

THE NEED FOR AN ASIAN AMERICAN SUPREME COURT JUSTICE

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INTRODUCTION

In her insightful Comment on *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*¹ (hereinafter *SFFA* cases), Dean Angela Onwuachi-Willig critiques Chief Justice Roberts's majority opinion for its "simplistic understanding of race and racism."² She interrogates the "doxa" — the "unexamined cultural beliefs" that structure the majority's narrative on racial experiences.³ Onwuachi-Willig elucidates how Chief Justice Roberts accepts whiteness as a tacit norm and ignores the marginalization of people of color.⁴ She contrasts this with the "fuller" history of American racism brought forth by Justices Sotomayor and Jackson in their dissents.⁵ And she deftly adds to their counternarrative with her own multifaceted analysis, incorporating narrative theory, history, and social science.⁶

Nevertheless, one important aspect of this "fuller" history was missing throughout: the precarious positioning of Asian Americans.⁷ I make

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¹ 143 S. Ct. 2141 (2023).

² Angela Onwuachi-Willig, *The Supreme Court, 2022 Term — Comment: Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 194 (2023).

³ *Id.* (quoting Peter Brooks, *Narrative Transactions — Does the Law Need a Narratology?*, 18 YALE J.L. & HUMANS. 1, 11 (2006)).

⁴ *Id.* at 202.

⁵ *Id.* at 207.

⁶ See generally *id.*

⁷ With some exceptions, I do not use the term "Asian" alone as shorthand for "Asian American," because I believe the "American" part is particularly important to emphasize for a group that has long been regarded as foreign. See generally Vinay Harpalani, *Can "Asians" Truly Be Americans?*, 27 WASH. & LEE J.C.R. & SOC. JUST. 559 (2021) (explaining, for instance, that Asian Americans have faced racism "rooted in the view of Asian Americans as 'perpetual foreigners' — people who can never truly be Americans," *id.* at 563). The exceptions are typically when I refer to animus or discrimination that targets both Asian Americans and nationals of Asian countries together.

I differ from Onwuachi-Willig in that I use "Latina/o" while she prefers "Latinx." See Onwuachi-Willig, *supra* note 2, at 195 n.21. I respect her desire to include individuals who identify outside the gender binary, along with her acknowledgement that "Latinx" is not a perfect choice. *Id.* My choice derives from the unpopularity of "Latinx" among Latina/os themselves. See Luisita Lopez Torregrosa, *Many Latinos Say "Latinx" Offends or Bothers Them. Here's Why.*, NBC NEWS

this observation as an Asian American academic — one who has written extensively about Asian Americans and affirmative action,⁸ sometimes in a very personal manner.⁹ We had an integral role in the cases, particularly in *SFFA v. Harvard*,¹⁰ which spotlighted its Asian American plaintiffs. But although five of the six opinions mentioned us,¹¹ their discussions lacked depth. The opinions did not situate Asian Americans within the broader U.S. racial landscape. They did not capture the complexity of Asian American identity. And they could not give voice to our experiences. What struck me as I read the opinions, and as I reflected on Onwuachi-Willig's analysis, is the need for an Asian American Supreme Court Justice.

The majority opinion, along with the concurrences by Justice Thomas and Justice Gorsuch, did tell a story about us. But it was a cursory, flawed, and shortsighted narrative of Asian Americans as victims of affirmative action. And yet this narrative prevailed, not just legally but rhetorically, because no alternative was presented. Justice Jackson had recused herself in the Harvard case,¹² where Asian Americans were most prominent, so her commentary about us was

(Dec. 14, 2021, 4:35 AM), <https://www.nbcnews.com/think/opinion/many-latinos-say-latinx-offends-or-bothers-them-here-s-ncna1285916> [https://perma.cc/GLJ8-4UFP]. For that reason, the League of United Latin American Citizens (LULAC), which is the oldest Latina/o civil rights organization in the United States, stopped using "Latinx" in its official communications. *Id.* "Latinx" is seen by many as an elitist academic term that does not fit into the traditional structure of Spanish and thus "erases a crucial part of Latin American identity and language, and replaces it with an English word." *Id.* (quoting Editorial, *The "Latinx Community" Doesn't Want to Be Called "Latinx."* *Just Drop It*, *Progressives*, MIA. HERALD (Dec. 7, 2021, 6:34 PM), <https://www.miamiherald.com/opinion/editorials/article256374737.html> [https://perma.cc/TV7H-TW4E]). Nevertheless, my choice is also imperfect, as it does not include people who identify outside of the gender binary and may not be as inclusive of nations where Spanish is not the predominant language, such as Brazil. See Onwuachi-Willig, *supra* note 2, at 195 n.21. Also, as Onwuachi-Willig notes, the term "Latine" is gender-neutral and has a Spanish pronunciation. *Id.*; see also *LATINE Vs. LATINX. What They Mean, Why They Matter*, LATV MEDIA (Aug. 10, 2021), <https://latv.com/latine-vs-latinx> [https://perma.cc/EHY3-3LXE] ("Latine (pronounced la·ti·ne) is a gender-neutral form . . . created by LGBTQIA+, gender non-binary, and feminist communities in Spanish speaking countries. . . . This idea is native to the Spanish language and can be seen in many gender-neutral words like 'estudiante.'"). Some of my Latina/o students have begun to prefer "Latine." If the term gains more traction in progressive Latina/o communities, I will adopt its usage as well.

⁸ See generally, e.g., Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022).

⁹ See generally Vinay Harpalani, *Ambiguity, Ambivalence, and Awakening: A South Asian Becoming "Critically" Aware of Race in America*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 71 (2009) (detailing my personal history as a South Asian American proponent of affirmative action).

¹⁰ See Harpalani, *supra* note 8, at 260.

¹¹ Only Justice Kavanaugh's concurring opinion made no mention of Asian Americans. The majority and other concurring opinions mentioned the term "Asian" 65 times (Chief Justice Roberts, 16; Justice Thomas, 18; Justice Gorsuch, 31), while Justice Sotomayor used it 33 times and Justice Jackson 3 times. See generally Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

¹² *SFFA*, 143 S. Ct. at 2263 n.* (Jackson, J., dissenting) ("Justice JACKSON did not participate in the consideration or decision of [*SFFA v. Harvard*], and issues this opinion with respect to [*SFFA v. UNC*.].")

inherently constrained. As a progressive voice, Justice Sotomayor was essentially triple-teamed and could devote only limited attention to Asian Americans. She gave good rebuttals to specific points, but these were isolated and incomplete. They did not gel effectively into a counternarrative.

When conveying their “fuller” history, Justices Sotomayor and Jackson understandably focused on Black Americans (and to an extent on Latina/os). They probably felt a duty to do so, as they are the voices on the Court for the most marginalized groups. They undertook an important endeavor, as Supreme Court dissents can influence the public sphere, shaping how future legal minds think about issues.¹³ Narratives are inevitably dictated by the experiences and understandings of the narrator, making representation all the more significant. But this is why, in the *SFFA* cases, the “fuller” history for Asian Americans was lost.¹⁴

My Response to Onwuachi-Willig aims to tell that “fuller” history, both to show how the victimhood narrative emerged and to pose a counternarrative — a story of Asian Americans not as victims of affirmative action, but as tools weaponized to dismantle it. While Onwuachi-Willig’s commentary focuses on the racialization of Black and Latina/o peoples and the “raceless” privilege of White people, I add Asian Americans to this explication of American racism. My counternarrative employs an alternative “narrative glue”: a different approach to “the way incidents and events are made to combine in a meaningful story.”¹⁵ And underlying my analysis is the view that an Asian American Justice could most effectively convey this counternarrative.

In Part I, I discuss the missing voice of Asian Americans in the *SFFA* opinions. I consider two questions: (1) What is this missing voice, given the diversity of views among Asian Americans? (2) Does the counternarrative I posit have to be told by an Asian American? Part II gives the historical and social context for understanding competing narratives about Asian Americans and admissions. It discusses the history leading up to the *SFFA* cases and the racial stereotypes that form the doxa for these competing narratives. Part III exposes the victimhood narrative. I illustrate how this narrative emerged from SFFA’s litigation strategy and how the majority and concurring opinions employed it. Part IV lays out the counternarrative: the weaponization of Asian Americans

¹³ See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (providing examples of dissenting opinions that “forecast the future”).

