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# Review Essay: “What’s Going On?”

Harvey Gee\*

Jeff Chang, *We Gon’ Be Alright: Notes on Race and Resegregation*,  
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## INTRODUCTION

In *We Gon’ Be Alright: Notes on Race and Resegregation* (“*We Gon’ Be Alright*”),<sup>1</sup> Jeff Chang, Executive Director of the Institute for Diversity in the Arts at Stanford University, relies on his vast knowledge of the cultural history of race in America, hip-hop music, and civil rights to comment on racial progress and race relations, bringing “renewed attention to questions of equity.”<sup>2</sup> In his brisk volume, Chang explains why inequality persists and how resegregation is still happening today.

Chang’s book is timely, as ongoing violence against young African American men across the country and the debates over immigration and affirmative action, destroys any professed color-blind vision of America. Chang ultimately eviscerates the notion held by some that this country entered a “post-racial” era after President Obama’s election.<sup>3</sup> Justice Sotomayor

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1. Jeff Chang, *WE GON’ BE ALRIGHT: NOTES ON RACE AND RESEGREGATION* (2016).  
2. *Id.* at 1.  
3. See Scott Lemieux, *Why Clarence Thomas’s Rulings on Race Are so Idiosyncratic*,

echoed these sentiments in her dissent in *Schuette. v. Coalition to Defend Affirmative Action*,<sup>4</sup> condemning the majority for upholding a Michigan state ban on racial affirmative action. In the dissent, she forcefully argued that race still matters because it has been used to prevent access to the political process, produce stark socioeconomic disparities, and serves as a basis for how society reacts to a person.<sup>5</sup> Given the ubiquity and permanence of race, she writes, “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”<sup>6</sup>

Chang does just this, by writing openly and candidly about race in seven opinion editorial-style essays drawn from his personal experiences as a native Hawaiian of Chinese descent, University of California at Berkeley student body president, and his ethnic identity as an Asian American. A two-fold overarching theme flows throughout: how the interconnection of inequality and segregation affects us all; and the necessity of subjugated racial minorities acknowledging and understanding the similarities and differences among minority groups to discover common goals to stop racial discrimination.

Part I of this review summarizes parts of *We Gon’ Be Alright*, setting up the landscape for extended analyses subsequent sections. Part II expands upon Chang’s narrative about the Black Lives Matter Movement to discuss the recent prosecution of New York Police Department Officer Peter Liang and its impact on the national debate on police brutality and deadly violence against young African American men. Part II also explains why there are tremendous possibilities for coalition building at the grassroots level with community organizing, despite cultural and class differences; it also discusses the potential conflicts and impediments that may arise during the building process. Part III analyzes *Fisher v. University of Texas*,<sup>7</sup> particularly focusing on Justice Alito’s dissent, which dubiously relies on Asian Americans to argue against the constitutionality of the University of Texas’s affirmative action program. Unfortunately, because *Fisher* was announced after *We Gon’ Be Alright*’s release, Chang missed an opportunity to strengthen his argument that Asian Americans play a major role in advancing race relations as honorary whites. As such, this section—combining law, social science, and race theory—tries to bridge together Chang’s analysis and the Court’s holding in *Fisher*. Finally, Part IV builds on Chang’s analysis and the holding in *Fisher*, exploring the latest litigation brought by Asian American students against affirmative action in higher education.

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THE NEW REPUBLIC (May 23, 2017), <https://newrepublic.com/article/142825/Clarence-thomass-rulings-race-idiosyncratic> (explaining that adherents to colorblindness believe that racism is no longer a major problem in American society); see also Jeff Chang, WHO WE BE: A CULTURAL HISTORY OF RACE IN POST-CIVIL RIGHTS AMERICA 276–80 (2014).

4. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291(2014).

5. *Id.* at 379 (Sotomayor, J., dissenting).

6. *Id.* at 381 (Sotomayor, J., dissenting).

7. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

Undoubtedly, *We Gon' Be Alright* adds to the cultural studies literature by expanding the traditional black-white dichotomous understanding of race relations, which inadequately addresses the wide demographic spectrum of racial and ethnic issues.<sup>8</sup> A binary racial paradigm does not account for interracial conflict, anti-Asian violence, the debate over affirmative action, or disparities in criminal prosecution and sentencing. For too long, bipolarity has forced racial groups to favor one race over another, while conforming to a racial hierarchy that places whites at the top, African Americans at the bottom, and Asian Americans and other non-whites somewhere in-between.<sup>9</sup>

Given these current discriminatory issues racial minorities face, Chang reaches two major conclusions. At the political level, Chang calls for more police accountability and for defending affirmative action, present opportunities for all communities of color to work together in fighting racial inequality. At the theoretical level, the Liang controversy and the affirmative action debate show how Asian Americans can be treated more like whites than African Americans in an inadequate, yet traditional, black/white binary of conversations of race in America.

#### I. JUST SAYIN': NARRATIVES ON RACE AND RESEGREGATION

Race and diversity go hand-in-hand. Early on, Chang explains that the meaning of diversity has been lost during its transition from inclusion and cultural change to serving as a euphemism for racial exclusion and "otherness." Oftentimes, half-hearted commitments to diversity have manifested themselves into mere number-counting and superficial appearances. Chang says, it was mostly white legislators and white voters who transformed diversity into a buzzword after the Court's ruling in *Regents of the University of California v. Bakke (Bakke)*<sup>10</sup> which effectively fused "diversity" with "affirmative action" when diversity became the only rationale for defending affirmative action.<sup>11</sup> "[D]iversity has been exploited and rendered meaningless" because the fungible term can mean practically anything including political view, social class, gender, extracurricular activities, or anything else beyond its original intent of addressing social or racial inequality.<sup>12</sup>

After offering a litany of examples of failed diversity efforts by universities and companies, Chang reminds readers that there is still more that must be done. Despite assurances of "diversity increases," members of affinity groups appearing in university recruitment brochures, and symbolic calls by business leaders for more inclusion, there still lacks meaningful minority

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8. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATIONS IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* 154 (Routledge 2d ed. 1994).

9. *Id.*

10. *Regents of the Univ. of Cal v. Bakke*, 438 U.S. 265, 270 (1978).

11. See Chang, *supra* note 1; see also Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 890 (1996).

12. Chang, *supra* note 1, at 18.

representation.<sup>13</sup> There is also great pushback against diversity from whites, who Chang says find demographic and cultural change unsettling to their privilege.<sup>14</sup> Fully aware of this, and seizing an opportunity, then presidential candidate Donald J. Trump mobilized segments of American society by capitalizing on the unequal division along racial lines, and espousing nativist sentiments on the campaign trail.<sup>15</sup> Chang argues, Trump fueled anxieties held by whites feeling vulnerable about their social and economic positions by blaming migrants, Muslims, African-Americans, women, and others deemed as undeserving of American citizenship.<sup>16</sup>

According to Chang, from the moment Trump demanded President Obama's birth certificate through the Republican primaries to the later stages of the campaign, Trump gained the support of frustrated and enraged white voters "undone by skyrocketing economic inequality, distrustful of big business and media, ignored by elites" to establish his political base.<sup>17</sup> After the election, President Trump delivered on his vitriolic campaign promises by limiting immigration,<sup>18</sup> speeding up deportations,<sup>19</sup> and pulling back on voting rights and police reform.<sup>20</sup>

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13. *Id.*

14. *Id.* at 31.

15. *Id.* at 11.

16. *Id.* at 11.

17. *Id.* As President, Trump is careful to take positions on current political controversies and issues so that he can retain his appeal to the working-class whites who voted him into office. This was apparent when Trump was slow to condemn white supremacists who instigated bloody confrontations in Charlottesville and were perceived to be Trump supporters. See, e.g., David Brooks, *How to Roll Back Fanaticism*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/opinion/fanaticism-white-nationalists-charlottesville.html>; Matthew Haag & Sarah Maslin Nir, *Thousands Give Trump Bronx Cheers as He Returns Home to Manhattan Home*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/nyregion/trump-new-york-city-visit.html>; David Jackson, *Trump Says "Alt Left" Acted Equally Violent in Virginia*, U.S.A. TODAY (Aug. 16, 2017), <https://www.press-reader.com/usa-usa-today-us-edition/20170816/281552290967888>; Glenn Thrush, *Trump Condemns Racists But Creates Fresh Uproar*, N.Y. TIMES (Aug. 15, 2017), <http://www.nytimes.com/images/2017/08/15/nyfrontpage/scan.pdf>.

18. See Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> (describing President Trumps supporting a plan slashing immigration to the United States by limiting the ability of American citizens and legal resident from bringing family members into the country).

