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Old Dilemmas, New Guises: Developing an Anti-Subordination Reading of *Students For Fair Admissions v. Harvard*

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OLD DILEMMAS, NEW GUISES: DEVELOPING AN ANTI-SUBORDINATION READING OF *STUDENTS FOR FAIR ADMISSIONS V. HARVARD*

Eric Szkarlat*

INTRODUCTION

In 2022, the U.S. Supreme Court will again hear arguments on the constitutionality of race-conscious affirmative action in college admissions.¹ This outcome was far from foretold: the late Justice Ruth Bader Ginsburg had suggested the Court might never take up affirmative action in admissions again.² Yet after dragging its feet on granting certiorari,³ the Court agreed to hear *Students for Fair Admissions (SFFA) v. Harvard*.⁴

This time, however, the case has a substantially different and quite controversial posture. That posture centers on alleged discrimination against

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1. See *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard College (SFFA III)*, 142 S. Ct. 895 (2022) (mem.) (granting certiorari). Notably, the question of affirmative action was petitioned separately from the question of racial discrimination. See Petition for Writ of Certiorari at i, *SFFA III*, No. 20-1199 (U.S. Feb. 25, 2021), 2021 WL 797848. This Comment assumes that the questions petitioned are actually two sides of the same coin, designed to highlight the weakness in the Court's affirmative action jurisprudence. Therefore, this Comment treats the questions together insofar as the Title VI question is relevant to the affirmative action question. See *infra* notes 126–130 and accompanying text.

2. See David A. Strauss, *Fisher v. University of Texas and the Conservative Case for Affirmative Action*, 2016 SUP. CT. REV. 1, 2 (2016) (quoting Justice Ginsburg as saying, “I don’t expect we’re going to see another affirmative action case, at least in education”).

3. See Amy Howe, *Justices Request Government’s Views on Harvard Affirmative-Action Dispute*, SCOTUSBLOG (June 14, 2021, 12:40 PM), <https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/> [https://perma.cc/2NUL-MU5J].

4. *SFFA III*, 142 S. Ct. 985 (2022).

Asian and Pacific American (APA)⁵ students applying to college.⁶ Some APA students are divided on affirmative action.⁷ Going all the way back to the Court's door-opening decision in *Regents of the University of California v. Bakke*,⁸ the relationship between APA students and affirmative action has been questioned.⁹ The proponents of affirmative action plans often have not produced compelling answers.¹⁰ Some scholars suggest that the issue may be intractable under current doctrine, as APA applicants do not neatly fit into either the "diversity" interest adopted in *Grutter v. Bollinger*,¹¹ nor the "remedy for societal discrimination" interest generally rejected by the Court.¹² Growing hostility and violence against APAs in the United States

5. The case discussed in this Comment deals with Harvard University, which groups APAs (other than Native Hawaiians) into the same category in its admissions process. See *Admissions Statistics: A Brief Profile of the Admitted Class of 2025*, HARVARD COLL., <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/9DV8-DUCZ>] (last visited Mar. 11, 2022). Therefore, this Comment will generally use "APA" to refer to Asian and Pacific Americans. Note, however, that the grouping together of Asian and Pacific Americans has many shortcomings, as the history of European and American colonization in the Pacific Islands differs dramatically from the geopolitical history of many parts of mainland Asia. See, e.g., Lisa Kahaleole Hall, *Navigating Our Own "Sea of Islands": Remapping a Theoretical Space for Hawaiian Women and Indigenous Feminism*, 24 WICAZO SA REV. 15 (2009); see also *infra* Part I.A. If a term for a particular nationality is relevant and available, this Comment will use that. Where the term "Asian" suitably highlights the racism experienced by APAs (e.g., "anti-Asian hate"), this Comment will use that. As a formal matter, "Asian" is the Census-designated term for anyone descended from "the original peoples of the Far East, Southeast Asia, or the Indian subcontinent." *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> [<https://perma.cc/X68G-8XXN>] (last visited Mar. 12, 2022). However, the term "Asian," while useful to some extent, masks a great deal of diversity among APAs. See, e.g., Nicole Robertshaw & Jimmy Koo, *AAP Communities Are Not a Monolith*, APCO WORLDWIDE (May 18, 2021), <https://apcoworldwide.com/blog/aapi-communities-are-not-a-monolith/> [<https://perma.cc/R2AZ-6DUB>].

6. Brief for Petitioner at 26–46, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, (SFFA II) 980 F.3d 157 (1st Cir. 2020) (No. 19-2005).

7. See, e.g., Janelle Marie Salanga, *Challenging the Model Minority Myth: Asian-American Students Divided over Affirmative Action*, CALMATTERS (Oct. 29, 2020), <https://calmatters.org/education/higher-education/college-beat-higher-education/2020/10/asian-american-students-affirmative-action/> [<https://perma.cc/YZ3L-PNTN>].

8. 438 U.S. 265 (1978).

9. During oral argument, Chief Justice Warren Burger used a term historically used in the law to refer to APA peoples. See Transcript of Oral Argument at 20, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811). This term has a derogatory history, and several efforts have been made by legislators to eliminate its use. See Yanan Wang, *The Long History and Slow Death of a Word Once Used to Describe Everyone and Everything from Egypt to China as Well as Rugs*, WASH. POST (May 13, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/05/13/the-long-history-and-slow-death-of-a-word-used-to-describe-everyone-from-turks-to-the-chinese/> [<https://perma.cc/EJV6-DRXS>].

10. See *infra* notes 44–45 and accompanying text.

11. 539 U.S. 306 (2003).