¹⁴ Such erasure is not new — scholars in past and recent times have called for greater attention to the racialization narratives of Asian Americans. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1247–48 (1993) (“[T]raditional civil rights work . . . is inadequate to address fully the needs of Asian Americans.”); Matthew Patrick Shaw, *The Perils of Asian-American Erasure*, 103 B.U. L. REV. ONLINE 140, 144 (2023) (noting that “affirmative action advocates . . . have ourselves to blame for decades of negligence towards . . . the [Asian American] community”).

¹⁵ Onwuachi-Willig, *supra* note 2, at 194 & n.15 (quoting Brooks, *supra* note 3, at 10).

against affirmative action. I consider how an Asian American Justice would be best positioned to deliver many aspects of this counternarrative. The Conclusion looks forward, to emerging admissions controversies where the racial positioning of Asian Americans is key, and where an Asian American voice on the Supreme Court is needed.

I. THE MISSING VOICE OF ASIAN AMERICANS

What exactly do I mean by the need for an Asian American Justice? In one sense it is a rhetorical device — a call to center Asian American identity in a case where we occupied such an important space. But there is tremendous diversity among Asian Americans, including differing views on affirmative action. Whenever the first Asian American Justice is appointed, they may well align with the Court's conservative wing.

Nevertheless, my counternarrative is decidedly pro-affirmative action. It would be part of a dissenting opinion in the *SFFA* cases. One reason for this is my own view: I have long been an ardent defender of race-conscious policies. Beyond that, however, an Asian American Justice concurring with the majority would likely parrot the victimhood narrative. Perhaps this Justice might address additional issues or deviate from the majority's reasoning in some way that specifically implicates Asian Americans.¹⁶ Nevertheless, the novelty here would pale in comparison to what a dissenting opinion would bring. For Asian Americans, the pro-affirmative action voice was the missing voice on the Court.

But must this voice come from an Asian American Justice? Could someone else convey the counternarrative? There are Justices who have been effective in addressing relevant issues and advocating for groups they do not belong to. Justice Sotomayor's opinions, including the one in the *SFFA* cases, have brought forth salient issues for Black Americans. Her dissent in *Utah v. Strieff*¹⁷ was dubbed a "Black Lives Matter manifesto."¹⁸ Similarly, Justice Gorsuch has written opinions which illustrate his knowledge of Native American history and defense of Indigenous sovereignty.¹⁹ Perhaps a current Justice could do something similar for Asian Americans.

There are parts of my weaponization counternarrative that could be told effectively by a Justice who is not Asian American, if they have a

¹⁶ The latter seems especially unlikely, given that Justices voting against affirmative action tend to embrace colorblindness and in the *SFFA* cases, also discounted the meaningfulness of Asian American identity. See *infra* notes 75, 102 and accompanying text.

¹⁷ 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

¹⁸ Imani Gandy, *Sonia Sotomayor: A "Wise Latina" Writes a Wise Dissent*, REWIRE NEWS GRP. (June 24, 2016, 2:25 PM), <https://rewirenewsgroup.com/2016/06/24/sonia-sotomayor-wise-latina-writes-wise-dissent> [https://perma.cc/GRK3-PYM8].

¹⁹ See, e.g., *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641–47 (2023) (Gorsuch, J., concurring) (giving detailed exposition of Native American sovereignty and historical context for the Indian Child Welfare Act).

nuanced knowledge of our history, identity, and experiences.²⁰ However, there are also parts of the counternarrative which I think require an Asian American voice speaking to us and for us. I discuss this throughout Part IV.

II. THE BACKDROP FOR NARRATIVES ABOUT ASIAN AMERICANS AND ELITE ADMISSIONS

Narratives often begin with history, establishing the backdrop for the stories they tell. In their dissents, Justices Sotomayor and Jackson analyzed the historical context for interpreting the Fourteenth Amendment and tied this to sociological data which highlighted current racial inequities.²¹ Justice Jackson also poignantly conveyed the plight of Black Americans through personal narratives of hypothetical applicants.²² As Onwuachi-Willig notes, their opinions established the salience of race in the past and present lives of Black and Latina/o Americans.²³

For Asian Americans, however, this backdrop was lacking. It was Justice Thomas who actually wrote the most about Asian American history. He referenced the Chinese Exclusion Act of 1882, the 1927 school segregation case of *Gong Lum v. Rice*,²⁴ and the internment of Japanese Americans during World War II.²⁵ All are important events, but Justice Thomas stopped there.²⁶ He ignored the more recent, complex history of Asian Americans that laid the foundation for the SFFA cases and the narratives told through them.²⁷ This history is intricately linked to racial stereotypes, as are the cases more generally. But while the majority, concurring, and dissenting opinions mentioned stereotypes, they said little of substance. Chief Justice Roberts, along with Justices Thomas and Gorsuch, merely contended that racial categories are themselves just

²⁰ I know this from personal experience. The professor who taught me the most about South Asian American identity was Dr. Rosane Rocher, Professor Emerita of South Asia Studies at the University of Pennsylvania, who is of Belgian descent.

²¹ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2225–63 (Sotomayor, J., dissenting) (discussing importance of education in addressing American racism from the Emancipation to the present); *id.* at 2263–79 (Jackson, J., dissenting) (“Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations.” *Id.* at 2263.).

²² *Id.* at 2264, 2270–74 (Jackson, J., dissenting).

²³ See Onwuachi-Willig, *supra* note 2, at 225 & n.178 (“[E]liminating affirmative action programs deepens the harms caused by implicit racial biases against Black and Latinx students.” *Id.* at 225.).

²⁴ 275 U.S. 78 (1927).

²⁵ See *SFFA*, 143 S. Ct. at 2199–200 (Thomas, J., concurring).

²⁶ See *id.*

²⁷ See Harpalani, *supra* note 8, at 243–82 (discussing the history of Asian American stereotypes and their involvement in elite university admissions controversies).

stereotypes.²⁸ And although Justice Sotomayor's dissent alluded to the "potent and dehumanizing stereotypes" that Asian Americans face,²⁹ she also did not elaborate.

The substance is especially important here. Onwuachi-Willig shows how racial stereotypes are part of the doxa that structures how narratives are created and understood.³⁰ Taken together and combined with a particular narrative glue, stereotypes give rise to complex racial ideologies.³¹ They can be used to exalt groups and to marginalize them, sometimes simultaneously.

The positioning of Asian Americans in admissions controversies is an exemplar of this process. In her racial triangulation framework, Professor Claire Jean Kim analyzes how Asian Americans are simultaneously valorized as hardworking achievers and ostracized as menacing foreigners, all to promote White supremacy.³² The "model minority" stereotype — the idea that Asian Americans excel academically more than other groups because of our cultural work ethic³³ — is key to our positioning. This stereotype became especially prominent after the Immigration and Nationality Act of 1965,³⁴ which facilitated greater immigration of scientists, engineers, and similar highly educated professionals.³⁵ The United States was then engaged in the Cold War, and it needed such professionals to compete technologically with the Soviet Union.³⁶ At the same time, Asian nations such as China and India had many educated professionals with few opportunities in their homelands.³⁷ The 1965 Act served the interests of both the U.S. government and these professionals. It resulted in a wave of educated Asian immigrants,³⁸ many of whom had the social capital to prime them for

²⁸ See, e.g., *SFFA*, 143 S. Ct. at 2202 (Thomas, J., concurring) ("[A]ll racial categories are little more than stereotypes . . ."); *id.* at 2175 (majority opinion) ("[T]he Harvard and [University of North Carolina (UNC)] admissions programs . . . involve racial stereotyping . . ."); *id.* at 2210 (Gorsuch, J., concurring) (contending that racial categories in university admissions "rest on incoherent" and "irrational stereotypes").

²⁹ *Id.* at 2258 (Sotomayor, J., dissenting).