19. See, e.g., Matt Apuzzo & Rebecca R. Ruiz, *Fitting Messenger for News the President Was Uncomfortable Delivering*, N.Y. TIMES Sept. 5, 2017, at A16; Michael D. Shear & Julie Hirschfeld Davis, *U.S. Ends Program Giving 'Dreamers' Legal Protection*, N.Y. TIMES (Sept. 6, 2017), <http://www.nytimes.com/images/2017/09/06/nyfrontpage/scannat.pdf>; Vivian Yee, *California Sues Justice Dept. Over Funding for Sanctuary Cities*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/california-sues-trump-administration-over-sanctuary-city-policy.html>; The Editorial Board, *Donald Trump's Cowardice on 'Dreamers'*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/opinion/trump-daca-dreamers-rescind.html>.

20. See Charlie Savage, *A Hate Crime? How the Charlottesville Car Attack May Become a Federal Case*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/>

Resegregation in our neighborhoods, in our schools and in the culture is another factor that works against inclusion.<sup>21</sup> Surprisingly, many people do not realize that this is happening because this resegregation is obfuscated by the culture wars preventing us from understanding it, or coming up with solutions.<sup>22</sup> To Chang's chagrin, wealthy whites in cities like San Francisco and Oakland have displaced the poor and subjugated them from their former communities as the gaps between them and non-whites continue to widen "[i]n terms of poverty, annual income, wealth, healthy, housing, schooling, and incarceration."<sup>23</sup> Much of this can be attributed to the tech boom which has forced many of the disenfranchised to relocate to underfinanced cities outside of the Bay Area.<sup>24</sup>

At times, Chang dives deep to discuss specifics. For example, Chang devotes a chapter to discussing the boycott of the Academy Awards to highlight the lack of women and racial minorities in the overwhelmingly white motion picture academy.<sup>25</sup> Chang starts with the April Reign's #OscarSoWhite hash tag that mobilized audience anger about the lack of nominations of black actors, directors, and others in its 2016 nominations, and then surveys the history of the inadequate representation of racial minorities in Hollywood, highlighting the limited roles available for African Americans, Latinos, and the almost non-existent opportunities for Asian Americans.<sup>26</sup>

With this racial reality, Chang says it is unfortunate that even though African Americans, Latinos, and Asian Americans share common goals, these groups have often unknowingly worked against one another within a white narrative.<sup>27</sup> On this point, Chang cites to the Oscars when Chris Rock and Sacha Baron Cohen made some unscripted tone-deaf jokes at the expense of Asian Americans who were racialized as a successful and industrious monolithic ethnic group.<sup>28</sup> In a segment about the accountant's tabulation of the

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politics/charlottesville-sessions-justice-department.html.

21. Chang, *supra* note 1, at 8.

22. *Id.* at 8.

23. *Id.* at 3.

24. *Id.* at 9.

25. *Id.* at 51.

26. *Id.* at 54, 60. Since the book's release, there has been a brewing controversy over Hollywood's "whitewashing" of Asian Americans by appropriating Asian roles and stories and filing them with white actors from films like "Ghost in the Shell" and "Doctor Strange" to shows such as "Iron Fist." See, e.g., Angie Han, *How the Ending of "Ghost in the Shell" Only Makes Its Race Problem Worse*, MASHABLE (Apr. 3, 2017), <http://mashable.com/2017/04/03/ghost-in-the-shell-movie-ending>; Amanda Hess, *Asian-Americans Actors Are Fighting for Visibility*, N.Y. TIMES (May 25, 2016), [www.nytimes.com/2016/05/29/movies/asian-american-actors-are-fighting-for-visibility-they-will-not-be-ignored.html](http://www.nytimes.com/2016/05/29/movies/asian-american-actors-are-fighting-for-visibility-they-will-not-be-ignored.html) (describing the lack of visibility for Asian American actors and Hollywood's "whitewashing" of Asian American by appropriating Asian roles and stories and filing them with white actors); Frank H. Wu, *A Chinese Hollywood?* HUFFINGTON POST (Mar. 10, 2017), [www.huffingtonpost.com/frank-h-wu/a-chinese-hollywood\\_h\\_9423458.html](http://www.huffingtonpost.com/frank-h-wu/a-chinese-hollywood_h_9423458.html) (discussing lack of Asian American representation in film and leading performance roles in Hollywood, and Chris Rock's ridiculing of Asian Americans through racial stereotypes).

27. Chang, *supra* note 1, at 53–56.

28. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 41 (2002)

votes, Rock invoked the model minority stereotype by referring to three Asian American kids carrying briefcases as dedicated and hardworking. He followed-up with an oft-remark about the audiences sending out tweets using phones made by child laborers.<sup>29</sup>

Not to be outdone, Cohen in a rant embracing racial stereotypes, separately referred to the animated Minions as “hardworking tiny yellow people with no donges.”<sup>30</sup> Chang explains that these comments were insensitive and insulting, exemplifying how communities of color are not listening to one another. “Cohen’s ‘post-racial’ humor turned on the shock value of saying racist things in a faux-clueless manner to an audience that knew they were racist jokes told by white liberals for white liberals.”<sup>31</sup> Here, Chang poses important questions. Did the audience fail to understand the racism because they wrongly believe that positive stereotypes are not offensive? Or perhaps they thought that racial jokes about Asian Americans, like racial jokes about whites, are relatively harmless?<sup>32</sup>

Unmistakably, *We Gon’ Be Alright’s* thrust is found in the last chapter, “The In-Betweens: On Asian Americanness,” where Chang explains why affirmative action has become a difficult ethical issue for Asian Americans, who have been bestowed by whites with the model minority stereotype and perceived as having achieved a nominal “honorary white” status through acculturation, education, and professional achievement.<sup>33</sup> But elsewhere, Professor Lopez cautions that the racial shifting of Asian Americans to whiteness is an example of how society is moving away from the black/white racial paradigm toward a hierarchy of “colorblind white dominance” whereby whites remain racially dominant, and who is considered “white” will be determined based on social-racial lines instead of biology.<sup>34</sup> Within this new racial paradigm “whites” adhere to a color-blind ideology.<sup>35</sup>

Chang is critical of Asian American groups opposed to affirmative action, including Asian American students who perceive affirmative action as a policy that unjustly benefits less-qualified African Americans and Latinos,

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(“From the 1960s to the 1990s, profiles of whiz kid Asian Americans became so common as to be clichés”); Natsu Taylor Saito, *Model Minority Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *ASIAN AM. L.J.* 71, 71–72 (1997) (explaining how Asian individuals are portrayed as a “model minority . . . succeeding in America despite their status as minorities by working and studying, saving and sacrificing for the future”).

29. See Chang, *supra* note 1, at 61.

30. *Id.* at 62.

31. *Id.*

32. *Id.* frank-h-wu/a-chinese-hollywood\_h\_9423458.html (discussing lack of Asian American representation in film and leading performance roles in Hollywood, and Chris Rock’s ridiculing of Asian Americans through racial stereotypes).

33. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 152; 155–156 (10<sup>th</sup> Anniversary Ed., N.Y. Univ. Press 2006); Min Zhou, *Are Asian Americans Becoming “White?”*, 3 *CONTEXTS* 29 (2004).

34. See LOPEZ, *supra* note 33, at 147–48.

35. *Id.* at 148.



and limits their own chances of admission to prestigious universities.<sup>36</sup> These groups believe admission decisions should be based on merit alone without any consideration of race.<sup>37</sup> For them, racial preferences in admissions are a continuation of the historical exclusion against Asian Americans.<sup>38</sup>

However, Chang disagrees with the premise of their claims, and explains why these Asian Americans are wrong to believe that they are harmed by affirmative action.

First, Asian Americans who oppose affirmative action are not considering the goals of diversity as separate from the history of exclusion against a racial group.<sup>39</sup> If they would, Chang says they would support affirmative action because past discrimination against Asian Americans does not justify discrimination against African Americans and Latinos going forward.

Second, "Asian American academic success, regrettably opened the door to the conservative right to sway Asian Americans towards white privilege."<sup>40</sup> Chang insists when these conservative groups refer to Asian Americans as innocent victims of affirmative action, they really are referring to whites, and Asian Americans are being used as a wedge by conservatives to divide racial groups.<sup>41</sup> Third, once made aware of these truths, Chang emphatically suggests ambivalent Asian Americans can play a major role in transforming and advancing race relations. As honorary whites, they can choose to support affirmative action, instead of perpetuating white dominance by seeking its elimination if they choose to do so. "[T]he days are over when Asian Americans should think only in terms of their self-interest, that Asian Americans ought to think about what it means to fight for justice and equity for all."<sup>42</sup>

In illustrating the stark outcomes brought by a race-blind admissions policy and how detrimental it is for Asian Americans to be short-sighted about affirmative action, Chang refers to San Francisco's Lowell High School controversy which pitted Asian American civil rights groups against one another and which resulted in a failure for diversity and equity. Unfortunately, to the book's detriment, Chang leaves out much of the facts of the lawsuit, which began in 1994 when Chinese American groups, who wanted Chinese American students to have an equal opportunity to compete for admission to the magnet high school, filed a class action legal in federal court. They challenged the school desegregation consent decree issued in 1983 to reenroll more African American students into the student body because it

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36. See Chang, *supra* note 1, at 147.

37. *Id.*

38. *Id.*

39. *Id.* at 32.

40. *Id.* at 147.