12. See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 263–65 (1995) (noting that it would be legitimate to exclude Asian Americans from college affirmative action programs under "all of the leading theories"); see also *Bakke*, 438 U.S. at 307 (rejecting the "societal discrimination" interest); *Grutter*, 539 U.S. at 323–25 (discussing and adopting Justice Powell's analysis in *Bakke*).

during the COVID-19 pandemic¹³ only bolsters the gravity of the case, as this hostility exhibits the deeply rooted and lingering discrimination from which APA communities still suffer.¹⁴

This Comment proceeds in three parts. Part I sets forth relevant history as to the U.S. government's targeting of APAs and the relevant law governing policies that consider race in university admissions. Part II examines a central tension in equal protection jurisprudence between the "anti-subordination" principle and the "anti-classification" principle. Part III argues that grounding the university's compelling interest in diversity in anti-subordination values would revitalize race-based affirmative action in higher education admissions while also advancing the interests of APA students.

I. ASIAN AND PACIFIC AMERICANS AND AFFIRMATIVE ACTION

For years, it has been repeated that APAs are not a monolith.¹⁵ But the law often paints race in broad strokes: the U.S. Census's racial categories, for example, only distinguish "Asian"¹⁶ from "Native Hawaiian or Other Pacific Islander."¹⁷ Harvard appears to lump both these groups together in an online demographic profile of its students.¹⁸ While perhaps useful to some limited extent, this choice masks a great deal of diversity among APA students.¹⁹ For one thing, there is diversity of ethnic background: APAs could have ancestry in China, the Philippines, Tonga, Japan, or many other countries.²⁰ Additionally, APAs can be from families that have lived in the United States for generations, or they might have recently immigrated—whether freely or as refugees or adopted children of non-APA parents.²¹ Further, income inequality among APA peoples in the United States is higher than for any other racial group in the country.²²

13. See Sakshi Venkatraman, *Anti-Asian Hate Crimes Rose 73% Last Year, Updated FBI Data Says*, NBC NEWS (Oct. 25, 2021, 4:33 PM), <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-rose-73-last-year-updated-fbi-data-says-rcna3741> [<https://perma.cc/9VQR-4P3U>].

14. See generally Denny Chin & Kathy Hirata Chin, *"Kung Flu": A History of Hostility and Violence Against Asian Americans*, 90 FORDHAM L. REV. 1889 (2022).

15. See Li Zhou, *The Inadequacy of the Term "Asian American"*, VOX (May 5, 2021, 10:10 PM), <https://www.vox.com/identities/22380197/asian-american-pacific-islander-AAPI-heritage-anti-asian-hate-attacks> [<https://perma.cc/XQ4J-F8RV>].

16. See *About the Topic of Race*, *supra* note 5.

17. *Id.*

18. See *Admissions Statistics*, *supra* note 5.

19. See Robertshaw & Koo, *supra* note 5.

20. Under the Census designations, "Asian" peoples originated in countries including, "for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam," while "Native Hawaiian or Other Pacific Islander" peoples originated in places including "Hawaii, Guam, Samoa, [and] other Pacific Islands." *About the Topic of Race*, *supra* note 5.

21. Brief for Asian Am. Legal Defense & Educ. Fund et al. as Amici Curiae Supporting Defendant-Appellant at 3–4, *SFFA II*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) [hereinafter *Amicus Brief for AALDEF*].

22. See Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social->

As Part I explains, however, U.S. law has scarcely dignified—or vindicated the rights of—APA peoples. Part I.A examines the role that APA peoples have played in the development of U.S. law, with a specific focus on education. Part I.B examines the relevant cases that develop the Court’s affirmative action jurisprudence.

A. *The Road to SFFA v. Harvard*

The U.S. government’s treatment of APAs also casts a long shadow, the effects of which are still felt in the law today.²³ Within the framework of U.S. policy attempting to subjugate APA peoples, education has provided its own flashpoints,²⁴ discussed here in two parts. Part I.A.1 discusses early legal discrimination against, and segregation of, APA peoples, focusing primarily on state and federal educational policies targeting Chinese, Japanese, and Filipino peoples. Part I.A.2 examines related developments after 1965.

1. Educational Subordination

In the mid-nineteenth century, California passed a law prohibiting “Mongolian[]” children, among others, from attending public school.²⁵ In 1880, these race-based restrictions were repealed,²⁶ but discrimination persisted. In *Tape v. Hurley*,²⁷ the California Supreme Court struck down a school board’s action not to admit Chinese students because it would deprive Chinese children of their right to educational opportunity.²⁸ As a result, the state had to allow Chinese students to attend public schools.²⁹

The win did not last long. The California legislature moved quickly to resegregate Chinese students out of schools.³⁰ After *Plessy v. Ferguson*³¹—the famous dissent to which unfavorably compared Chinese immigrants to Black people³²—the constitutionality of these segregated schools for APA

trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/
[https://perma.cc/6RQR-YU3P].

23. See generally Denny Chin & Kathy Hirata Chin, *Asian Americans and the Law*, 11 JUD. NOTICE 6 (2016).

24. Historical perspectives on Asian Americans in education are sometimes scant. See generally Eileen H. Tamura, *Asian Americans in the History of Education: An Historiographical Essay*, 41 HIST. EDUC. Q. 58, 65–68 (2001) (performing a review of the “few” existing historical books and essays on the subject).

25. Act of Mar. 22, 1864, ch. 209, 1864 Cal. Stat. 209, § 68.

26. Act of Apr. 7, 1880, ch. 54, 1880 Cal. Stat. 38, § 26.

27. 6 P. 129 (Cal. 1885).