³⁰ See Onwuachi-Willig, *supra* note 2, at 213 ("The Chief Justice . . . consistently engaged in his own harmful [racial] stereotyping. [H]e assumed that Black and Latinx students largely did not belong at either Harvard or UNC, yet assumed — without any question (not even once) — that Whites and Asian Americans fully earned their spots without any benefits from racial advantage." (footnote omitted)).

³¹ Harpalani, *supra* note 8, at 308 (noting the "importance of viewing racial ideology in a relational manner — through the positioning of all groups together rather than the consideration of each group separately").

³² Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 107 (1999).

³³ Harpalani, *supra* note 8, at 240, 245–49.

³⁴ Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

³⁵ Harpalani, *supra* note 8, at 246–47.

³⁶ *Id.* at 246.

³⁷ *Id.*

³⁸ See Arun Peter Lobo & Joseph J. Salvo, *Changing U.S. Immigration Law and the Occupational Selectivity of Asian Immigrants*, 32 INT'L MIGRATION REV. 737, 737 (1998).

success.³⁹ This wave of immigrants and their children became the high-achieving Asian Americans whose numbers have grown at elite institutions over the last fifty years.⁴⁰ Importantly, there are also many Asian immigrants and Asian Americans who do not fit this profile.⁴¹

Nevertheless, conservatives have employed the model minority stereotype to pit Asian Americans against Black, Latina/o, and Native Americans.⁴² They argue that because Asian Americans worked hard to overcome barriers, these other groups can also do it.⁴³ But this ignores all of our groups' distinct histories and social positions. Highly educated, voluntary immigrants occupy a very different position in America's social hierarchy than people whose ancestors came here forcibly on slave ships (many Black Americans), or who were incorporated through conquest (many Native Americans), or who came here without high levels of skill or education (many Latina/os).⁴⁴ Still, the model minority stereotype is exploited to undermine progressive policies such as affirmative action.⁴⁵ For the SFFA cases, it created a sympathetic context for the narrative of victimhood: hardworking, high-achieving Asian Americans rejected from elite universities in favor of undeserving applicants.

There is also a flipside to the model minority stereotype that SFFA exploited even more. While we are valorized as model minorities, Asian Americans are simultaneously ostracized as "perpetual foreigners" — more tied to our ancestral homelands than to the United States.⁴⁶ We are seen as interlopers in elite White spaces.⁴⁷ As high-achieving Asian American students became visible on elite campuses, there was a backlash in response to our presence.⁴⁸ Asian Americans became viewed as a "peril of the mind" — a threat to White dominance precisely because of our success.⁴⁹ In the early 1980s, White students who felt threatened labeled various campuses with epithets: Massachusetts Institute of Technology became "Made in Taiwan" and University of California, Los Angeles (UCLA) became "University of Caucasians

³⁹ Harpalani, *supra* note 8, at 246.

⁴⁰ See *id.* at 267.

⁴¹ *Id.* at 312–14.

⁴² See *id.* at 248, 310.

⁴³ *Id.*

⁴⁴ See *id.* at 310–12.

⁴⁵ *Id.* at 244–49.

⁴⁶ *Id.* at 249–54. See also Frank H. Wu, *Where Are You Really From?: Asian Americans and the Perpetual Foreigner Syndrome*, 6 C.R.J. 14, 14–17 (2002); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000).

⁴⁷ Harpalani, *supra* note 8, at 249–54.

⁴⁸ *Id.* at 267–73.

⁴⁹ *Id.* at 254–56, 267.

Living Among Asians.”⁵⁰ Asian American students were seen as overly competitive students who raised grading curves.⁵¹

Some university faculty and administrators also made racist comments about the overrepresentation of Asian Americans. Brown’s admissions director allegedly stated that Brown could reduce its class size “by cutting the first ten Kims off the top of the list.”⁵² And at Princeton, a professor recalled an admissions committee discussion of a “clearly qualified Asian-American student” where one committee member stated “[w]e have enough of them” and another concurred that “[y]ou have to admit, there are a lot.”⁵³

In the mid-1980s, a study at Princeton also found that while Asian American applicants had higher grades and test scores than other groups, they were rated lower on personal characteristics.⁵⁴ Similarly, an investigation at Stanford found that unconscious biases in the evaluation of personality traits might work against Asian American applicants.⁵⁵ Both of these studies concluded there was no intentional discrimination,⁵⁶ but their findings reflected another stereotype of Asian Americans: that we are passive and socially inept.⁵⁷ Over three decades later, the SFFA litigation would bring forth a similar controversy over Harvard’s ratings of personal characteristics.⁵⁸

In this context, suspicions arose that elite universities might be engaging in “negative action”: discrimination against Asian American applicants in favor of White applicants.⁵⁹ Asian American activists, including supporters of affirmative action, raised the issue of negative action in the media.⁶⁰ Some compared this alleged discrimination to the

⁵⁰ *Id.* at 267; DANA Y. TAKAGI, THE RETREAT FROM RACE 60 (1992).

⁵¹ Harpalani, *supra* note 8, at 256.

⁵² TAKAGI, *supra* note 50, at 65. Another Brown admissions director later stated that Asian Americans had a “justifiable sense of concern” about discrimination in the admissions process. Julie Johnson, *Wider Door at Top Colleges Sought by Asian-Americans*, N.Y. TIMES (Sept. 9, 1989), <https://www.nytimes.com/1989/09/09/us/wider-door-at-top-colleges-sought-by-asian-americans.html> [<https://perma.cc/Q3XX-ZT4K>].

⁵³ Michael Winerip, *Asian-Americans Question Ivy League’s Entry Policies*, N.Y. TIMES (May 30, 1985), <https://www.nytimes.com/1985/05/30/nyregion/asian-americans-question-ivy-league-s-entry-policies.html> [<https://perma.cc/T666-FJK6>].

⁵⁴ *See id.*

⁵⁵ *See* TAKAGI, *supra* note 50, at 66–67.

⁵⁶ *Id.* at 66; *see also* Winerip, *supra* note 53.

⁵⁷ Harpalani, *supra* note 8, at 257–60.

⁵⁸ *Id.* at 292.

⁵⁹ Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (defining “negative action” as “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison”).

⁶⁰ See, e.g., Robert Lindsey, *Colleges Accused of Bias to Stem Asians’ Gains*, N.Y. TIMES (Jan. 19, 1987), <https://www.nytimes.com/1987/01/19/us/colleges-accused-of-bias-to-stem-asians-gains.html> [<https://perma.cc/J59U-SYRV>] (“Henry Der, executive director of Chinese for Affirmative Action . . . said, ‘There is a perception growing around the country that [Asian Americans] are somehow squeezing the university systems, that Asians are cutthroat students

animus that Jewish students faced at elite universities in the early and mid-twentieth century.⁶¹ The Department of Education Office of Civil Rights (OCR) investigated allegations of negative action, finding that UCLA had discriminated against five students of Asian descent in 1987 and 1988.⁶² And while Harvard was cleared of discrimination, SFFA would later claim that the OCR investigation of Harvard was “roundly criticized.”⁶³

This history is significant for the SFFA cases, and distinguishing negative action from affirmative action is key. The latter refers to policies intended to increase presence of underrepresented groups, not to favor White Americans.⁶⁴ Nevertheless, in the 1990s, opponents of affirmative action blurred this distinction, as they began challenging race-conscious policies.⁶⁵ In 2003, twenty-five years after the Supreme Court’s decision in *Regents of the University of California v. Bakke*,⁶⁶ race-conscious admissions again reached the Court. The opinions in *Gratz v. Bollinger*⁶⁷ and *Grutter v. Bollinger*⁶⁸ did not discuss Asian Americans,⁶⁹ and neither did the majority opinions in *Fisher v.*

What I see evolving among academicians, among administrators, among admissions officers . . . is a growing uneasiness that as a disproportionate number of Asians get admission to the system they are creating an imbalance and there should be quotas.”).

