 2023.

This Article paints a grim picture of race relations in the United States, now and in the future, so I would like to end on a positive note. I cannot provide any hope regarding the cynical but accurate hypothesis underlying interest convergence: “people in power do not assist subordinated people because of altruistic or charitable motives; they do so only when it serves their own group interest.”⁴⁷⁰ Professor Bell’s pessimistic view of the power dynamic that explains race relations has proven too durable, too correct, to refute. This Article is but one more proof point among many.

But White Americans are not locked-in to fearing demographic and political power shifts and forever opposing any policies benefitting minorities from this point forward.⁴⁷¹ An increasingly multiracial country does not have to end in racial retrenchment and strife. It is possible to embrace, rather than fear, the coming demographic and political shifts—though the *SFFA* decision makes it harder. Significant research shows that exposure to different races reduces explicit and implicit racial bias and improves

HIERARCHY AND OPPRESSION 104 (1999) (explaining that the “legitimizing myth[]” of model minorities increases inequality within and between racial groups).

470. Garda, *White Interest*, *supra* note 11, at 604.

471. See Klein, *supra* note 259 (explaining that researchers believe that White fear of demographic shifts may be avoided).

intergroup relations.⁴⁷² Being educated in diverse settings breaks down racial stereotypes, prejudice, and bias and improves racial harmony.⁴⁷³

The Court prevents this from happening in colleges and universities, so it must occur in primary and secondary schools. I have argued elsewhere that White Americans should strenuously pursue racially integrated primary and secondary schools.⁴⁷⁴ That call is becoming even more imperative, but also more challenging.⁴⁷⁵ It is critical that K–12 education policymakers pursue all means necessary—of which there are many—to create racially diverse educational environments to stave off racial anxiety and retrenchment.⁴⁷⁶ Justice Thurgood Marshall’s “fear” in 1974 is even more apt today: “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”⁴⁷⁷

472. See, e.g., Brian Resnick, *These Scientists Can Prove It’s Possible to Reduce Prejudice*, Vox (Apr. 8, 2016, 3:00 PM), <https://www.vox.com/2016/4/7/11380974/reduce-prejudice-science-transgender> [<https://perma.cc/AN9K-GR56>] (summarizing recent showing that face-to-face contact can reduce prejudice); Garda, *White Interest*, *supra* note 11, at 622–29; Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

473. See, e.g., Brief of the American Educational Research Ass’n, *supra* note 80, at 6–16; Brief of American Federation of Teachers, *supra* note 80, at 4–5; Brief of Amici Curiae Deborah Cohen, *supra* note 80, at 8–16; WELLS, FOX & CORDOVA-COBO, *supra* note 72, at 9.

474. Garda, *White Interest*, *supra* note 11, at 646–50.

475. See Alvin Chang, *White America Is Quietly Self-Segregating*, Vox (July 31, 2018), <https://www.vox.com/2017/1/18/14296126/white-segregated-suburb-neighborhood-cartoon> [<https://perma.cc/9537-VAQ2>] (explaining that White Americans are slowly self-segregating from diverse communities).

476. See Garda, *White Interest*, *supra* note 11, at 643–52 (discussing methods to create racially diverse K-12 schools).

477. Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