28. *Id.* at 129–30.

29. *Id.*

30. Act of Mar. 12, 1885, ch. 117, 1885 Cal. Stat. 99–100, § 1. Notably, the Court did not confirm the citizenship of Chinese people born within the United States until 1898. See generally *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

31. 163 U.S. 537 (1896).

32. See *id.* at 561 (Harlan, J., dissenting). For a thorough discussion of Justice Harlan’s anti-Asian racism, see Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was “The Great Dissenter?”*, 32 AKRON L. REV. 629 (1999). Despite Justice Harlan’s virulent anti-Asian sentiments, SFFA and its amici rely heavily on Justice Harlan’s statement

students was confirmed in *Gong Lum v. Rice*.³³ While the *Tape* and *Gong Lum* cases each involved Chinese students, the decision in *Gong Lum* applied broadly to the “yellow races”—that is, all APA students.³⁴

Other educational policies of the United States targeted other APA communities. For example, during the United States’s occupation of the Philippines, President William McKinley proclaimed a policy of “benevolent assimilation” for Filipinos.³⁵ During this time, the United States administered the country’s public schools,³⁶ using English as the mode of teaching, which was seen as superior to the local languages.³⁷ One scholar attributed the absence of a national literature to the widespread use of English in the Philippines.³⁸ Additionally, during World War II, Japanese children imprisoned in internment camps suffered poor schooling conditions.³⁹

2. The Post-War Period

After World War II, a number of changes occurred in the law, and public perception shifted along with it.⁴⁰ In 1954, famously, *Brown v. Board of Education*⁴¹ ended de jure segregated schooling.⁴² Then, in 1965, comprehensive immigration and civil rights reform allowed many more immigrants, including those from Asia, into the country.⁴³

Questions began swirling about APA students and affirmative action policies as early as the *Bakke* case in 1978. In oral arguments, Chief Justice Burger asked about how affirmative action policies affected APA students.⁴⁴ Professor Archibald Cox, attorney for the University of California, merely

that the “constitution is colorblind” in their briefs. See Brief for Petitioner at 47, *SFFA III*, No. 20-1199 (U.S. May 2, 2022); Brief for Texas as Amicus Curiae Supporting Petitioner, *SFFA III*, No. 20-1199 (U.S. May 9, 2022) (quoting Justice Harlan’s dissent in *Plessy*, 163 U.S. at 559).

33. 275 U.S. 78 (1927).

34. *Id.* at 87. Justice William H. Taft’s language evokes the notion of “yellow peril,” which refers to a racist fear in the United States that Asian people pose a threat to Western civilization. For a full discussion on the origins of “yellow peril,” see Stanford M. Lyman, *The “Yellow Peril” Mystique: Origins and Vicissitudes of a Racist Discourse*, 13 INT’L J. POL., CULTURE, & SOC’Y 683 (2000).

35. See Kenton J. Clymer, *Not So Benevolent Assimilation: The Philippine-American War*, 11 REVS. AM. HIST. 547, 547 (1983).

36. See *id.* at 549; see also Napoleon J. Casambre, *The Impact of American Education in the Philippines*, 21 EDUC. PERSPS. 7, 7 (1982).

37. See Casambre, *supra* note 36, at 9, 12.

38. *Id.* at 13.

39. See Hui Wu, *Writing and Teaching Behind Barbed Wire: An Exiled Composition Class in a Japanese-American Internment Camp*, 59 COLL. COMPOSITION & COMM’N 237, 241 (2007).

40. See Chin & Chin, *supra* note 14, at 1920.

41. 347 U.S. 483 (1954).

42. *Id.* at 495.

43. See Wu, *supra* note 12, at 244–45. These new waves of immigrants have tended to be well-educated, reflecting the nature of U.S. immigration policy and the significance of socioeconomic background. *Id.* (noting that in 1980 nearly 36 percent of foreign-born Asians in the United States had completed four years or more of college, compared with about 16 percent of native-born Asian citizen of the United States).

44. See Transcript of Oral Argument, *supra* note 9, at 20.

alluded to a few recent cases involving discriminatory property laws.⁴⁵ Since that time, how affirmative action relates to APA students has been an open question.⁴⁶ According to some APA students, they pay the “Asian Penalty,” defined as a limit on the number of APA students who can be admitted.⁴⁷

Further, public perception of APA peoples and students has changed significantly in the post-war period amid the proliferation of the “model minority” myth.⁴⁸ This myth refers to the harmful stereotype that APA peoples achieve success in the “right” ways and chiefly provides a tactic to put down other people of color.⁴⁹ The myth accords with widespread prejudice that APA students always or naturally perform better in school and attributes much of this performance to cultural values of APA peoples.⁵⁰

The reality is much more complicated. While average school performance and income levels for APA peoples are generally higher than other races, disaggregated data show wide inequality among different APA communities.⁵¹ Furthermore, while APA students are less segregated overall, they are still highly concentrated in schooling environments where minority races make up the majority of the students.⁵² It is wrong to assume, then, that all APA students experience less segregated schooling environments, greater prosperity, and better academic performance than their Black and Latinx counterparts.⁵³ It is also quite wrong to assume that APA students always fare better than white students.⁵⁴

45. Since Professor Cox’s argument rested in part on remedying discrimination throughout society, he noted how Asian peoples faced discrimination in non-educational contexts. *Id.* at 20–21; *see also* *Oyama v. California*, 332 U.S. 633, 647 (1948) (overturning discriminatory state property laws); *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 422 (1948) (overturning discriminatory state property laws).

46. *See* Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 320–21 (2014) (examining Justice Alito’s questioning during oral arguments in *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*)).