⁶¹ *Id.* (“Ling-chi Wang, an associate professor of Asian-American studies at the University of California [Berkeley] . . . said . . . ‘I don’t want to say it was a conspiracy, but I think all of the elite universities in America suddenly realized they had what used to be called a ‘Jewish problem’ before World War II, and they began to look for ways of slowing down the admissions of Asians . . .’”). Professor Wang was also a founder of Chinese for Affirmative Action. See Ling-chi Wang, ASIAN AM. & ASIAN DIASPORA STUD., DEP’T OF ETHNIC STUD., U.C. BERKELEY, <https://aaads.berkeley.edu/faculty/ling-chi-wang> [<https://perma.cc/5UM4-YNUN>]. SFFA would later employ this analogy between anti-Jewish and anti-Asian discrimination. See Harpalani, *supra* note 8, at 286, 288. Justices Thomas and Gorsuch would also reference it in their SFFA concurrences. See *infra* note 100 and accompanying text.

⁶² TAKAGI, *supra* note 50, at 161–66.

⁶³ Complaint at 37, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176).

⁶⁴ It is worth reiterating that Asian American activists who spoke out against negative action in the 1980s also supported affirmative action. See, e.g., *supra* notes 60–61 and accompanying text.

⁶⁵ See TAKAGI, *supra* note 50, at 103–04.

⁶⁶ 438 U.S. 265 (1978) (striking down special program which reserved set number of seats for underrepresented applicants but upholding use of race as an individualized “plus” factor in admissions).

⁶⁷ 539 U.S. 244 (2003) (finding that the University of Michigan College of Literature, Science, and the Arts’s admissions policy, which awarded a fixed number of points to underrepresented minority applications, violated the Equal Protection Clause).

⁶⁸ 539 U.S. 306 (2003) (upholding the University of Michigan Law School’s admissions policy, which used race as one flexible “plus” factor on an individualized basis).

⁶⁹ *Gratz* mentioned the term “Asian” only three times, all in Justice Ginsburg’s dissent. See 539 U.S. at 299 nn.2–3 (Ginsburg, J., dissenting). The term appeared in *Grutter* only three times — once in Justice O’Connor’s majority opinion, 539 U.S. at 319; once in Justice Thomas’s opinion, *id.* at 375 (Thomas, J., concurring in part and dissenting in part); and once in Chief Justice Rehnquist’s dissent, *id.* at 382 (Rehnquist, C.J., dissenting). All of these mentions referenced basic comparisons between racial groups, rather than any specific points about Asian Americans.

*University of Texas at Austin I*⁷⁰ and *II*.⁷¹ However, Justice Alito's dissent in *Fisher II* began to create a judicial narrative of Asian American victimhood.⁷² Justice Alito claimed that the University of Texas at Austin (UT) admissions policy discriminated against Asian Americans and found this "particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education."⁷³ He further contended that UT did not value Asian Americans' contributions to diversity,⁷⁴ and he criticized the notion of Asian American as a category and identity⁷⁵ — portending another issue in the SFFA cases.⁷⁶

All of this laid the groundwork for SFFA's strategy. The conflation of negative action and affirmative action culminated in the SFFA cases and undergirded the narrative of Asian American victimhood.

III. THE ASIAN AMERICAN VICTIMHOOD NARRATIVE

The victimhood narrative began with SFFA's "bait-and-switch" litigation strategy.⁷⁷ SFFA exploited the sympathies generated by alleged negative action against high-achieving Asian Americans.⁷⁸ It transferred these sympathies to its attack on affirmative action. The SFFA plaintiffs were anonymous, but at least one was an Asian American who was rejected by Harvard.⁷⁹ The first claim in SFFA's complaint was solely one of negative action: that Harvard intentionally disfavored Asian Americans in comparison to White Americans.⁸⁰ This claim never had much chance of success, because Harvard denied intentional discrimination and SFFA had the high burden to prove it.⁸¹

⁷⁰ 570 U.S. 297, 314–15 (2013) (remanding case for proper application of strict scrutiny). *Fisher I* only had five mentions of "Asian," all in Justice Thomas's concurrence. *See id.* at 331–32 (Thomas, J., concurring). All of these mentions merely discussed differences in academic performance between racial groups.

⁷¹ 136 S. Ct. 2198 (2016) (upholding the University of Texas at Austin's admissions policy).

⁷² *Fisher II* had 61 references to "Asian," 58 of which were in Justice Alito's dissent. *See id.*

⁷³ *Id.* at 2228 (Alito, J., dissenting).

⁷⁴ *Id.* at 2227 (contending "that classroom diversity [at UT] was more lacking for students classified as Asian-American than for those classified as Hispanic").

⁷⁵ *Id.* at 2229 (critiquing UT because "students [UT] labeled 'Asian American[]' . . . seemingly include 'individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population'" (citation omitted) (quoting Brief for the Asian American Legal Foundation and the Judicial Education Project as *Amicus Curiae* in Support of Petitioner at 28, *Fisher I*, 570 U.S. 297 (No. 11-345))).

⁷⁶ *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2210 (2023) (Gorsuch, J., concurring).

⁷⁷ Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, U. PITTR. CTR. FOR C.R. & RACIAL JUST.: RACE RTS. & THE L. BLOG (June 6, 2023, 6:13 PM), <https://www.civilrights.pitt.edu/asian-americans-and-bait-and-switch-attack-affirmative-action-vinay-harpalani> [<https://perma.cc/WMP5-9BQT>].

⁷⁸ *See id.*

⁷⁹ Complaint, *supra* note 63, at 8.

⁸⁰ Harpalani, *supra* note 8, at 284.

⁸¹ *Id.* at 284–85.

Nevertheless, the first claim was the bait. SFFA showed that admitted Asian American applicants had higher academic credentials than admitted White applicants.⁸² It revealed the many facets of Harvard's admissions process that did disfavor Asian Americans.⁸³ It selectively quoted stereotypical comments, and through statistical modeling, SFFA also showed that Asian Americans were rated lower than all other applicants on Harvard's personal rating — a score given by admissions reviewers that assesses characteristics such as "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit."⁸⁴ This harkened back to the admissions controversies of the 1980s, where Asian Americans were stereotyped as lacking in these same characteristics.

Although these findings may be problematic, none of them prove intentional discrimination. But they did help create a narrative of Asian American victimhood, which seeped into the second claim.

That claim was the switch: a straight challenge to affirmative action.⁸⁵ SFFA claimed that Harvard used race-conscious admissions in an unconstitutional manner that penalizes Asian Americans. And since Harvard admitted to using a race-conscious admissions policy, the courts applied strict scrutiny.⁸⁶ Harvard bore the burden to show that its policy was narrowly tailored to its compelling interest in diversity.

SFFA's requested remedy was to remove all references to race from applications. Doing so could eliminate negative action and affirmative action, since both require knowledge of an applicant's race.⁸⁷ But importantly, SFFA later changed this position and focused solely on affirmative action.⁸⁸

SFFA lost on both claims in the lower courts.⁸⁹ However, in the Harvard case, the district court noted that "the disparity between white

⁸² *Id.* at 291.

⁸³ *Id.*; see also Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 620–21 (2017); Jonathan P. Feingold, SFFA v. Harvard: *How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 721–23 (2019).

⁸⁴ Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 141 (D. Mass. 2019), *overruled by* 143 S. Ct. 2141 (2023). The district court also noted that "[t]he personal rating criteria, perhaps in response to this lawsuit, were overhauled for the class of 2023, and . . . encourage admissions officers to consider 'qualities of character' such as 'courage in the face of seemingly insurmountable obstacles,' 'leadership,' 'maturity,' 'genuineness, selflessness[,] humility,' 'resiliency,' 'judgment,' 'citizenship,' and 'spirit and camaraderie with peers.'" *Id.*

⁸⁵ See Complaint, *supra* note 63, at 107–19.

⁸⁶ *Harvard*, 397 F. Supp. 3d at 189.

⁸⁷ See Complaint, *supra* note 63, at 119 (seeking "[a] permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission").

⁸⁸ See Transcript of Oral Argument at 7–10, *SFFA*, 143 S. Ct. 2141 (No. 20-1199), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_b17a.pdf [<https://perma.cc/8CWW-HRNY>] (statement of SFFA counsel Cameron Norris) (conceding that applicants can discuss racial discrimination they faced in personal essays).