41. *Id.* at 147; see also Robert S. Chang & Rose C. Villazor, "Testing the 'Model Minority Myth': A Case of Weak Empiricism," 101 Nw. UNIV. L. REV. COLLOQUY 107 (2007) (characterizing affirmative action opponents as using "affirmative action as a wedge issue to create divisions among Asian Americans and between Asian Americans and other racial minorities.").

42. See Chang, *supra* note 1, at 155.



capped the percentage of Chinese Americans to 45 percent of the school's enrollment and required Chinese American freshman applicants to score higher than whites and other candidates.<sup>43</sup>

After years of protracted litigation, the parties entered into a settlement which eventually resulted in the school having a student body lacking diversity—the current student body is 57 percent Asian, 14 percent white, 10 percent Latino, and 2 percent African American.<sup>44</sup> Lowell High School set a national trend followed by high schools with race-blind and merit-focused policies that look only at standard test scores: Stuyvesant in New York, Monte Vista High School in Cupertino, Thomas Jefferson High School for Science and Technology in Alexandria, and Boston Latin School.<sup>45</sup> At these high schools, Asian American students significantly outnumber students from other racial backgrounds.<sup>46</sup> This lack of diversity compels the question of: How can these schools admit more students who are not Asian or white to their student body?

More broadly, this diversity conundrum extends to colleges and universities. If affirmative action were abolished, major university campuses would likely have predominantly white and Asian American student bodies. By Chang's account, whites are three times as likely to be admitted to selective universities as Asians with a similar academic record.<sup>47</sup> Some scholars supplement Chang's outlook while others detract from it. Professors Frank Wu and Jerry Kang argue that without affirmative action, more whites with lower test scores would be admitted over Asian Americans.<sup>48</sup> In contrast, other studies show that more Asian Americans than whites would be admitted.<sup>49</sup>

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43. See *Lawsuit Could Decide the Future of Desegregation Efforts in San Francisco Schools*, N.Y. TIMES (Feb. 16, 1999), <https://nytimes.com/1999/02/16/us/lawsuit-could-decide-future-desegregation-efforts-san-francisco-schools.html>; See Elaine Woo, *Caught on the Wrong Side of the Line?*, L.A. TIMES (July 13, 1995), [http://articles.latimes.com/1995-07-13/news/mn-23543\\_1\\_chinese-americans](http://articles.latimes.com/1995-07-13/news/mn-23543_1_chinese-americans); See *Ho by Ho v. S.F. School Dist.*, 965 F.Supp. 1316, 1318 (N.D. Cal. 1997). Over a decade, the demographics of San Francisco changed. The percentage of Chinese children grew from 19.5 of the City's schools age population in 1983 to almost a third of the school-age population by 1993. *Id.*

44. See *The Daunting Struggle to Diversify Elite Public High Schools*, PBS NEWS HOUR (June 15, 2016) <http://www.pbs.org/newshour/tag/lowell-high-school>; see also Clarissa Wan, *Finding Equity, Part 2: Latino Students Share Stories About Lowell's Lack of Diversity*, THE LOWELL (Oct. 25, 2016), <https://thelowell.org/finding-equity-part-2-latino-students-share-their-stories-of-problems-with-lowells-lack-of-b27b4dd1209c>; see also Stephanie Li, *Finding Equity, Part 1: African-Americans Students Share Their Stories of Problems with Lowell's Lack of Diversity*, THE LOWELL (Oct. 24, 2016), <https://thelowell.org/finding-equity-part-1-african-american-students-share-their-stories-of-problems-with-lowells-896d6da7e0d9>.

45. See Anemona Hartocollis & Stephanie Saul, *Affirmative Action Battle Has a New Focus: Asian-Americans*, N.Y. TIMES, (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/affirmative-action-battle-has-a-new-focus-asian-americans.html>.

46. *Id.*

47. *Id.*

48. See Frank H. Wu, *The Truth About Asian Americans And Affirmative Action*, HUFFINGTON POST, (last updated Jan. 31, 2017), [https://www.huffingtonpost.com/entry/the-truth-about-asian-americans-and-affirmative-action\\_us\\_588fdec1e4b04c35d5835199](https://www.huffingtonpost.com/entry/the-truth-about-asian-americans-and-affirmative-action_us_588fdec1e4b04c35d5835199).

49. See Alia Wong, *The Thorny Relationship Between Asians and Affirmative Action*,

Irrespective of these divergent opinions is the general consensus that there would be fewer African Americans, Latinos, and Southeast Asians such as Vietnamese, Hmong, and Filipino people, in higher education without affirmative action. As shown through the elimination of affirmative action in California after the California Board of Regents ended the use of race as a criterion for student admissions and the enactment of Proposition 209 in 1998, which banned affirmative action from state universities, there has been a significant drop in the admission rates for African American and Latino freshman applicants at UC Berkeley and UCLA.<sup>50</sup> Today, Asian Americans currently represent 42 percent of the student body at the University of California at Berkeley,<sup>51</sup> while African American and Hispanic students are more underrepresented at the nation's top universities than they were 35 five years ago.<sup>52</sup>

## II. FERGUSON, THE BLACK LIVES MATTER MOVEMENT, AND THE PROSECUTION OF N.Y.P.D. OFFICER PETER LIANG

In a chapter entitled "Hands up: On Ferguson," Chang discusses the August 9, 2014 shooting of 18-year-old Michael Brown in Ferguson, Missouri and creates a narrative about the ways in which we view race in post-civil rights movement America.<sup>53</sup> Alicia Garza, Patrisse Cullors, and Opal Tometi, led street demonstrations against violence and racism toward African Americans after the acquittal of George Zimmerman in the shooting death of African American teen Trayvon Martin in the summer of 2013.<sup>54</sup> A Depart-

THE ATLANTIC (Aug. 3, 2017), <http://www.theatlantic.com/education/archive/2017/08/asians-affirmative-action/535812> (stating that studies have shown that more Asian American student would be admitted race-conscious admissions policies were eliminated and noting compelling evidence that East Asians especially benefit).

50. See Katy Murphy, *UC After Proposition 209: How Minority Student Admissions Changed*, MERCURY NEWS (June 21, 2013), <http://www.mercurynews.com/2013/06/21/uc-after-proposition-209-how-minority-student-admissions-changed> (recognizing Proposition 209's effect on admission at the University of California's most selective campuses: UC Berkeley and UCLA and noting that black students applying to enter UC Berkeley's freshman class fell from 47.8 percent to 19.7 percent, while Latino students' admission dropped from 44.4 percent to 20.6 percent; the admission rate for African American UCLA freshman applicants fell from 37.6 percent to 23 percent and Latino applicants dropped from 40.4 percent to 24.3 percent; and noting that "At UC Berkeley, the transfer admissions rates in the fall of 2010 were 22.5 percent for black applicants, 27.1 percent for Latinos, 25.1 percent for Asian Americans and 28.1 percent for white students."); see also William C. Kidder, *Situating Asian Pacific American in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN AM. L.J. 29, 42 (2000).

51. See Andrew Lam, *White Students' Unfair Advantage in Admissions*, N.Y. TIMES (Jan. 30, 2017), <http://www.nytimes.com/2017/01/30/opinion/white-students-unfair-advantage-in-admissions.html>.

52. See Jeremy Ashkenas, et al., *Even With Affirmative Action, Blacks and Hispanics are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <http://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html>.

53. *Id.*

54. See Chang, *supra* note 1, at 108; Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015), <https://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/index.html>.

ment of Justice investigation was launched after the protests over Brown's killing uncovered intentionally racist and unconstitutional practices by the Ferguson police and Ferguson municipal courts.<sup>55</sup> Chang suggests that the Black Lives Matter movement was more than organized protests against police violence. These activists advocated for all persons on the margins of society, brought attention to prisoners, domestic workers, and migrants, and forced Americans to rethink culture and understand racial justice issues.<sup>56</sup>

Next, Chang expands the largely black/white narrative of police violence and misconduct by discussing the prosecution of rookie New York Police Department (N.Y.P.D.) Officer Peter Liang. Unfortunately, Chang paints a description of this case with such broad strokes when describing the Liang case that he misses an opportunity to discuss the case in greater detail. Officer Liang was prosecuted for the shooting death of 28-year-old Akai Gurley in a dark stairway in the Louis H. Pink Houses in the Bronx.<sup>57</sup> Liang and his partner were patrolling different floors of the housing project simultaneously, and consistent with police policy, had their guns drawn when Liang opened a door.<sup>58</sup> When Liang's gun went off, a bullet ricocheted off a wall, and struck Gurley in the heart.<sup>59</sup> Instead of helping Gurley as he laid in a pool of his blood, Liang called his union representative with concern about losing his job.<sup>60</sup> Gurley later died at a hospital. The defense argued at trial that the gun accidentally went off.

A jury convicted Liang of manslaughter, official misconduct, and for failing to assist Gurley.<sup>61</sup> Liang's supporters believed he was selectively prosecuted because Liang was the first N.Y.P.D. officer in over a decade convicted

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55. Chang, *supra* note 1, at 96.