47. *See* Alvin Chang, *Asians Are Being Used to Make the Case Against Affirmative Action. Again.*, Vox (Aug. 30, 2018, 1:19 PM), <https://www.vox.com/2018/3/28/17031460/affirmative-action-asian-discrimination-admissions> [<https://perma.cc/KS4Q-YMV7>]; Sharad Goel & Julian Nyarko, *Justices Will Hear a Challenge to Affirmative Action That Isn’t Really About Affirmative Action*, WASH. POST (Feb. 22, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/02/22/supreme-court-harvard-affirmative-action/> [<https://perma.cc/4C87-L3LG>].

48. Wu, *supra* note 12, at 226.

49. *See id.* at 229 (“The model minority myth of Asian Americans has been used since the Sixties to denigrate other nonwhites.”).

50. *See id.* at 226.

51. Kimberly Goyette & Yu Xie, *Educational Expectations of Asian American Youths: Determinants and Ethnic Differences*, SOCIO. EDUC., Jan. 1999, at 22, 23.

52. *See* GARY ORFIELD, *ASIAN STUDENTS AND MULTIETHNIC DESEGREGATION* 2–3 (1994), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/asian-students-and-multiethnic-desegregation/asian-students_orfield_glass.pdf [<https://perma.cc/EPH6-RX6J>].

53. *See id.*

54. *Cf.* Goyette & Xie, *supra* note 51, at 23.

B. *The Law of Affirmative Action in College Admissions*

The Fourteenth Amendment, which guarantees that states shall not deny any person “equal protection of the laws,”⁵⁵ governs affirmative action cases. The Court has generally rejected the idea that the Fourteenth Amendment can be applied to remedy societal discrimination against groups.⁵⁶ They have, however, upheld affirmative action programs under the strict scrutiny standard of review because the state has a compelling interest in achieving a “diverse student body.”⁵⁷ As the Court reasoned, “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.”⁵⁸ Thus, the exposure of its students to new ideas, which in turn train better citizens and professionals, supports the compelling interest of the state implementing affirmative action.⁵⁹

In *Bakke*, this rationale did not satisfy Justice Thurgood Marshall. Justice Marshall noted that the Constitution, as historically interpreted, had permitted pervasive discrimination.⁶⁰ He discussed, at length, the history of Jim Crow before turning to the Court’s jurisprudence, which seemed to support the idea that remedying societal discrimination was a compelling interest.⁶¹ Justice Marshall’s stand-alone opinion did not exactly catch fire, though its reasoning appeared salient to Justice Sotomayor in *Schuette v. Coalition to Defend Affirmative Action*.⁶² In contrast to Justice Marshall, Justice Sotomayor tailored her dissent to educational discrimination, rather than discussing general societal discrimination.⁶³

In 2003, the Supreme Court again held that race-based affirmative action was inherently suspect and, therefore, subject to strict scrutiny. In *Gratz v. Bollinger*,⁶⁴ the Court held the University of Michigan’s race-based affirmative action program unconstitutional because it provided for little to no assessment of individual applicants.⁶⁵ However, the Court upheld the University of Michigan’s “critical mass” policy in *Grutter v. Bollinger*,⁶⁶ premised in part on a value-added theory of affirmative action,⁶⁷ without

55. U.S. CONST. amend. XIV § 1, cl. 2.

56. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–11 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 323–25 (2003) (endorsing Justice Powell’s opinion in *Bakke* and discussing his rejection of the “societal discrimination” rationale).

57. See *Bakke*, 438 U.S. at 311–12.

58. *Id.* at 313 (citation omitted).

59. See *id.* In *Bakke*, the University’s medical school admissions policy was under review. See *id.* at 269.

60. See *id.* at 387–402 (Marshall, J., dissenting).

61. See *id.* at 393–96.

62. 572 U.S. 291, 337 (2014) (Sotomayor, J., dissenting).

63. See *id.* at 381–92.

64. 539 U.S. 244 (2003).

65. See *id.* at 271.

66. 539 U.S. 306 (2003).

67. *Id.* at 330. What I call the “value-added” theory of affirmative action has been called a “market-driven” theory. See Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. PA. J. CONST. L. 1145, 1178

ruling it an impermissible quota.⁶⁸ The Court emphasized the delivery of an improved educational product to students.⁶⁹ Somewhat confusingly, however, Justice O'Connor's opinion for the Court stated that consideration of race should be limited to twenty-five years.⁷⁰ The Court's later affirmative action decisions ignored the statement.⁷¹ The Court upheld affirmative action again in the narrow decision *Fisher v. University of Texas*,⁷² which affirmed student body diversity as a compelling interest.⁷³ Today, the Department of Education maintains a series of policy guidance encouraging the use of race to achieve diversity in higher education.⁷⁴

II. ANTI-SUBORDINATION AND ANTI-CLASSIFICATION

In discussions about affirmative action, unsettled questions about the Fourteenth Amendment's meaning often resurface. Professor Owen Fiss ignited one such major debate in 1976.⁷⁵ He argued in favor of what became known as the anti-subordination principle⁷⁶ underlying the Fourteenth Amendment, as contrasted with its anti-classification principle.⁷⁷ Part II.A discusses the anti-subordination principle. Part II.B discusses the anti-classification principle.