⁸⁹ *Harvard*, 397 F. Supp. 3d at 204; Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 667 (M.D.N.C. 2021).

and Asian American applicants' personal ratings has not been fully and satisfactorily explained."⁹⁰ It rejected intentional discrimination as the cause, but it mentioned the possibility of implicit bias against Asian Americans.⁹¹ SFFA appealed the court's ruling on this basis, arguing that Harvard bore the burden to explain Asian Americans' lower scores on the personal rating.⁹² This argument was inconsistent with precedent, and the First Circuit soundly rejected it.⁹³

At the Supreme Court, SFFA argued foremost that *Grutter* should be overturned.⁹⁴ It folded in the argument that "Harvard penalizes Asian Americans" via the personal rating,⁹⁵ but its negative action claim was long gone. And SFFA now conceded that applicants could reveal their racial identities through essays, thus eschewing its own remedy for negative action.⁹⁶

Ultimately, the Court adopted many of SFFA's arguments. The majority and concurring opinions did not address negative action directly, as it was no longer legally relevant. However, Chief Justice Roberts, along with Justices Thomas and Gorsuch, adopted the Asian American victimhood narrative. The majority opinion asserted that race was a "negative factor" for Asian Americans because "the District Court [which ruled for Harvard] observed that Harvard's . . . [race-conscious policy] overall results in fewer Asian American[s] . . . being admitted."⁹⁷ It noted that "[c]ollege admissions are zero-sum" because percentages add up to one hundred: an advantage that increases the percentage of one group will necessarily decrease the percentage of another.⁹⁸ Asian

⁹⁰ *Harvard*, 397 F. Supp. 3d at 171.

⁹¹ *Id.* ("It is . . . possible, although unsupported by any direct evidence . . . that . . . implicit biases . . . disadvantaged Asian American applicants in the personal rating relative to white applicants . . .").

⁹² Brief of Appellant Students for Fair Admissions, Inc. at 27, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (arguing that because the district court "could not rule out . . . 'overt discrimination or implicit bias at work to the disadvantage of Asian American applicants,'" Harvard had not satisfied this burden under strict scrutiny (quoting *Harvard*, 397 F. Supp. 3d at 194)).

⁹³ *Harvard*, 980 F.3d 157 at 203.

⁹⁴ See Brief for Petitioner at 49, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707).

⁹⁵ *Id.* at 73; see also *id.* at 72–75. Harvard's personal rating did not come up in the majority opinion, although Justice Sotomayor's dissent discussed it. *SFFA*, 143 S. Ct. at 2257–58 (Sotomayor, J., dissenting). The majority opinion did note that at UNC, "underrepresented minority students were 'more likely to score [highly] on their personal ratings than their white and Asian American peers.'" *Id.* at 2155 (majority opinion) (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 616 (M.D.N.C. 2021)).

⁹⁶ See Transcript of Oral Argument, *supra* note 88, at 7–10.

⁹⁷ *SFFA*, 143 S. Ct. at 2168–69.

⁹⁸ *Id.* at 2169. Justice Thomas made a similar point. *Id.* at 2199 n.9 (Thomas, J., concurring) ("In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way . . . has discriminated based on race to the benefit of some races and the detriment of others.").

Americans were thus harmed by any boost in Black and Latina/o enrollment due to affirmative action.

But while Chief Justice Roberts showed that he could do basic math, he eschewed precedent. As Justice Sotomayor pointed out, in *Grutter* and *Fisher I* and *II*, the Court affirmed race-conscious policies that had a similar effect on the percentages of different groups.⁹⁹ 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. And by calling race a “negative factor” for Asian Americans, the majority portrayed us as victims of affirmative action.

Justices Thomas and Gorsuch reinforced the victimhood narrative. They both referenced Harvard’s history of discrimination against Jewish applicants, analogizing it to holistic review for Asian American applicants.¹⁰⁰ Justice Gorsuch noted that college counselors advise Asian Americans to hide their racial identities on applications.¹⁰¹ He also contended that universities engage in stereotyping by grouping together “East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi) . . . [which] . . . paves over countless differences in ‘language,’ ‘culture,’ and historical experience.”¹⁰²

In response, Justice Sotomayor reiterated that the lower courts had rejected claims of negative action.¹⁰³ She rebuked Justice Gorsuch by pointing out that “Asian American activists — mostly college students” coined the term “Asian American” to unify groups with common experiences.¹⁰⁴ Justice Sotomayor also noted that SFFA’s remedy did not address potential biases against Asian Americans in the personal rating score or elsewhere.¹⁰⁵ Both she and Justice Jackson underscored that Asian Americans can sometimes benefit from race-conscious admissions.¹⁰⁶

But despite their solid points of rebuttal, Justices Sotomayor and Jackson could not synthesize a counternarrative to Asian American

⁹⁹ *Id.* at 2243 n.28 (Sotomayor, J., dissenting) (“[A]bsent the consideration of race, [Asian American] representation would increase from 24% to 27%. . . . [S]uch an impact from the use of race . . . is consistent with the impact that this Court’s precedents have tolerated.”(quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 191 n.29 (1st Cir. 2020))).

¹⁰⁰ *Id.* at 2191, 2193, 2201 (Thomas, J., concurring); *id.* at 2214 (Gorsuch, J., concurring).

¹⁰¹ *Id.* at 2211–12 (Gorsuch, J., concurring).

¹⁰² *Id.* at 2210 (quoting Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner at 5, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707)). Ironically, Justice Gorsuch himself stereotyped Asian Americans as perpetual foreigners here. See *infra* notes 135–36 and accompanying text.

¹⁰³ *SFFA*, 143 S. Ct. at 2257–58 (Sotomayor, J., dissenting).

¹⁰⁴ *Id.* at 2254 n.36.

¹⁰⁵ *Id.* at 2258 (“[E]ven assuming . . . that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and . . . ending the limited use of race in the entire admissions process.”).

¹⁰⁶ *Id.*; *id.* at 2272 n.83 (Jackson, J., dissenting).

victimhood. Their assertions, while valid, were largely isolated and did not fit together into an alternative story. They could not dispute that if Harvard stopped using race, the overall enrollment of Asian Americans would increase.¹⁰⁷ Chief Justice Roberts, and Justices Thomas and Gorsuch, mischaracterized that incidental burden with inapplicable referents to negative action.¹⁰⁸ And overall, the majority and concurring opinions simply devoted more space to Asian Americans.¹⁰⁹ The victimhood narrative prevailed in the *SFFA* cases, not only in the legal sense, but in the way that Asian Americans were portrayed.

IV. THE COUNTERNARRATIVE: ASIAN AMERICAN WEAPONIZATION

What might such a counternarrative to Asian American victimhood look like? And how might an Asian American Justice write a dissent that embodies it? Rather than casting us as victims, it would show how we were weaponized to dismantle affirmative action. It would also address the plethora of issues about Asian American identity and experiences that were ignored or covered only superficially in the *SFFA* opinions.

Such a dissent could be organized in various ways. Like all of the other opinions, it would address other issues not directly related to Asian Americans. The weaponization counternarrative might be interspersed within these other issues, but the analysis of Asian Americans' racial positioning would be far more prominent and in-depth. I envision four aspects to this counternarrative.

A. Origins of the Victimhood Narrative

First, the counternarrative would lay out the social and historical context for the victimhood narrative. Analogous to Justice Sotomayor's and Justice Jackson's "fuller" history, it would delve into the history of discrimination that Asian Americans have faced. But unlike Justice Thomas's opinion, it would go beyond World War II. It would describe the role of selective immigration policy in facilitating Asian American achievement. It would debunk the model minority stereotype by noting that many Asian Americans have structural advantages that other

¹⁰⁷ See *id.* at 2243 n.28 (Sotomayor, J., dissenting).

¹⁰⁸ See *supra* notes 87–94 and accompanying text. For an analysis of the incidental burden of affirmative action on White and Asian Americans, see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) ("[T]he perceived unfairness [of affirmative action] is more exaggerated than real. The perception is a distortion of statistical truth, premised on an error in logic. There is strong evidence . . . that minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action. But that fact provides no logical basis to infer that white applicants [and by extension, Asian American applicants] would stand a much better chance of admission in the absence of affirmative action.").