56. *Id.* at 90–95.

57. See, e.g., Asian American Alliance, *Asian America: We Cannot Support Peter Liang*, COLUMBIA SPECTATOR (Jan. 26, 2017), <https://www.columbiaspectator.com/opinion/2016/02/25/asian-america-we-cannot-support-peter-liang>; Susan Chang, *Why Many Asian Americans Support Conviction of Peter Liang*, ASIAN AMERICANS (Feb. 20, 2016), <https://asamnews.com/2016/02/20/why-many-asian-americans-support-conviction-of-peter-liang>; Jay Caspian Kang, *How Should Asian-Americans Feel About the Peter Liang Protests*, N.Y. TIMES, (Feb. 23, 2016), <http://www.nytimes.com/2016/02/23/magazine/how-should-asian-americans-feel-about-the-peter-liang-protests.html>; J. Weston Phippen, *Sentencing for Peter Liang*, THE ATLANTIC (Apr. 19, 2016), <https://www.theatlantic.com/national/archive/2016/04/peter-liang-sentenced/478248>; Yanan Wang, *N.Y. Police Shooting That Has Divided Chinese Americans Will Be Tried by Jury*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/08/n-y-police-shooting-that-has-divided-chinese-americans-will-be-tried-by-jury>.

58. See Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html>.

59. See Hansi Lo Wang, *'Awoken' By N.Y. Cop Shooting, Asian-American Activists Chart Way Forward*, NPR (Apr. 23, 2016), <http://www.npr.org/sections/codeswitch/2016/04/23/475369524/awoken-by-n-y-cop-shooting-asian-american-activists-chart-way-forward>.

60. *Id.*

61. See Chang, *supra* note 1, at 153.

in a line-of-duty shooting, while white officers in other misconduct cases were not prosecuted or received nominal punishment.<sup>62</sup>

Justice Danny Chun reduced Liang's manslaughter charge to criminal negligence homicide and sentenced him to five years of probation and 800 hours of community service.<sup>63</sup> Initially, the Brooklyn District Attorney's Office and Liang appealed, but Liang later waived his right to file a motion to vacate his conviction, and in turn, the prosecutors withdrew their appeal.<sup>64</sup> The City agreed to pay more than \$4 million to settle a wrongful-death lawsuit brought by the Gurley family.<sup>65</sup>

Liang's prosecution generated massive Asian American activism, and drew a rally of 10,000 in April 2016.<sup>66</sup> This show of support for Liang was reminiscent of the outcry by Pan-Asian American coalition groups after the violent murder of Chinese American Vincent Chin thirty-five years before.<sup>67</sup> Liang received nationwide support from the Chinatown community, composed of mainly immigrants, who insisted that the 28-year-old officer was scapegoated in a prosecution that did not involve an altercation and in a climate of ongoing protests by African Americans against police violence.<sup>68</sup> Their concerns were shared by Professor Stephen Saltzburg who believed

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62. See Frank H. Wu, *Peter Liang, An Asian American Scapegoat?*, HUFFINGTON POST (Feb.13, 2017), [https://www.huffingtonpost.com/frank-h-wu/peter-liang-an-asian-amer\\_b\\_9225996.html](https://www.huffingtonpost.com/frank-h-wu/peter-liang-an-asian-amer_b_9225996.html).

63. See Wang, *supra* note 59.

64. See *id.*; Trevor Kapp, *Ex-NYPD Officer Drops Appeal Over Akai Gurley Shooting Conviction*, DNAINFO (Dec. 7, 2016), <https://www.dnainfo.com/new-york/20161207/east-new-york/peter-liang-prosecutors-appeals-fatal-shooting-akai-gurley>.

65. See Yoav Gonen & Emily Saul, *Akai Gurley's Family to Receive \$4 Million Settlement From City*, NY POST (Aug. 16, 2016), <https://nypost.com/2016/08/16/akai-gurleys-family-to-receive-4-million-settlement-from-city>.

66. See *Thousands Rally In NYC For Peter Liang, Cop Convicted In Brooklyn Stairwell Shooting*, CBS NEW YORK (Feb. 20, 2016), <https://newyork.cbslocal.com/2016/02/20/peter-liang-rally-nyc>.

67. Chin was adopted and raised in a working-class Chinese-American family and was having his bachelor party at a Detroit bar. See *United States v. Ebens*, 800 F.2d 1422, 1427–29 (6th Cir. 1986) (describing the brutal attack on Chin). Believing him to be Japanese and economic competition, two white men who had been recently laid off from a Chrysler plant started a fight and fatally struck Chin several times in the head with a baseball bat. Chin's killers were fined \$3000 and ordered to pay \$780 in court fees but never went to jail. At that time, the popular perception was that Asian Americans and immigrants were not minorities protected by civil rights laws. Chin's killing sparked outrage and galvanized the Asian American community into protest. See Eric Fish, *35 Years After Vincent Chin's Murder, How Has America Changed?*, ASIA Soc'y (June 16, 2017), <http://asiasociety.org/blog/asia/35-years-after-vincent-chins-murder-how-has-america-changed>.

68. See Carol Huang, *Foreword to ASIAN/AMERICANS, EDUCATION, AND CRIME: THE MODEL MINORITY MYTH AS VICTIM AND PERPETRATOR* xi-xii (Daisy Ball & Nicholas D. Hartlep eds., 2016) ("More than 10,000 people rallied before the sentencing of Peter Liang, an Asian/American police officer, who was convicted of killing Akai Gurley, an African American man, in Brooklyn, New York, in April 2016.").

Liang would not have been prosecuted or would have been acquitted but for the movements clamoring for police accountability.<sup>69</sup>

Liang, the son of immigrants, was raised in Chinatown. Many of the foreign-born Chinese protesters considered Liang as Chinese and not American. Much of the media attention was placed on these Asian immigrants and conservative Asian groups that were loudly supporting Liang.<sup>70</sup> According to Chang, Liang seemingly acquired the status of conditional whiteness because he represented law enforcement, yet he was not afforded the protections that white officers are normally given. Believing Liang supporters were naïve to think that Liang would be afforded all the privileges of whiteness, Chang rhetorically asks:

Did they really believe the killing of Akai Gurley should be less indictable because it came at the hands of an Asian American officer? Were they really arguing that if hundreds of thousands of people had not taken to the streets in a freedom movement against state violence, this Chinese American police officer would have been afforded all privileges offered a white cop who had taken the life of a Black person?<sup>71</sup>

On the flipside, assimilated Asian Americans, many of whom supported the Black Lives Matter movement and similar racial justice projects that sought solidarity and police accountability, were against any special treatment for Liang due to his race.<sup>72</sup> These Asian Americans argued that as a matter of principle, Liang should not be afforded “white” privilege and immunity from prosecution, which has been frequently granted to white officers who shot unarmed African Americans.<sup>73</sup>

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69. See J. Weston Phippen, *Why was Officer Peter Liang Convicted: Was It Racism, the Facts of the Case, or Fraying Trust in Police?*, THE ATLANTIC (Mar. 3, 2016), <https://www.theatlantic.com/national/archive/2016/03/peter-liang-police-shooting/471687>.

70. See Wang, *supra* note 59.

71. See Chang, *supra* note 1, at 152–153.

72. See Frank H. Wu, *The Dilemma of Peter Liang*, HUFFINGTON POST (last updated Feb. 24, 2017, 9:57 AM), [https://www.huffingtonpost.com/frank-h-wu/the-dilemma-of-peter-liang\\_b\\_9305958.html](https://www.huffingtonpost.com/frank-h-wu/the-dilemma-of-peter-liang_b_9305958.html).

73. *Id.* These Asian Americans joined African Americans in calling for nationwide accountability against excessive and unjust policing, included Emma Chen, president of American Citizens for Justice/Asian Americans Center for Justice who declared, “More than three decades after Vincent Chin’s death, the decision not to indict Darren Wilson reminds us that our justice system is still broken.” See *Asian Americans Show Solidarity, Support for Ferguson*, NBC NEWS (Nov. 25, 2014, 12:56 PM), <https://www.nbcnews.com/news/asian-america/asian-americans-show-solidarity-support-ferguson-n256001> (reporting on the response of Asian American activist groups in supporting Ferguson and protesting Michael Brown’s death). Likewise, the Japanese American Citizens League, Chinese for Affirmative Action, the National Korean American Service & Education Consortium, South Asian Americans Leading Together, and other Asian Pacific Islander American organizations expressed support for Ferguson’s African American community and protesters. See Nichi Bei Weekly Staff, *Asian Americans Show Solidarity with Ferguson, Mo. After Grand Jury Decision*, NICHIBEI WEEKLY (Dec. 4, 2014), <https://www.nichibeio.org/2014/12/asian-americans-show-solidarity-with-ferguson-mo-after-grand-jury-decision>. Asian Americans Advancing Justice-Atlanta called for “answers and justice for Michael Brown’s death” while pledging solidarity with African Americans and other impacted communities. See Press

Though not considered by Chang, readers may ask themselves: what explains the different positions held by the two opposing Asian American camps? A possible theory is that Asian immigrants who insisted that Liang was scapegoated were not familiar with the ugly racial history of this country, and therefore did not fully understand the African Americans experience or the Black Lives Matter movement. Nor did they realize that Asian Americans are beneficiaries of the civil rights struggles during the 1960s,<sup>74</sup> or recall that African American and Asian American communities previously worked together in seeking institutional reform of the N.Y.P.D. "stop-and-frisk" practice. This naivety could have made it easier for Asian immigrants to inherit and be influenced by American racial stereotypes as depicted in the media.