A. Anti-Subordination

Professor Fiss's anti-subordination principle would guide courts to interpret the Fourteenth Amendment so that the laws of the states cannot subordinate any particular group of people.⁷⁸ Professor Fiss acknowledged that this principle is difficult to locate in the text or original meaning of the Amendment,⁷⁹ but he argued that the spirit of the Amendment seeks to eliminate racial subordination.⁸⁰ Accordingly, equal protection enforcement would center not around preventing mere "arbitrary" discrimination but

(2018). This theory emphasizes the utilitarian, commercially-centered reasoning underlying the Court's affirmative action jurisprudence. *See id.*

68. *See Grutter*, 539 U.S. at 306.

69. *See id.* at 328; Bloch, *supra* note 67, at 1190.

70. *See Grutter*, 539 U.S. at 343.

71. *See generally Fisher I*, 570 U.S. 297 (2013); *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*).

72. 570 U.S. 297 (2013).

73. *Id.* at 308–09.

74. *See Supporting Racial Diversity*, OFF. FOR C.R., U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/roi-issue07.html> [<https://perma.cc/KY3P-3ZBQ>] (last visited Mar. 19, 2022).

75. *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

76. Professor Fiss called this concept the "group-disadvantaging principle." *See id.* at 147–49.

77. Professor Fiss called this the "antidiscrimination principle." *See id.* at 108–09.

78. *See id.* at 157.

79. *See id.* at 172–73.

80. *See id.* at 147 ("[T]he original intent [was that] the Clause was viewed as a means of safeguarding blacks from hostile state action.").

would focus on preventing “invidious” discrimination, which aggravates the subordinate position of disadvantaged groups.⁸¹

Justice Marshall’s opinion in *Bakke* represents perhaps the firmest expression of the anti-subordination principle in affirmative action jurisprudence.⁸² His tracing of the long legacy of slavery and the history of discrimination against Black people in higher education clarified how Black people had been legally subjugated throughout history.⁸³ But he was not the only one discussing affirmative action in these terms: President Lyndon B. Johnson’s initial outline of affirmative action during a speech at Howard University sounded in anti-subordination,⁸⁴ as did Justice Sotomayor’s dissent in *Schuette*.⁸⁵

As a strictly legal matter, however, anti-subordination remains a subject of academic intrigue, rather than law.⁸⁶ In the affirmative action context, this is because the Court in *Grutter* adopted Justice Powell’s *Bakke* analysis—finding only a university’s interest in diversity to be a compelling interest.⁸⁷ But there are necessary limits to anti-subordination, as Fourteenth Amendment jurisprudence protects the rights of *individuals*, not of groups.⁸⁸

Anti-subordination advocates have not always clearly situated APA peoples into the anti-subordination story.⁸⁹ Professor Cox’s lackluster answer during *Bakke* oral arguments suggested a lack of thought toward the treatment of APA peoples in the educational context.⁹⁰ And, certainly, when the group boundaries are drawn as broadly as Harvard has drawn them, problems arise with seeing certain groups as disadvantaged according to contemporary metrics.⁹¹ If, for example, universities see only the aggregated data showing that the average APA household makes more money than the

81. *Id.* at 109 n.1.

82. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., dissenting).

83. *See id.*

84. *See* President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights> [<https://perma.cc/AT7N-V36H>].

85. *See* *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 337–92 (2014) (Sotomayor, J., dissenting).

86. *See* Nurse, *supra* note 46, at 295 (calling anti-subordination an “academic principle”).

87. *See* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

88. *See* *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). Several briefs supporting SFFA expressly address anti-subordination arguments. *See* Brief for U.S. Senators and Representatives as Amici Curiae Supporting Petitioner at 7, *SFFA III*, No. 20-1199 (U.S. May 9, 2022); Brief for The Foundation Against Intolerance & Racism as Amicus Curiae Supporting Petitioner at 4–20, *SFFA III*, No. 20-1199 (U.S. May 9, 2022). SFFA’s brief on the merits specifically states that the problem with segregation, for example, was the classification itself. Brief for Petitioner, *supra* note 32 at 6; *see also infra* Part II.B.

89. *See* Wu, *supra* note 12, at 263. For one attempt to apply anti-subordination principles to one APA community, see Victor C. Romero, *Are Filipinas Asians or Latinas?: Reclaiming the Anti-Subordination Objective of Equal Protection After Grutter and Gratz*, 7 U. PA. J. CONST. L. 765 (2005).

90. *See supra* notes 44–45 and accompanying text.

91. *See supra* note 18 and accompanying text.

average white household, then they would be hard-pressed to say that APA peoples are subordinated.⁹² And since racial categories on admissions applications largely come from Census designations, it is not clear that universities can meaningfully adjust these categories to control for issues of line-drawing.⁹³ As a result, anti-subordination arguments relating to APA peoples in higher education are uncommon.⁹⁴

B. Anti-Classification

The more dominant interpretation of the Fourteenth Amendment follows what Professor Fiss calls the “antidiscrimination” principle,⁹⁵ also known as the “anti-classification” principle.⁹⁶ Under this interpretation, the Fourteenth Amendment protects individuals, not groups, and typically, advocates of anti-classification argue for prohibition of *any* official consideration of race, regardless of past discrimination.⁹⁷

The anti-classification principle clearly appeared to influence the Court in *Bakke* and *Grutter*. The *Bakke* Court notably stressed the importance of individual consideration of each applicant.⁹⁸ The Court’s rationale in *Grutter*, on the other hand, focused on the educational value of diversity.⁹⁹ In other words, the Court appraised the educational product that the school would deliver to its students if it had a diverse student body.¹⁰⁰ The Court further stressed that applicants should still be reviewed as individuals.¹⁰¹

Together, these cases have caused higher education policymakers to focus on what is called the “proportionate ideal”—that is, an aspiration to assemble a student body population that reflects virtually the same racial demographics as general society.¹⁰² As a result, colleges sometimes defend themselves against charges of bias against APA students on the grounds that such students are *over*represented on campus relative to their share of the general population.¹⁰³ But many APA students believe that the current state of race-based affirmative action causes universities to lower the number of accepted

92. See *supra* note 22 and accompanying text.

93. This Comment limits itself to analyzing the law of affirmative action, not to recommending any particular university policy. However, this Comment does argue that poorly drawn constitutional parameters may lead to poorly drawn policies. See *infra* notes 126–130 and accompanying text.