¹⁰⁹ See *supra* note 11.

groups of color often lack.¹¹⁰ The counternarrative would also discuss psychological advantages Asian Americans may possess, relative to other groups. Onwuachi-Willig discusses research on “stereotype threat,” where invocation of stereotypes can diminish academic performance of Black students.¹¹¹ Similarly, Asian American scholars have described “stereotype promise”—where the stereotype of Asian Americans as high achievers “can enhance . . . performance” and become a “self-fulfilling prophecy.”¹¹²

Continuing this “fuller” history, the counternarrative would discuss backlash to Asian American presence on elite campuses, allegations of negative action, and the transformation of these allegations into attacks on affirmative action.¹¹³ It would call out SFFA’s bait-and-switch litigation by clearly distinguishing between the negative action and affirmative action claims and explaining how SFFA conflated the two.¹¹⁴ It would also point out how SFFA changed its position on the remedy for negative action.¹¹⁵ Justice Sotomayor was on the verge of exposing this bait-and-switch,¹¹⁶ but she may have been reluctant to say that Asian Americans were used as tools to dismantle affirmative action. Perhaps an Asian American Justice would be more emboldened to speak from our perspective and elaborate on our positioning within the litigation.

B. Burdens on Admission

Second, the counternarrative would address the incidental burden of race-conscious admissions policies on Asian Americans. Like Justice Sotomayor’s opinion, it would emphasize that such a burden was perfectly consistent with *Grutter*.¹¹⁷ Justice Sotomayor further stated that it is predominantly White applicants who receive advantages for “athletes, legacy applicants, applicants on the Dean’s Interest List [primarily relatives of donors], and children of faculty or staff,” collectively known as “ALDC” applicants.¹¹⁸ She noted how advantages for ALDCs

¹¹⁰ See *supra* notes 42–45 and accompanying text.

¹¹¹ Onwuachi-Willig, *supra* note 2, at 210–12; see also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 797 (1995) (defining “stereotype threat” as “being at risk of confirming, as self-characteristic, a negative stereotype about one’s group”).

¹¹² Jennifer Lee & Min Zhou, *From Unassimilable to Exceptional: The Rise of Asian Americans and “Stereotype Promise”*, 16 NEW DIVERSITIES 7, 7 (2014).

¹¹³ See *supra* Part II, pp. 27–32. While any Justice might bring forth these issues, an Asian American might be more keenly aware and motivated to do so — perhaps having experienced anti-Asian sentiments or having parents who came to the United States via the 1965 Immigration Act.

¹¹⁴ See *supra* notes 77–88 and accompanying text.

¹¹⁵ See *supra* notes 87–88 and accompanying text.

¹¹⁶ See *supra* note 105 and accompanying text.

¹¹⁷ See *supra* note 99 and accompanying text.

¹¹⁸ Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2249 (2023) (Sotomayor, J., dissenting) (alteration in original) (quoting Students for Fair Admissions,

disfavor Black and Latina/o applicants.¹¹⁹ But she did not point out that only two percent of Asian American applicants were ALDCs — less than any other group.¹²⁰ An Asian American Justice, thinking about how our communities perceive the SFFA cases, would highlight clearly how many 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.¹²¹

Similarly, an Asian American Justice could also see the importance of addressing anti-Asian animus, negative action, and biases against Asian Americans in the admissions process much more fully than any of the Justices did. While the district court rejected SFFA's claim of intentional discrimination by Harvard, it expressed concern about the lower personal rating scores of Asian American applicants and recommended implicit bias training for Harvard's admissions reviewers.¹²² These biases could have originated from teachers' and counselors' recommendations,¹²³ but the specter of negative action by universities remains in our minds. SFFA¹²⁴ and Justice Gorsuch¹²⁵ were correct when noting that professional college counseling services cater specifically to Asian American applicants who fear discrimination in the admissions process.¹²⁶ And whether or not such discrimination is common, Asian Americans' concerns about it should be taken seriously.

SFFA's litigation also revealed problematic behavior by Harvard administrators. Harvard Dean of Admissions William Fitzsimmons was criticized by both SFFA and amici supporting Harvard for stating that White applicants were lifelong residents of rural areas while Asian Americans had only moved to these areas recently.¹²⁷ And SFFA also

Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 171 (1st Cir. 2020)); *id.* (“ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino.” (citing *Harvard*, 980 F.3d at 171)).

¹¹⁹ *Id.*

¹²⁰ Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 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.”), *overruled by* 143 S. Ct. 2141 (2023).

¹²¹ See sources cited *supra* note 83; 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/5F8F-XZBV]; 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/9NGP-VMP5].

¹²² *Harvard*, 397 F. Supp. 3d. at 204 (noting that “Harvard’s admissions program . . . would likely benefit from conducting implicit bias trainings for admissions officers”).

¹²³ Harpalani, *supra* note 8, at 293, 297–98.

¹²⁴ See Complaint, *supra* note 63, at 59.

¹²⁵ See SFFA, 143 S. Ct. at 2211 (Gorsuch, J., concurring).

¹²⁶ Harpalani, *supra* note 8, at 289–90.

¹²⁷ See Brief for Petitioner, *supra* note 94, at 21; Brief of Amici Curiae Asian American Legal Defense and Education Fund *et al.* in Support of Respondents at 11 n.28, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707).

pointed out where the Harvard administration failed to respond to anti-Asian sentiments with proper vigilance.¹²⁸ All of this occurs in a context where Asian Americans are increasingly viewed as a “peril of the mind” even in K–12 schooling.¹²⁹ Almost two decades ago, the *Wall Street Journal* reported on the “New White Flight”: affluent White families in Silicon Valley, California, moving away from high-performing high schools, out of fear that their children would be outcompeted by Asian American students who were “too academically driven.”¹³⁰ Such “new White flight” has also occurred in other cities.¹³¹ Moreover, two recent sociological studies examined backlash to Asian Americans’ success in predominantly White, affluent communities.¹³²

Although a sitting Justice would not comment specifically on cases that could come before the Court, all of these dynamics are in the backdrop of magnet school admissions cases that the Justices may hear in the future.¹³³ It is therefore important to address Asian Americans’ concerns about negative action in general terms. Any counternarrative that fails to do so cedes this discourse to the victimhood narrative. And an Asian American Justice would more likely be in tune with our concerns and understand the importance of addressing these issues.¹³⁴

C. Nuances of Asian American Identity

Third, the counternarrative would delve into the nuances of Asian American identity, elaborating on the commonalities and differences among Asian Americans. It would respond to Justice Gorsuch’s assumption that ancestral “language” and “cultural” differences are more

¹²⁸ Harpalani, *supra* note 8, at 294–96.

¹²⁹ *Id.* at 254–56.

¹³⁰ Suein Hwang, *The New White Flight*, WALL ST. J. (Nov. 19, 2005, 11:59 PM), <https://www.wsj.com/articles/SB113236377590902105> [https://perma.cc/45JB-MWDC].

¹³¹ Harpalani, *supra* note 8, at 255–56.

¹³² See WILLOW LUNG-AMAM, TRESPASSERS?: ASIAN AMERICANS AND THE BATTLE FOR SUBURBIA 55 (2017) (“Whereas many established White families [in Fremont, California,] claimed to want less competitive schools[,] . . . Asian American families were widely associated with an increasing . . . premium on high grades and academic rigor. Tensions over these differences . . . led a number of White families to leave the neighborhood and the district.”); NATASHA WARIKOO, RACE AT THE TOP: ASIAN AMERICANS AND WHITES IN PURSUIT OF THE AMERICAN DREAM IN SUBURBAN SCHOOLS 137 (2022) (“[W]hite parents [of students at an affluent East Coast suburban school] critical of Asian parenting seemed to lament their children’s lost status. As they watched their children no longer feel above average, they grew resentful of the growing number of Asians in their community. Despite Asian American teens excelling academically, white parents did not emulate the cultural repertoires that they saw leading to that outcome . . . Instead, whites maintained their feeling of superiority by rejecting Asian families for getting ahead . . . [and] . . . [d]rawing moral boundaries around parenting, judging Asian parenting to be unworthy, even if it led to academic excellence . . . ”).

¹³³ See *infra* notes 163–68 and accompanying text.