Beyond the Liang case, the fluidity in the racial positioning of Asian Americans as functionally white or constructively black, is apparent in several recent cases involving them. In each case, the racial implications were downplayed or not mentioned at all. First, a few days before Christmas 2014, N.Y.P.D. Officers Wenjian Liu and Rafael Ramos were sitting in their patrol car in Brooklyn when they were killed by Ismaaiyl Brinsley in an ambush.<sup>75</sup> Brinsley, an African American with an extensive criminal history, traveled from Baltimore after shooting his girlfriend, with the intent to kill police officers in retaliation for the killings of Eric Garner and Michael Brown.<sup>76</sup> Apparently, it made no difference to Brinsley that Liu and Ramos were not white because their police uniforms represented whiteness.

Second, Jiansheng Chen, a 60-year-old retired restaurant worker and grandfather playing Pokémon GO was shot to death in his van by a security guard over a disagreement in Virginia.<sup>77</sup> Third, just before graduation, Seattle high school student Tommy Le was first tased and then shot and killed by sheriff's deputies responding to a 911 report of disturbance by an armed man.<sup>78</sup>

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Release, Asian Americans Advancing Justice, *Asian Americans Advancing Justice Condemns Grand Jury's Failure to Bring Charges Against Darren Wilson in Michael Brown Shooting Death*, ASIAN AMERICANS ADVANCING JUSTICE (Nov. 24, 2014).

74. See Chris Punongbayan, *What Asian Americans Owe African Americans*, ASIAN AMERICANS ADVANCING JUSTICE (Oct. 5, 2015), [https://www.advancingjustice-alc.org/news\\_and\\_media/what-asian-americans-owe-african-americans](https://www.advancingjustice-alc.org/news_and_media/what-asian-americans-owe-african-americans) ("The untold story is that Asian America is what it is today because of the African American-led civil rights movement . . . . In 2015, when police brutality is a daily news headline and African Americans are senselessly murdered by law enforcement, Asian Americans must stand as allies to the Black Lives Matter movement.").

75. See Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html>.

76. See Andres Jauregui, *Ismaaiyl Brinsley Had Violent Criminal History, 'Estranged Relationship' With Family*, HUFFINGTON POST (Dec. 21, 2014, 11:29 AM), [http://www.huffingtonpost.com/2014/12/21/ismaaiyl-brinsley-cop-killer\\_n\\_6362298.html](http://www.huffingtonpost.com/2014/12/21/ismaaiyl-brinsley-cop-killer_n_6362298.html).

77. See Chris Fuchs, *60-Year-Old Grandfather Killed by Security Guard While Playing Pokemon Go: Lawyer*, NBC NEWS (Feb. 1, 2017, 6:56 AM), <https://www.nbcnews.com/news/asian-america/60-year-old-grandfather-killed-security-guard-while-playing-pokemon-n715311>.

78. See Christine Willmsen, *'Bubbly Kid' was Fatally Shot by King County Deputy*



The three officers who arrived on the scene said they mistook the pen Le was carrying for a sharp object that resembled a knife.<sup>79</sup> Fourth, United Airlines singled out 69-year-old Dr. David Dao by requesting Department of Aviation security officers to remove him from a plane. To the shock of other passengers, a bloodied Dao was forcibly dragged off the plane despite his repeated protestations.<sup>80</sup> The emotionally disturbing incident was captured on a video that went viral, sparking public outcry and creating a public relations debacle for United Airlines.

Collectively, these cases pose the question: Was the race of the victims initially minimized due to unconscious attitudes and cognitive bias?<sup>81</sup> On this issue, Implicit Association Tests (IAT) show that individuals unconsciously express preferences for and attribute positive characteristics to individuals who are like them.<sup>82</sup> Conversely, they react negatively toward and attribute negative characteristics to those outside of their social and racial groups.<sup>83</sup> According to a 2015 Pew Research Center Report, two IAT studies show that fifty percent of whites subjects tested held subconscious preferences for other whites over Asian Americans, and forty-eight percent of whites held subconscious preferences for other whites over African Americans.<sup>84</sup>

In light of the power of unconscious biases, is it possible that Asian Americans have been considered as somehow mattering less than whites or African Americans in the four cases discussed? Consider the following. In the case of Chen, did his inability to speak English and immigrant background contribute to the security guard's perception of Chen as an "other" which made it easier to shoot Chen at least five times? As for Tommy Le, would he have been shot in the arm and back if he were white instead of Vietnamese American? If Le were perceived as an American and not as a foreigner, would the narrative of the shooting by the Sheriff's Department change as much as it has?<sup>85</sup> Would the optics be different if Dr. Dao was an African American being dragged off a commercial airplane?

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*Hours Before High-School Graduation*, THE SEATTLE TIMES (June 28, 2017, 3:56 PM), <http://www.seattletimes.com/seattle-news/crime/bubbly-kid-was-fatally-shot-by-king-county-deputy-hours-before-high-school-graduation>.

79. See Ryan General, *Asian High School Student Shot Dead by Police for Holding a Pen*, NEXTSHARK (JUNE 29, 2017), <https://nextshark.com/tommy-le-shot-dead-by-police-knife>.

80. See Clio Chang, *Why it Matters that the United Dragging Victim is Asian*, THE NEW REPUBLIC (Apr. 11, 2017), <https://newrepublic.com/article/141970/matters-united-dragging-victim-asian>; Erik Ortiz, *Doctor Dragged Off United Flight Stands to Gain in a Lawsuit, Experts Say*, NBC NEWS (Apr. 14, 2017, 10:27 AM), <https://www.nbcnews.com/news/us-news/doctor-dragged-united-flight-stands-gain-lawsuit-experts-say-n746186>.

81. Cf. Chang & Villazor, *supra* note 41, at 106–107 (comparing unconscious discrimination against Asian Americans with intentional discrimination against them).

82. See Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. OF L. & SOC. CHANGE 451, 475 (2018).

83. *Id.*

84. See Nick K. Sexton, *Study Reveals Americans' Subconscious Racial Biases*, NBC NEWS (Aug. 21, 2015, 7:06 AM), <https://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferences-americans-n413371>.

85. An analysis of the racialization of Asian Americans would not be complete



### III. FISHER V. UNIVERSITY OF TEXAS

As reflected in mainstream media, affirmative action supporters hailed *Fisher* as a major victory for fairness and racial diversity. Edward Blum, Executive Director of the Project on Fair Representation and a longtime advocate for color-blindness who is credited for being responsible for gutting the Voting Rights Act, orchestrated the lawsuit against the University of Texas (UT).<sup>86</sup>

At the center was the UT admissions program that was designed to admit a bright and diverse entering class to alleviate the lingering effects of racial discrimination and graduate a diverse student body for the professional workforce. In 2008, Abigail Fisher, a white female high school student, applied for undergraduate admission to the UT's flagship campus in Austin and was rejected.<sup>87</sup> She filed suit, claiming that UT's consideration of race in admission decisions was in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>88</sup>

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without addressing the way in which Asian Americans are attributed with foreignness. For the uninitiated, Asians, like Latinos are often perceived as foreigners even though they were born in this country or their families have been rooted in the United States for generations. A particularly egregious example was the mass internment of Japanese Americans during World War II, many of whom were born in the United States and were fully assimilated into American society. See generally Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947 (2013) (describing the entire history of discrimination against Asians in the United States in the form of laws and restrictive immigration laws); Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. REV. 1315, 1321 (2006) (asserting that in the weeks following Pearl Harbor "a demand for the mass evacuation of all persons of Japanese ancestry, including American citizens, exploded along the west coast."); ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 104–120 (Vicki Been et al. eds., 2001). Generations later, the experiences of N.B.A. player Jeremy Lin is a reminder that the perpetual foreigner stereotype remains. Lin, who was born in California, faced racial slurs while playing at Harvard, and when he was playing for the New York Knicks during the emergence of "Linsanity," which captured the attention of basketball fans everywhere. See Huan Hsu, *No More Chinks in the Armor*, SLATE (Feb. 21, 2012, 5:05 PM), <https://slate.com/culture/2012/02/chink-in-the-armor-jeremy-lin-why-its-time-to-retire-the-phrase-for-good.html>. When ESPN ran an article about Lin's scoring and playmaking acumen with the headline, "Chink in the Armor." See, e.g., Aaron Couch, *ESPN Apologizes for Jeremy Lin Headline with Racial Slur*, THE HOLLYWOOD REPORTER (Feb. 18, 2012, 3:55 PM), <http://www.hollywoodreporter.com/news/espn-jeremy-lin-knicks-race-292611>; Sean Gregory, *Harvard's Hoops Star is Asian. Why's That a Problem?*, TIME (Dec. 31, 2009), <http://content.time.com/time/magazine/article/0,9171,1953708,00.html>. This was yet another failed attempt at "post-racial" honor.