94. For one such case, however, see Romero, *supra* note 89.

95. See Fiss, *supra* note 75, at 108–29 (outlining the anti-discrimination principle and its appeal).

96. Nurse, *supra* note 46, at 298–300.

97. Fiss, *supra* note 75, at 129–30.

98. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

99. Grutter v. Bollinger, 539 U.S. 306, 328–33 (2003).

100. See *id.*

101. *Id.* at 337.

102. See Chan Hee Chu, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 ASIAN AM. L.J. 99, 104–10 (2016).

103. P.R. Lockhart, *The Lawsuit Against Harvard that Could Change Affirmative Action in College Admissions, Explained*, VOX (Oct. 18, 2018, 8:00 PM), <https://www.vox.com/2018/10/18/17984108/harvard-asian-americans-affirmative-action-racial-discrimination> [<https://perma.cc/87ZV-PDVU>].

APA applicants artificially because, despite their qualifications, their acceptance would not serve greater diversity.¹⁰⁴ The framework under which colleges are alleged to discriminate against APA applicants to maintain a “proportionate ideal” is often described as “negative action.”¹⁰⁵

Justice O’Connor’s twenty-five-year limit in *Grutter* provokes further questions about the diversity interest.¹⁰⁶ If the compelling interest in diversity rests primarily on how it enhances the education delivered by the school, why would it be time-limited? Should the educational value of racially diverse perspectives not endure? In other words, what about affirmative consideration of racial diversity in higher education *now* would promote greater racial diversity in higher education *later*?¹⁰⁷

III. APPLYING ANTI-SUBORDINATION

This Comment suggests an answer to those questions: the anti-subordination principle implicitly persuaded the Court to uphold the University of Michigan’s affirmative action policies. It is the implicit anti-subordination, rather than the explicit reasoning of Justice Marshall, which advocates may use when arguing *SFFA v. Harvard* in October 2022.

An explicitly anti-subordination jurisprudence of the Fourteenth Amendment currently seems unreachable.¹⁰⁸ But Professor Fiss notes that the anti-subordination principle persuades judges, even when they do not expressly endorse it.¹⁰⁹ Indeed, anti-subordination seemed to animate Justice O’Connor’s time limitation and discussion of the role education plays in cultivating good citizens, while the opinion itself generally sounds more like an anti-classification ruling.¹¹⁰ If diversity now will serve to end affirmative consideration of race later, then diversity now should be concerned, at least in part, with reversing the legacies of the laws by which certain races were subordinated.¹¹¹ And if that is the case, then diversity efforts now ought to include a consideration of the historical subordination of APA students.¹¹²

The laws of this country have unquestionably sought to subordinate APA peoples.¹¹³ And while there is a great deal of diversity among APA peoples,¹¹⁴ and significant differences in the way the law has treated each

104. *See supra* note 7 and accompanying text.

105. *See, e.g.*, Julie J. Park, *Interest Convergence, Negative Action, and SFFA vs. Harvard*, 26 *ASIAN AM. L.J.* 13, 16–18 (2019).

106. *Grutter*, 539 U.S. at 343.

107. This Comment argues that *Grutter* embraced anti-subordination values, but it is not the first to do so. *See, e.g.*, Bloch, *supra* note 67, at 1173, 1179–80 (arguing that anti-subordination values were present in *Grutter*).

108. *See supra* notes 56–72 and accompanying text.

109. *See* Fiss, *supra* note 75, at 175.

110. *See supra* notes 59, 69 and accompanying text.

111. *See supra* note 70 and accompanying text.

112. *See supra* notes 25–39 and accompanying text.

113. *See supra* notes 25–39 and accompanying text.

114. *See supra* notes 15–22 and accompanying text.

individual APA community,¹¹⁵ it is still clear that race-based affirmative action does—or, at minimum, should—help APAs.¹¹⁶

The petitioners in *SFFA*, therefore, suffer from a flaw of reasoning endemic to the model minority myth: they advance one narrative—that of the highly successful APA student who fails to be admitted to Harvard—and characterize it as universal to all APA students.¹¹⁷ They strain to assert that this one experience demonstrates that *Grutter* must be overruled.¹¹⁸ By so doing, the petitioners disregard the differences and diversity within APA communities.¹¹⁹ Applying anti-subordination values, by contrast, would force advocates to consider inequalities among APA communities and understand where the law—especially education law¹²⁰—has contributed to these inequalities.¹²¹ Supreme Court Justices also express interest in racial inequities in standardized testing, so advocates may consider making well-tailored arguments on historical and present educational inequities in testing.¹²²

But perhaps *SFFA* is not the only party to elide the complexity of APA communities. At least one amicus brief for the case notes that Harvard originally adopted a race-conscious admissions policy to limit the number of Jewish students on campus and compares limitations against Jewish students to those alleged against APA students.¹²³ That Harvard places all APA students in the broad category of “Asians,” without separately noting its proportion of Pacific American students despite the Census doing so,¹²⁴ suggests that Harvard may not be fully recognizing the complexity of APA communities either.

115. *See supra* notes 25–39 and accompanying text.