¹³⁴ Elsewhere, I have argued that racial justice advocates have neglected Asian Americans’ concerns about negative action. See Vinay Harpalani, *From the DeVine Gift to the Devil’s Bargains: Asian Americans in the Ideology of White Supremacy*, 103 B.U. L. REV. ONLINE 151, 155–56 (2023).

significant than common experiences in America.¹³⁵ Whether of East Asian or South Asian ancestry, most Asian Americans do speak the same language — English. We grew up speaking it, and we grew up with people assuming we couldn't speak it.¹³⁶

Justice Sotomayor's point that it was college student activists who coined the term "Asian American" is of particular significance for university admissions.¹³⁷ College campuses are particularly salient venues for the development of Asian American identity. Asian Americans of different ethnicities have faced not only common experiences of stereotyping and discrimination,¹³⁸ but also common family conflicts and cultural dilemmas — around issues such as dating, career choices, and pressures to achieve. College is precisely the time when such conflicts and dilemmas become most salient. And when dealing with such issues, Chinese American young adults often have more in common with their Indian American counterparts than they do with international students from China.¹³⁹

The counternarrative would point out that Asian American students also bring these commonalities into classroom and campus discussions to break down the perpetual foreigner stereotype — reflecting the hallmark benefit of diversity that *Grutter* put forth.¹⁴⁰ Universities consider such commonalities when providing campus resources, such as mental health and educational programs. Some of these resources are geared specifically towards Asian Americans,¹⁴¹ and others are focused on international students — including students from Asian countries.¹⁴² Justice Gorsuch missed the key distinction between these two groups.

The counternarrative would also highlight the times when it is important to disaggregate different Asian American subgroups. Justice Sotomayor noted that "the Asian American community is not a

¹³⁵ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2210–11 (2023) (Gorsuch, J., concurring).

¹³⁶ See, e.g., Vanessa Hua, "Your English Is So Good" — Pop Culture Stereotypes Asians, S.F. CHRON. (June 21, 2018, 1:17 PM), <https://www.sfchronicle.com/entertainment/article/Your-English-is-so-good-pop-culture-13014590.php> [https://perma.cc/C674-RU66].

¹³⁷ SFJA, 143 S. Ct. at 2254 n.36 (Sotomayor, J., dissenting).

¹³⁸ *Id.*

¹³⁹ There are exceptions. For example, violent backlash to COVID-19 tended to target both East Asian nationals and East Asian Americans. *See generally* Harpalani, *supra* note 7.

¹⁴⁰ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (noting breakdown of racial stereotypes as one of the educational benefits of diversity).

¹⁴¹ Student activists themselves have led the way here. Two decades ago, I was part of a student movement at the University of Pennsylvania to create the Pan Asian American Community House (PAACH) — a movement that included students of East Asian, South Asian, and Southeast Asian descent. *See PAACH — U. PA.*, <https://paach.universitylife.upenn.edu> [https://perma.cc/Q7AA-RUFR].

¹⁴² See, e.g., ISSS, <https://global.upenn.edu/issss> [https://perma.cc/3QS4-HEQU].

monolith”¹⁴³ but she did not elaborate or differentiate between subgroups.¹⁴⁴ On campuses, students navigate this interplay between commonality and difference. There are student organizations and resources for both Asian Americans as a whole and for specific Asian American subgroups.¹⁴⁵ Often these entities work together closely.¹⁴⁶ Different subgroups may be underrepresented at different universities, and some subgroups face particular challenges that admissions committees can take into account.¹⁴⁷ Justices Sotomayor and Jackson noted that applicants can articulate their individual racial identities and personal experiences as part of a holistic admissions process.¹⁴⁸ Universities, along with Asian American students themselves, are in the best position to determine when to think of Asian Americans as a whole and when to

¹⁴³ *SFFA*, 143 S. Ct. at 2258 (Sotomayor, J., dissenting).

¹⁴⁴ Justices Sotomayor and Jackson both missed opportunities to differentiate among Asian American subgroups when it would have been appropriate to do so. For example, citing the National Center for Education Statistics, Justice Sotomayor noted that “78% of Asian students have a parent with a bachelor’s degree or higher, while the same is true for only 25% of Latino students and 33% of Black students.” *Id.* at 2235 n.12 (citing DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS tbl.104.70 (2021)). Justice Sotomayor’s point about racial inequity in education is well taken. However, more nuanced data indicate that while East and South Asian Americans have high levels of education on average, the percentage of Southeast Asian Americans with bachelor’s degrees is lower than the overall U.S. population. *See AAPI Demographics: Data on Asian American Ethnicities, Geography, Income, and Education*, USA FACTS (Apr. 25, 2023), <https://usafacts.org/articles/the-diverse-demographics-of-asian-americans> [<https://perma.cc/KB6S-2JYA>]; Sono Shah & Karthick Ramakrishnan, *Why Disaggregate? Big Differences in AAPI Education*, AAPI DATA (Apr. 18, 2017), <http://aapidata.com/blog/countmein-aapi-education> [<https://perma.cc/5HLU-7JUT>].

Similarly, citing U.S. Census Bureau statistics, Justice Jackson noted that “[m]edian income numbers from 2019 . . . [are] \$98,174 for Asian households, \$56,113 for Latino households, and \$45,438 for Black households.” *SFFA*, 143 S. Ct. at 2269 (Jackson, J., dissenting) (citing Brief for National Academy of Education as Amicus Curiae at 14–15, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707)). Again, the point about racial disparity in household income is significant. However, more nuanced data again show that some Asian American subgroups have much lower household incomes, and that the data are conflated because many Asian American subgroups — particularly South Asian and Southeast Asian Americans — tend to have larger families (and thus potentially more earners). *See AAPI Demographics: Data on Asian American Ethnicities, Geography, Income, and Education*, *supra*.

¹⁴⁵ See, e.g., *Student Communities*, PAACH — U. PA., <https://paach.universitylife.upenn.edu/organizations> [<https://perma.cc/5DJS-2XLQ>] (listing specific Asian American subgroup organizations affiliated with the Pan Asian American Community House at the University of Pennsylvania).

¹⁴⁶ *Id.*

¹⁴⁷ See sources cited *supra* note 144.

¹⁴⁸ *SFFA*, 143 S. Ct. 2258 (Sotomayor, J., dissenting) (“Race-conscious holistic admissions that contextualize the racial identity . . . allow Asian American applicants . . . to explain ‘the value of their unique background, heritage, and perspective.’”); *id.* at 2272 n.83 (Jackson, J., dissenting) (giving example of “a North Carolinian applicant, originally from Vietnam, who identified as ‘Asian and Montagnard,’ whose personal story played a role in her admission to UNC”).

disaggregate subgroups.¹⁴⁹ That is one reason why *Grutter* deferred to universities on defining diversity-related goals.¹⁵⁰

Unfortunately, the majority and concurring opinions were divorced from such nuances around the lived experiences of Asian Americans on campuses, and the dissents only addressed them briefly. An Asian American Supreme Court Justice — perhaps one who was involved in Asian American student organizations while in college — may have been able to articulate such nuances of Asian American identity and diversity more effectively.

D. Solidarity for Racial Justice

Finally, the counternarrative would speak directly to Asian Americans about our positioning in the U.S. racial landscape. It would invoke the guidance of four prominent Asian American law professors to look “beyond self-interest”¹⁵¹ rather than focus narrowly on the incidental burden of race-conscious admissions. It would lay out how Asian Americans are valorized as model minorities to pit us against Black, Latina/o, and Native Americans. Like Onwuachi-Willig’s analysis, it would highlight the importance of racial identity, but specifically for Asian Americans: our own need to become aware of our histories, articulate our own experiences with racism, understand our positioning in relation to other groups of color, and to be in solidarity with those groups in advocacy for racial justice. The college student activists whom Justice Sotomayor credited with coining “Asian American” also formed coalitions with other groups of students of color.¹⁵² In the late 1960s, the Third World Liberation Front (TWLF) at San Francisco State

¹⁴⁹ South Asian Americans are particularly in tune with the duality here. See generally A PART, YET APART: SOUTH ASIANS IN ASIAN AMERICA (Lavina Dhingra Shankar & Rajini Srikanth eds., 1998) (discussing how South Asian Americans are sometimes a part of Asian America and sometimes not); Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 138–39 (2013) (reviewing scholars’ different positions on whether South Asians are part of Asian America). Other Asian American subgroups can also encounter this duality — particularly those identified as “Brown Asian American.” See Kevin L. Nadal, *The Brown Asian American Movement: Advocating for South Asian, Southeast Asian, and Filipino American Communities*, 29 ASIAN AM. POL’Y REV. 2, 4 (2019), https://www.researchgate.net/publication/333658828_The_Brown_Asian_American_Movement_Advocating_for_South_Asian_Southeast_Asian_and_Filipino_American_Communities [https://perma.cc/CR9R-8HZF] (noting use of the term “Brown Asian” since the early 1970s to refer to various Asian American subgroups, who adopted it to increase visibility).