86. See Julia Glum, *Abby Fisher Case Strategist Edward Blum Reacts to Rumors Trump May Tackle Affirmative Action*, NEWSWEEK (Aug. 2, 2017, 3:59 PM), <http://www.newsweek.com/affirmative-action-trump-fisher-supreme-court-645594>; Stephanie Mencimer, *Meet the Brains Behind the Effort to Get the Supreme Court to Rethink Civil Rights*, MOTHER JONES, (Apr. 2016), <http://www.motherjones.com/politics/2016/04/edward-blum-supreme-court-affirmative-action-civil-rights>.

87. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S.Ct. 2198, 2202 (2016).

88. *Id.*

In upholding the constitutionality of UT's admissions program, Justice Kennedy concluded that UT's diversity goals satisfied the strict scrutiny standard that requires government racial classifications to advance a compelling interest, and that the holistic aspect of the admissions program was needed to reach the diversity goals of the university's freshman class.<sup>89</sup> With this ruling against Fisher, an unrelenting Blum filed a new lawsuit a year later in Texas state court arguing that the use of racial and ethnic preferences by UT in admissions violated Texas law and the State Constitution.<sup>90</sup>

Asian Americans were drawn into the Supreme Court's affirmative action jurisprudence by Fisher and Justice Alito. In Fisher's brief, she referred to Asian Americans in arguing that Texas's use of race in admission decisions was detrimental to Asian Americans and subjected them to the same inequality as white applicants, thereby exacerbating classroom diversity problems.<sup>91</sup> UT's response brief did not mention Asian Americans because they were neither beneficiaries of its admission plan, nor were they underrepresented minorities.<sup>92</sup>

Asian American interest groups on both sides of the issue assumed an active advocacy role by filing *amicus curiae* briefs. Asian American interest groups that loudly opposed affirmative action received more media attention than Asian American groups that supported them. In their *amicus* brief, the Asian American Legal Foundation (AALF) and the Asian American Coalition for Education argued that the university's admission program uses impermissible racial balancing by including Hispanics in the program but excluding Asian Americans. AALF argued that Asian Americans were harmed the most by the university's affirmative action program, and the exclusion of Asian Americans as beneficiaries diminishes their value.<sup>93</sup> As a counter, in their brief, Asian Americans Advancing Justice (AAAJ), joined by 150 civil rights groups advocacy organizations, bar associations, and business organization, representing the majority of Asian American supporting affirmative action, argued that Fisher used Asian Americans as pawns to strengthen her arguments. They took issue with Fisher's characterization of Asian Americans as innocent victims burdened by affirmative action programs.<sup>94</sup>

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89. *Id.* at 2202–04.

90. See Ralph K.M. Haurwitz, *UT Faces New Lawsuit Over Role of Race in Admissions Policy*, AUSTIN AMERICAN-STATESMAN (last updated Sept. 25, 2018, 9:47 PM), <http://www.mystatesman.com/news/state—regional-govt—politics/faces-new-lawsuit-over-role-race-admissions-policy/kcZFIIUwGHmGCCl6uSAhtI>.

91. See Brief for Petitioner at 8, *Fisher v. Univ. of Tex. at Austin* (Fisher II), 136 S.Ct. 2198 (2016) (No. 14–981).

92. See Brief for Respondents, *Abigail Noel Fisher*, 136 S.Ct. 2198 (2016) (No. 14–981).

93. See Brief of Amici Curiae The Asian American Legal Foundation and The Asian American Coalition for Education (Representing 117 Affiliated Asian American Organizations in Support of Petitioner) at 6, *Abigail Noel Fisher*, 136 S.Ct. 2198 (2016) (No. 14–981).

94. See Brief of Amici Curiae Members of Asian Americans Advancing Justice et al., in Support of Respondents at 4, *Abigail Noel Fisher*, 136 S.Ct. 2198 (2016) (No. 14–981).

Remarkably, Justice Alito transformed Asian Americans into honorary whites and made them the centerpiece of his dissent.<sup>95</sup> Early indicators that Alito was going to place the spotlight on Asian Americans materialized five years before in a series of robust questions during oral arguments in *Fisher I*. At the time, Alito was particularly interested in how UT's program impacts Asian Americans. When asked if Asian Americans were treated fairly in the admission process, he insinuated that UT lumped together all Asian groups to support its decision to exclude Asian Americans as beneficiaries, and then grilled Gregory Gare, counsel for UT, about how the university determined if there was a critical mass of traditionally underrepresented Asian subgroups such as Cambodians, Vietnamese, Hmong, and Filipinos.<sup>96</sup>

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95. See Margaret Burnham, *Sessions Feigns Concern for Asian-Americans To Gut Affirmative Action*, WBUR: COGNOSCENTI (Aug. 4, 2017), <http://www.wbur.org/cognoscenti/2017/08/04/sessions-asian-americans-affirmative-action-margaret-burnham> (declaring "[t]ransforming Asian-Americans into honorary whites for purposes of the affirmative action debate is a win-win for Alito and others on the right"); see also Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD. WORLD L.J. 225, 272 (1995) ("Functionally, the injection of Asian Americans into the affirmative action debate transforms formally non-cognizable harm to the white majority into arguably cognizable harm against a colored minority. It completes the 'divide and conquer' tactic by then turning affirmative action for African Americans into discrimination against Asian Americans." Asian Americans become the innocent victims in place of whites).

96. See Josh Gerstein, *Alito Speaks Up for Asian Americans*, POLITICO (Oct. 11, 2012, 12:26 AM), <http://www.politico.com/blogs/under-the-radar/2012/10/alito-speaks-up-for-asian-americans-138099>. To his credit, Alito asks important questions since new research on the experiences of law students of Asian subgroups confirm their disaggregated experiences including disparities in socioeconomic backgrounds, varied range of LSAT scores, and skewed admission rates. In particular, Vietnamese and Filipino students score the lowest and are the least likely to gain law school admission. See also AARON N. TAYLOR ET AL., *DIVERSITY WITHIN DIVERSITY: THE VARIED EXPERIENCES OF ASIAN AND ASIAN AMERICAN LAW STUDENTS* (June 26, 2017), <http://lssse.indiana.edu/wp-content/uploads/2015/12/Diversity-within-Diversity.pdf>. Alito expressed skepticism about whether the Texas plan appropriately accounts for determining the admission rates for Asian American subgroups. Despite UT's university's assurances that this self-identification process was an accurate measure for Asian American students, Alito argued that Asian Americans remain "over-represented" due to the lumping together of the major and subgroups of Asian Americans: Chinese, Japanese, Korean, Vietnamese, Hmong, and Indians on campus as a monolithic group. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2229 (2016). From Alito's perspective, Asian Americans are not overrepresented based on state demographics. *Id.* Alito's concerns may have stemmed from his belief that UT has a poor history of actively recruiting Asian American applicants in the years leading up to *Fisher*. Though Alito never mentioned it in his dissent, the weak recruitment of Asian American students was particularly noticeable in UT's 1992 affirmative action program which excluded Asian Americans, and was deemed to be unconstitutional four years later in 1996 by the Fifth Circuit in *Hopwood v. Texas* (*Hopwood*). 78 F. 3d 932, 945-46 (5th Cir. 1996). *Hopwood* revealed that UT valued African Americans and Mexican Americans more than Asian Americans since the university chose to give preferences to the former two groups. On this issue about the place of Asian Americans in the Texas program, Professor Gabriel Chin comments that such a decision "sends a signal of the valuation of the race in the eyes of the law school if the law school helps some races . . . but not others." Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 932 (1996).

Alito's festering concerns about UT's discrimination against Asian Americans manifested into a boisterous fifty-one-page dissent, joined by Chief Justice Roberts and Justice Thomas. Alito's dissent began with a detailed critique of UT's policies, and then argued that UT failed to define the term "critical mass" and explain how the use of race and ethnicity were used to achieve that goal.<sup>97</sup> Alito insisted that the UT program could not satisfy strict scrutiny because the university merely made vague amorphous definitions of critical mass and how it measures diversity on campus, and that the majority decision gives too much deference to UT.<sup>98</sup>

Throughout his dissent, Justice Alito effectively functions as a self-anointed advocate for Asian Americans opposing affirmative action.<sup>99</sup> As a rejoinder to the single mention of Asian Americans in the majority's opinion, Alito did the reverse and over-relied on Asian Americans to avoid talking about white interests and white victimhood. Alito purposefully minimized references to Fisher as being a white woman. This avoidance of the plaintiff's white identity was noticed by one academic who argued that Asian Americans were used as a proxy for whites.