116. Amicus Brief for AALDEF, *supra* note 21, at 1–8. Certainly, if racial diversity is the goal, then some “overrepresentation” of APA applicants would primarily enhance racial diversity, largely because of the lack of parity among APA peoples. *See supra* notes 15–22 and accompanying text. Of course, as an initial matter, the admitted students would have to be drawn from a sample representative of APA communities in the United States. But that fact alone is hardly a reason to find affirmative action unlawful.

117. *See supra* notes 6–7 and accompanying text.

118. Reply Brief for Petitioner at 5–9, *SFFA III*, No. 20-1199 (U.S. May 24, 2021), 2021 WL 2182173.

119. *See supra* notes 15–22 and accompanying text.

120. Justice Powell’s concern about the societal discrimination interest stemmed in part from its lack of “focus[]” and its “amorphous” nature. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

121. *See supra* notes 25–39, 51–54 and accompanying text.

122. *See Fisher II*, 136 S. Ct. 2198, 2234 (2016) (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 369–70 (2003) (Thomas, J., dissenting). Certainly, this Comment has focused on some educational inequities as matters of history. *See supra* Part I.A. However, Justice Sotomayor’s public comments have also focused on these very present testing inequities. Charlie Savage, *Videos Shed New Light on Sotomayor’s Positions*, N.Y. TIMES (June 10, 2009), <https://www.nytimes.com/2009/06/11/us/politics/11judge.html> [<https://perma.cc/6HF7-2X9U>] (quoting Sotomayor to say in the 1990s that “cultural biases” are built into standardized tests, which is one motivation for affirmative action policies).

123. Brief for Louis D. Brandeis Ctr. for Hum. Rts. Under L. and the Silicon Valley Chinese Ass’n Found. as Amici Curiae Supporting Petitioner at 5–19, *SFFA III*, No. 20-1199 (U.S. Mar. 31, 2021), 2021 WL 1255541.

124. *See supra* notes 5, 16, 20 and accompanying text.

But the Harvard policy is wrong because the constitutional parameter around affirmative action has been poorly drawn.¹²⁵ By emphasizing the diversity interest, the Court encouraged a “proportionate ideal,”¹²⁶ which does not always serve APA students.¹²⁷ Indeed, the proportionate ideal sounds a bit like an impermissible quota.¹²⁸ Accordingly, there can be no defense that “overrepresentation” should cause a university to suppress affirmative consideration of any given student’s race.¹²⁹ Rather, racial diversity should be used as a plus-factor on APA students’ applications, and negative action should not be permitted.¹³⁰

Of course, the trial court found that Harvard’s policy was appropriate and did not discriminate against APA students.¹³¹ But *SFFA* is about more than the specifics of Harvard’s admissions policy. It is also the latest attempt to overrule *Grutter* and compel the Court to find that race-based affirmative action in college admissions is unconstitutional.¹³² However, because of the country’s history of legal subordination of APA peoples, the Court should not do so.¹³³

It may be true that the subordination of APA peoples has not been coextensive with that of Black and Indigenous peoples.¹³⁴ But this distinction cannot justify eliminating race-conscious admissions programs. Federal and state law have historically denied Asian and Pacific immigrants and citizens equal protection in education.¹³⁵ APA students have suffered segregation.¹³⁶ Japanese people suffered poor educational conditions while interned.¹³⁷ Filipino people experienced colonialist assimilation policies under U.S.-administered education.¹³⁸ Some universities even expressly precluded consideration of Japanese people during World War II.¹³⁹

The recent anti-Asian attacks should weigh heavily upon us all.¹⁴⁰ The COVID-19 pandemic, along with politicians and the media blaming China and Chinese people for the virus, have exposed and aggravated anti-Asian hate.¹⁴¹ If there ever were a time for the Supreme Court to recognize the

125. Indeed, the racial categories of “Asian” and “Pacific Islander” may by themselves be too broadly drawn, but this inquiry falls outside the scope of this Comment. *See supra* notes 5, 15–17 and accompanying text.

126. *See supra* notes 102–104 and accompanying text.

127. *See supra* note 47 and accompanying text.

128. *See supra* note 68 and accompanying text.

129. *See supra* notes 103, 105 and accompanying text.

130. *See supra* notes 98–101 and accompanying text.

131. *See SFFA v. Harvard (SFFA I)*, 397 F. Supp. 3d 126, 198–99 (D. Mass. 2019).

132. *See Chang, supra* note 47.

133. *See supra* notes 25–39, 75–94 and accompanying text.

134. *See Wu, supra* note 12, at 263.

135. *See supra* notes 25–39 and accompanying text.

136. *See supra* notes 33–34 and accompanying text.

137. *See supra* note 39 and accompanying text.

138. *See supra* notes 35–37 and accompanying text.

139. *See generally* Eric Langowski, *Education Denied: Indiana University’s Japanese American Ban, 1942 to 1945*, 115 IND. MAG. HIST. 65, 65 (2019).

140. *See supra* note 13 and accompanying text.

141. *See* Dylan Wells, “Not Just About COVID”: Lawmakers Warn China Bashing in Congress Could Spur New Wave of Anti-Asian Hate, USA TODAY (Feb. 21, 2022, 12:17 PM),

legacy of racist laws aiming to subordinate APA peoples in this country, it would be now.