¹⁵⁰ See *Fisher II*, 136 S. Ct. 2198, 2214 (2016) (“Considerable deference is owed to a university in defining . . . intangible characteristics, like student body diversity, that are central to its identity and educational mission.”).

¹⁵¹ 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).

¹⁵² See Anika Raju, *Black and Asian Solidarity in American History: The Power of Unity Exemplified by 5 Major Events*, MEDIUM: ASIAN AMS. ADVANCING JUST. (Feb. 25, 2021), <https://medium.com/advancing-justice-aajc/black-and-asian-solidarity-in-american-historythe-power-of-unity-exemplified-by-5-major-events-391025bbf228> [https://perma.cc/TFH7-EDN4].

University and the University of California, Berkeley, included Black, Asian American, Mexican American, and Native American student groups.¹⁵³ TWLF resulted in the creation of the Departments of Ethnic Studies and African American Studies at Berkeley.¹⁵⁴ Asian American identity itself is historically linked to coalitions between people of color on campuses,¹⁵⁵ to fight for representation of all groups.¹⁵⁶

Over two decades ago, the late Norman Mineta — U.S. Representative from San Jose, California, who would later serve in two presidential cabinets and become the then-highest ranking Asian American in federal government¹⁵⁷ — made such a bold statement about California's ban on affirmative action:

Asian Pacific Americans will lose out if affirmative action programs are abolished. Our community will pay a price that will far outweigh any increase in Asian Pacific enrollment in the University of California system. Asian Pacific American students admitted to the University may find that the number of Asian Pacific American professors at their school won't be getting any larger. . . . [W]hen they enter the workforce they may run into the same glass ceiling their parents and grandparents are running into today. This time, however, the best weapon to fight that glass ceiling — affirmative action — will no longer be available.¹⁵⁸

Representative Mineta's statement highlights the common ground in fighting racism that Asian Americans share with all people of color.¹⁵⁹ And articulating this common ground would be the culmination of the counternarrative written by an Asian American Supreme Court Justice.

CONCLUSION

The majority and concurring opinions in the SFFA cases employed a narrative of Asian American victimhood to justify their embrace of constitutional colorblindness — the principle espoused by Justice John

¹⁵³ *The Third World Liberation Front and the Origins of Ethnic Studies and African American Studies*, U.C. BERKELEY LIBR., <https://guides.lib.berkeley.edu/twlf> [<https://perma.cc/ZC9D-XRNE>].

¹⁵⁴ *Id.*

¹⁵⁵ See generally Anna Purna Kambhampaty, *In 1968, These Activists Coined the Term “Asian American” — And Helped Shape Decades of Advocacy*, TIME (May 22, 2020, 12:00 PM), <https://time.com/5837805/asian-american-history> [<https://perma.cc/46LQ-KHEF>] (explaining history of the term “Asian American”).

¹⁵⁶ See Jeffrey O.G. Ogbar, *Yellow Power: The Formation of Asian-American Nationalism in the Age of Black Power, 1966–1975*, 3 SOULS: CRITICAL J. BLACK POL. CULTURE & SOC'Y 29, 29–31 (2001).

¹⁵⁷ See Norman Mineta, *First Asian American Cabinet Secretary, Dies at Age 90*, NPR (May 3, 2022, 5:48 PM), <https://www.npr.org/2022/05/03/1096440480/norman-mineta-first-asian-american-cabinet-secretary-dies-at-age-90> [<https://perma.cc/H9M9-KSUA>].

¹⁵⁸ Paul Rockwell, *Asian American Voices for Affirmative Action*, IN MOTION MAG. (1997), <https://inmotionmagazine.com/rockasn.html> [<https://perma.cc/9CND-N92F>].

¹⁵⁹ See Stacy L. Hawkins, *Finding Common Ground*, 103 B.U. L. REV. ONLINE 131, 135 (2023) (arguing that Asian Americans and Black Americans should find “common ground to forge coalition in the fight . . . against our true common enemy — the ideology of white supremacy”).

Marshall Harlan's dissent in *Plessy v. Ferguson*.¹⁶⁰ Onwuachi-Willig notes that when Chief Justice Roberts invoked this dissent, he ignored Justice Harlan's apparent "nod to white superiority," because acknowledging it "would have disrupted the sanitized and simplistic narrative about the racial history of the United States" that the majority put forth in support of its holding.¹⁶¹ But Chief Justice Roberts also ignored another passage from Justice Harlan's *Plessy* dissent: one that "allude[d] to the Chinese race," which according to Justice Harlan was "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."¹⁶² Even in 1896, Asian Americans were part of the story in the case that upheld the segregation of Black Americans. And a complete narrative of American racial history must include the complex racial positioning of Asian Americans.

The precarious role of Asian Americans in admissions controversies is far from over. The next battleground is selective public magnet high school admissions, where several lawsuits are pending.¹⁶³ The most prominent of these, *Coalition for TJ v. Fairfax County School Board*,¹⁶⁴ has Asian American plaintiffs.¹⁶⁵ This lawsuit goes one step further than the SFFA cases and challenges race-neutral efforts to attain diversity.¹⁶⁶ It also reveals even more complexities in the positioning of Asian Americans.¹⁶⁷ The Supreme Court will eventually hear this or another similar case, but unlike the *SFFA* cases, the outcome will be

¹⁶⁰ 163 U.S. 537 (1896); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)) ("Our Constitution is color-blind . . .").

¹⁶¹ Onwuachi-Willig, *supra* note 2, at 206–07 (discussing *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage . . .").

¹⁶² *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

¹⁶³ For an overview of the current status of these cases, see Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354321 [<https://perma.cc/H5FU-B8CV>].

¹⁶⁴ 68 F.4th 864 (4th Cir. 2023) (upholding new admissions policy at Thomas Jefferson High School for Science and Technology); *id.* at 871.

¹⁶⁵ See Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 779–87 (2022).

¹⁶⁶ *Id.* at 786–87.

¹⁶⁷ *Coalition for TJ* involves Asian American plaintiffs challenging changes to a race-neutral admissions policy that increased representation of Black and Latina/o students. Unlike the anonymous plaintiffs in *SFFA*, the Coalition for TJ is a visible group of Asian American parents. And there is some evidence of animus towards Asian Americans in the process of changing the policy. See *id.* at 783–84. The district court ruled for the plaintiffs but was reversed by the Fourth Circuit. See *Coal. for TJ*, 68 F.4th at 887–88. Even if the Supreme Court does not hear *Coalition for TJ*, there are other cases pending in New York, Boston, and Montgomery County, Maryland. See Starr, *supra* note 163.

uncertain.¹⁶⁸ The narratives emerging from the case's proceedings might even determine the ruling. And when the Justices meet secretly at that long conference table to discuss the case, I can only hope that a voice for Asian Americans is present.

¹⁶⁸ Before ruling for the School Board, the Fourth Circuit had stayed the district court order to reinstate the old admissions policy. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *1 (4th Cir. Mar. 31, 2022). The Coalition for TJ filed an emergency stay application to the Supreme Court, which was denied by Chief Justice Roberts and the Court. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672, 2672 (2022) (mem.). Only three conservative Justices — Justices Thomas, Alito, and Gorsuch — said they would grant the stay. *Id.* at 2673. Although far from conclusive, this suggests that the Justices may view *Coalition for TJ* differently than the *SFFA* cases. See Harpalani, *supra* note 165, at 782–83.