Justice Alito mentions white people only ten times . . . , and not once does he use the word in reference to Fisher herself. Yet the words "Asian Americans" appear sixty-two times in his dissent. If it were not for the ubiquity of Abigail Fisher's image in the media today, one might think that Justice Alito was examining the petition of a person like me a Chinese American.<sup>100</sup>

Alito's use of Asian Americans to argue that affirmative action discriminates against whites is the kind of argument that Professor Alfred Yen warns about: when Asian Americans are assigned the model minority stereotype, they are "given whites attributes mak[ing] it possible [to] argue about the interests of whites without ever mentioning whites."<sup>101</sup>

Arguably, Alito's use of the racial identity of Asian Americans to further anti-blackness reached a high point when Alito separated Asian Americans from African Americans and Hispanics. Alito asserted that the majority opinion helped affluent African American students while hurting Asian Americans students, and used the perennial trope of pitting African Americans and Hispanics against Asian Americans.<sup>102</sup> Observations such as these

97. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215–2217 (2016).

98. *Id.* at 2220–2224.

99. *Id.* at 2229–2230.

100. David Shih, *Abigail Fisher Isn't an Asian American*, DAVID SHIH (July 1, 2016), <http://professorshih.blogspot.com/2016/07/abigail-fisher-isnt-asian-american.html>.

101. Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L.J.* 39, 52 (1996). Whiteness status is not based solely on skin color since it can be achieved based on socio-economic success and upward mobility. As Professor Ian Haney Lopez points out in reference to Cubans and Asians, "Growing numbers of minority individuals, those with fair skin, wealth, political connections or high athletic artistic or professional accomplishments—can virtually achieve a white identity. [This] racial designation . . . like others . . . operates on a sliding scale." See Ian Haney Lopez, *White Latinos*, 6 *HARV. LATINO L. REV.* 1, 5 (2003).

102. See *Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198 (2016) at 2227 n.4 This is an

have been criticized by AAAJ: "Justice Alito takes pains during a period of significant racial conflict in our society, to look outside the record to irresponsibly pit Asian Americans against other communities of color."<sup>103</sup>

Ultimately, Alito's dissent was not all for naught for it serves as a blueprint for other challenges against affirmative action that awaited *Fisher's* outcome, "Alito's repeated references to Asian students were a clear nod to two other cases working their way through federal court, although he did not mention them specifically."<sup>104</sup> Indeed, as is explored in the next section, Asian Americans are plaintiffs in current lawsuits against Harvard College and the University of North Carolina in Chapel Hill (UNC).<sup>105</sup>

#### IV. POST-*FISHER V. TEXAS*: DISCRIMINATION AGAINST ASIAN AMERICANS AT ELITE UNIVERSITIES REDUX?

Students For Fair Admissions (SFFA), an arm of Blum's group, moved away from applying the strategy of using a sympathetic young white female in *Fisher* to using Asian American student-plaintiffs to challenge the Harvard

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example of what Frank Wu articulates as "[Asian Americans] placed in the awkward position of buffer or intermediary, elevated as the preferred racial minority at the expense of denigrating African Americans." See Wu, *supra* note 28. Alito's concerns about the plight of Asian American applicants continued when he announced his dissent from the bench and offered queries about a hypothetical applicant (straw man), who has one Asian grandparent, self-selecting his or her ethnic background on their application and asked whether such an applicant bring a different diversity perceptiveness to UT. Justice Alito's reading of his dissent from the bench. *Fisher*, 136 S.Ct. 2198. He rhetorically asked whether UT would have the presumption that the Asian applicant bring a distinctive "Asian viewpoint" to the classroom. To Alito, given the many diverse ethnic backgrounds of Asian students, "It would be ludicrous to believe that the student will have the same viewpoint to share in class." *Id.*

103. See Stewart Kwoh & Mee Moua, *Affirmative Action, Asian Americans 'Are Not Your Wedge'*, NBC NEWS (July 19, 2016), <http://www.nbcnews.com/news/asian-american/opinion-affirmative-action-asian-americans-are-no-your-wedge-n610596>.

104. See Stephanie Mencimer, *Affirmative Action Won, But Now It Faces a Far Bigger Threat*, MOTHER JONES (June 24, 2016, 5:32 PM), <http://motherjones.com/politics/2016/06/samuel-alito-fisher-v.-texas-affirmative-action>; Anemona Hartocollis & Stephanie Saul, *Asians Become Focus of Battle on Admissions*, N.Y. TIMES, Aug. 3, 2017, at A1 "[S]ome legal experts noted that Justice Samuel A. Alito, Jr., in his dissent, said the Texas plan discriminated against Asian-Americans, and they saw that as a future theme to be pursued by opponents of affirmative action.")

105. See Stephanie Mencimer, *Here's the Next Sleeper Challenge to Affirmative Action*, MOTHER JONES, (July 19, 2016, 10:00 AM), <https://www.motherjones.com/politics/2016/07/abigail-fisher-going-stay-mad>; Joseph P. Williams, *A New Face for Affirmative Action?* U.S. NEWS.COM (Feb. 3, 2017), <https://www.usnews.com/news/the-report/articles/2017-02-03/are-asians-the-new-face-of-affirmative-action>; Hartocollis & Saul, *supra* note 104, at A1 (reporting that the Harvard case places the spotlight on Asian Americans in the affirmative action debate); See Felicia Bailey, *UNC's Affirmative Action Lawsuit Moves Forward with Supreme Court Ruling*, THE DAILY TAR HEEL (Nov. 20, 2016, 11:07 PM), <http://www.dailytarheel.com/article/2016/11/uncs-affirmative-action-lawsuit-moves-forward-with-supreme-court-ruling>; Brittany N. Ellis, *The Harvard Admissions Lawsuit, Explained*, THE HARVARD CRIMSON (Nov. 7, 2016), <http://www.thecrimson.com/article/2016/11/7/harvard-admissions-lawsuit-explainer>.

and UNC affirmative action programs.<sup>106</sup> Just like Abigail Fisher, these Asian American students are portrayed as innocent victims, but unlike Fisher, they are not white and possess much stronger compelling qualifications for admission.<sup>107</sup>

To begin, SFFA filed suit against Harvard College on behalf of a rejected Chinese American applicant alleging that the university's admissions policy violates Title VI of the Civil Rights Act of 1964 which bars federally funded entities from discriminating based on race or ethnicity.<sup>108</sup> SFFA's Complaint argues that Harvard intentionally discriminates against Asian American applicants by requiring them to score 112–140 points higher on the SAT than white or other minority applicants and has imposed longstanding ceilings on Asian American admissions that are akin to the quotas placed on Jewish students generations before.<sup>109</sup> It further alleges that more whites and Asian Americans would be admitted into Harvard absent its reliance on "racial classifications" in its admission decisions.<sup>110</sup>

Similarly, SFFA alleges UNC-Chapel Hill (UNC) discriminates against white and Asian American applicants because it uses race as determinative factor in admissions.<sup>111</sup> Compared to the Harvard brief, SFFA's grouping together of whites and Asian Americans in the UNC Complaint is even more explicit:

UNC-Chapel Hill's racial preference for each underrepresented minority student (which equates to a penalty imposed upon *white and Asian-American applicants*) is so large . . . using race or ethnicity as a dominant factor in admissions decisions could, for example, account for the disparate treatment of *high-achieving Asian-American and white applicants*, and underrepresented minority applicants with inferior academic credentials. UNC-Chapel Hill admission decisions simply were not explainable on grounds other than race. *High-achieving Asian-American and white applicants* are as broadly diverse and eclectic in their abilities and interests as any other group seeking admission to UNC-Chapel Hill.<sup>112</sup>

Coinciding with these SFFA's sleeper cases are the allegations made by the Asian American Coalition for Education (AACE) joined by sixty

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106. See Stephanie Mencimer, *Here's the Next Sleeper Challenge to Affirmative Action*, MOTHER JONES (July 19, 2016, 10:00 AM), <http://motherjones.com/politics/2016/07/abigail-fisher-going-stay-mad>; Williams, *supra* note 106.

107. See Mencimer, *supra* note 105.

108. See Compl. for Appellant at 3, *Students for Fair Admission, Inc. v. Harvard College*, (D. Mass. 2014) (No.14-cv-14176-ADB).

109. *Id.* at 35–36; 49.

110. *Id.* at 3.

111. See Compl. for Appellant at 2–4; 17, *Students For Fair Admissions, Inc. v. University of North Carolina*, (M.D.N.C 2017) (1:14-cv-954). Interestingly, SFFA's Complaint ignored the issue of legacy admissions, which have historically benefited children of affluent white alumni, big donors, politicians, and celebrities, and displaced more deserving candidates from all backgrounds including middle-class whites. See Daniel Golden, *Blame Rich Whites for 'Asian Fail' at Top Colleges*, BLOOMBERG NEWS, (Aug. 9, 2017, 12:18 PM), <https://www.bloomberg.com/opinion/articles/2017-08-09/blame-rich-whites-for-asian-fail-at-top-colleges>.