Unfortunately, such recognition could also present a double-edged sword to affirmative action advocates. Certainly, the Court could acknowledge all of this history, and then say that the present condition of Harvard's affirmative action plan only carries that legacy forward.¹⁴² Such reasoning would require the Supreme Court to acknowledge that anti-subordination arguments can, even *ad arguendo*, influence their Fourteenth Amendment decision-making, but it would ultimately uphold the anti-classification principle. Because this reasoning would not hold across other racial demographics, any decision rendered on this basis would necessarily be at least as doctrinally confused as *Grutter*.¹⁴³ Taken together, filings made by or in support of SFFA touch both on anti-classification principles and on anti-subordination principles.¹⁴⁴

Certainly, however, the *Grutter* decision needs greater clarity, and for this reason, advocates for Harvard should urge the Court to clarify the doctrine by addressing this sordid history of subordination. The amicus briefs, however, tell a different story: in the litigation below, the only briefs raising detailed histories of subordination were filed in support of SFFA.¹⁴⁵ In supporting SFFA's petition for certiorari, some other amicus briefs likened APA students at Harvard to Jewish students in the early twentieth century.¹⁴⁶ Most recently, several of the amicus briefs supporting petitioner on the merits raise arguments about anti-Asian subordination.¹⁴⁷ By contrast, briefs opposing SFFA's petition to the Supreme Court did not touch upon the history of anti-Asian racism.¹⁴⁸

When Respondents and their amici file their briefs on the merits, they should sketch this sordid history for the Court. The Court probably will not announce that the Fourteenth Amendment should be interpreted according to an anti-subordination principle any time in the near future, and it is not clear that Professor Fiss ever thought the Court would.¹⁴⁹ The anti-subordination

<https://www.usatoday.com/story/news/politics/2022/02/19/anti-china-rhetoric-aapi-hate/9289187002/?gnt-cfr=1> [<https://perma.cc/3DHM-YCXN>].

142. See Brief for Pac. Legal Found., et al., as Amici Curiae Supporting Plaintiff-Appellant Students for Fair Admissions, Inc. and Reversal at 15–17, *SFFA II*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) [hereinafter Amicus Brief for PLF].

143. See *supra* notes 106–107 and accompanying text.

144. Compare Petition for Writ of Certiorari at 30–31, *SFFA III*, No. 20-1199 (U.S. Feb. 25, 2021), 2021 WL 797848, with Amicus Brief for PLF, *supra* note 142, at 17–18.

145. See, e.g., Amicus Brief for PLF, *supra* note 142, at 17–18.

146. See *supra* note 123 and accompanying text.

147. See Brief for U.S. Senators and Representatives, *supra* note 88, at 23–25; Brief for the Asian Am. Coalition for Educ. & The Asian Am. Legal Foundation at 19–26, *SFFA III*, No. 20-1199 (U.S. May 9, 2022).

148. See, e.g., Brief in Opposition at 35–36, *SFFA III*, No. 20-1199, 2021 WL 2004129 (noting adverse effects of overturning *Grutter* but not those on APA students). *But see* Amicus Brief for AALDEF, *supra* note 21, at 3–6 (discussing adverse impacts of overruling *Grutter* on APA students but failing to discuss any history of subordination targeting APA communities).

149. See Fiss, *supra* note 75, at 175.

principle simply insists that the justices not forget what they know to be true as citizens.¹⁵⁰ The metric should not be whether the subordination was co-extensive with that of other racial groups, but whether it was enshrined in federal and state law.¹⁵¹ It was.¹⁵² There can be no doubt that federal and state law have subordinated APA peoples.¹⁵³ The anti-subordination principle merely admonishes us to remember.

When litigating *SFFA* this year, therefore, respondents should stress this history. In *Fisher I*, the justices seemed to expect anti-subordination arguments, but the advocates did not make them.¹⁵⁴ Affirmative action then was narrowly spared.¹⁵⁵ The argument now should be even stronger: there is a compelling interest in diversity, in part because affirmative consideration of race will still serve to level the playing field for APA applicants in the future.¹⁵⁶ Thus, universities can do their part to correct the unequal protection extended to APA peoples by the laws of the country. Equal protection requires a balanced equation, and narrowing the focus to an individual neglects the histories and legacies of racism that have bound so many communities of color to disparate outcomes.¹⁵⁷ Such neglect allows history to repeat itself through facially neutral criteria.¹⁵⁸ The better argument says that, where history shows unequal protection, Congress should enforce the law to restore the balance.¹⁵⁹ Preventing the “old dilemma” of educational subordination from occurring again in a “new guise” requires it.¹⁶⁰

CONCLUSION

APA communities have suffered a great deal of legal discrimination throughout history and the present. The anti-subordination principle teaches that the purpose of the Fourteenth Amendment includes the power to remedy this history. Since anti-subordination is primarily a persuasive argument for upholding anti-subordination policies, respondents in *SFFA* should note the history of subordination in education inflicted upon APA communities, incorporating it within the recognized diversity interest. Doing so may help persuade the Court to preserve affirmative action.

150. See *United States v. Zubaydah*, No. 20-827, slip op. at 1 (Mar. 3, 2022) (Gorsuch, J., dissenting).

151. Cf. Wu, *supra* note 12, at 263–71; see also Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice*, 4 UCLA ASIAN PAC. AM. L.J. 129, 143–60 (1996).

152. See *supra* notes 25–39 and accompanying text.

153. See generally Chin & Chin, *supra* note 23.

154. Nurse, *supra* note 46, at 320–21.

155. See *supra* note 72 and accompanying text.

156. See *supra* notes 106–107 and accompanying text.

157. See, e.g., *supra* notes 15–39 and accompanying text.

158. See Fiss, *supra* note 75, at 141–46.

159. See U.S. CONST. amend. XIV, § 1, cl. 2; *id.* § 5.

160. See Fiss, *supra* note 75, at 177.