112. *Id.* at 4–5. (emphasis added).



other Asian American groups opposed to affirmative action in a complaint with the Department of Justice.<sup>113</sup> AACE asked the Civil Rights Division to investigate unlawful discrimination against Asian American applicants in the admissions programs at Yale, Brown, and Dartmouth.<sup>114</sup> AACE claims these universities are enforcing race-based quotas against Asian American applicants, and this anti-Asian bias is facilitated by the university's embrace of negative racial and cultural stereotypes such as: (1) Asian Americans lack creativity and cannot think critically think; (2) Asian Americans lack leadership skills; and (3) Asian American students are not well-rounded because they overemphasize studying over extracurricular activities.<sup>115</sup> Unlike the Harvard and UNC cases held in abeyance, AACE's complaint laid dormant after it was lodged in 2015. It only received increased attention last summer when the Justice Department signaled a renewed federal effort to challenge affirmative action policies in college and university admissions.<sup>116</sup>

Anyone familiar with Asian American issues will probably realize that the allegations of university admission policies discriminating against Asian Americans made by SFFA and AACE, portraying "Asian Americans as victims" of affirmative action, are not new. In fact, such arguments harken back to the Reagan Administration's argument that affirmative action unfairly limited opportunities of whites<sup>117</sup> and echo the charges made by Asian Americans in the 1980s that Berkeley, UCLA, Brown, Stanford, Harvard, and Princeton

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113. See Doug Tsuruoka, *Asian American Groups Backs Trump Probe on University Bias*, ASIA TIMES, (Aug. 3, 2017, 12:42PM), <http://www.atimes.com/article/asian-american-groups-back-trump-probe-university-bias> (noting that this complaint joined by 60 Asian American organizations was "one of the largest ever by Asians in the US on an education rights issue.").

114. See Compl., *Asian Am. Coal. for Educ. v. Yale Univ., et al.*, May 23, 2016 at 3.

115. *Id.* at 7–9.

116. See Hartocollis & Saul, *supra* note 45, at A1; Opinion, *Does the Nation Still Need Affirmative Action?*, WASH. POST (Aug. 6, 2017), [http://www.washingtonpost.com/opinions/does-the-nation-still-need-affirmative-action/2017/08/06/bdd56db4-77cb-11e7-9eac-d56bd5568db8\\_story.html](http://www.washingtonpost.com/opinions/does-the-nation-still-need-affirmative-action/2017/08/06/bdd56db4-77cb-11e7-9eac-d56bd5568db8_story.html); See CAA, *CAA Denounces Trump Efforts to Choke Immigration and Attack Affirmative Action*, CHINESE FOR AFFIRMATIVE ACTION (Aug. 21, 2017), <http://www.caasf.org/2017/08/caa-denounces-trump-efforts-to-choke-immigration-and-attack-affirmative-action/#more-6609> (Department of Justice plans were resoundly denounced by Chinese for Affirmative Action and other civil rights leaders); Charlie Savage, *U.S. Rights Unit Shifts to Study Antiwhite Bias*, N.Y. TIMES, Aug. 2, 2017, at A1 ("The Trump administration is preparing to redirect resources of the Justice Department's civil rights division toward investigating and suing universities over affirmative action admissions policies deemed to discriminate against white applicants"); see also Sari Horwitz & Robert Costa, *Sessions's Move to Take on Affirmative Action Energizes Trump's Base*, WASH. POST (Aug. 2, 2017), [http://www.washingtonpost.com/world/national-security/sessions-move-to-take-on-affirmative-action-energizes-trumps-base/2017/08/02/771285b4-779f-11e7-8839-ec48ec4cae25\\_story.html](http://www.washingtonpost.com/world/national-security/sessions-move-to-take-on-affirmative-action-energizes-trumps-base/2017/08/02/771285b4-779f-11e7-8839-ec48ec4cae25_story.html); Sari Horwitz & Emma Brown, *Justice Department Plans New Project to Sue Universities Over Affirmative Action Policies*, WASH. POST (Aug. 1, 2017), [https://www.washingtonpost.com/world/national-security/justice-department-plans-new-project-to-sue-universities-over-affirmative-action-policies/2017/08/01/6295eba4-772b-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-plans-new-project-to-sue-universities-over-affirmative-action-policies/2017/08/01/6295eba4-772b-11e7-8f39-eeb7d3a2d304_story.html).

117. See Chang, *supra* note 1, at 26.



intentionally discriminated against them by claiming that Asian American applicants were overrepresented or unqualified for admission.<sup>118</sup> Like before, these claims about “reverse discrimination” claims are misguided. On this issue sociologists Michael Omi and Howard Winnant clarify that affirmative action programs are not reverse discrimination because they are designed to address social and historical inequalities, and do not essentialize a particular individual race.<sup>119</sup> To the contrary, when properly administered, the benefits and burden of affirmative action are shared by everyone.<sup>120</sup>

So why the rehash? Are conservatives simply out of ideas? In my view, the mirrored claims made in the Harvard and UNC lawsuits by affirmative action opponents are analogous to the times when Hollywood decides to reboot an older film property. These movie studios will obfuscate the real reason why they are making a “new version” by claiming that they are seeking to introduce a new generation to a classic movie, but the truth is they are just lacking original ideas. Similarly, with the same characters and plot, but with new actors cast, affirmative action opponents are recycling old arguments about the harm caused to Asian Americans. But like most rebooted films, the “new one” is not warranted and fans of the original were not clamoring for a remake. As such, a reboot made in such desperation is unlikely to perform well at the box office, and it runs the risk of being eternally ridiculed in film history as an attempted cash grab.

Note the resemblance. In her seminal book about Asian Americans and affirmative action published in 1992, sociologist Dana Takagi wrote:

Beginning in late 1988 conservative and neoconservatives suggested that discrimination against Asian Americans was sympathetic of deeper problems with the university: affirmative action . . . discrimination against

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118. See DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN AMERICAN ADMISSIONS AND RACIAL POLITICS* 8–9 (Rutgers Univ. Press, 1992). In the 1970s, Asian Americans were underrepresented minorities on universities in the 1970s and grew to about 4 percent of all university students (and over 35 percent of the UC system) during the 1980s. See also ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 39 (U.C. Press, 2002); OMI & WINANT, *supra* note 8, at 77–78; Alia Wong, *The Thorny Relationship Between Asians and Affirmative Action*, *THE ATLANTIC* (Aug. 3, 2017), <http://www.theatlantic.com/education/archive/2017/08/asians-affirmative-action/535812> (reporting Asian American communities generally support race-conscious admissions policies).

119. See OMI & WINANT, *supra* note 8, at 72–73.

120. See Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice*, 4 *UCLA ASIAN PAC. AM. L.J.* 129, 159 (1996) (explaining “It will be reasonable to exclude APAs from the affirmative action program and treat them no differently from everyone else excluded, such as Whites . . . since APAs do not warrant affirmative action in this particular case, they will be treated no differently than Americans who happen to be white.”); see also RUTH BADER GINSBURG, *MY OWN WORDS* 274–275 (2016) (opining “Affirmative action and the disparate-impact concept have potential to lessen substantive inequality, foster diversity, and promote the economic and social well-being of people raised in unprivileged communities . . . . We will all profit from a more diverse, inclusive society, understanding, accommodating, even celebrating our difference, while pulling together for the common good.”).

Asians was the logical and inevitable outcome of preferences for 'other' minorities (that is, Blacks and Chicanos/Latinos).<sup>121</sup>

Blum applies a similar tactic when he commented about the Harvard lawsuit and the use of racial classifications in university admissions in a *Washington Post* op-ed last summer:

Today, Harvard's discriminatory policies harm Asian Americans—call it the Asian problem . . . . From 1992 through 2013, the percentage of Asians admitted to Harvard each year has been remarkably stable. In 1992, 19 percent of Asian admitted to Harvard each year has been remarkably stable. In 1992, 19 percent of admitted students were Asian, while in 2013, 18 percent were Asian. This is true even though the number of Asian applicants to elite schools have disproportionately risen in recent decades . . . . This rate of admission of Asians cannot be a coincidence . . . Harvard isn't alone. The same flat rate of Asian admissions is evidenced at all of the Ivy League schools.<sup>122</sup>

Zooming in for a closer examination, Blum is using this tired affirmative action trope to separate Asian Americans from other communities of color on this issue. Legal scholars Nancy Leong and Erwin Chemerinsky characterize such disingenuous arguments as strategic ones made to further a conservative agenda rather than protect Asian Americans.<sup>123</sup> Unveiled, this feigned concern for Asian Americans is a way to "protect the existing racial hierarchy—with white people at the top—while disguising their efforts as race-neutral rather than racially motivated."<sup>124</sup>

Conservatives are not the only ones at fault for not acting in the best interests of Asian Americans. The political left can be criticized for leaving out Asian Americans in their broad pro-affirmative action arguments on behalf of African Americans and Latinos. On this topic, professors Michael Omi and Dana Takagi argue it is problematic that Asian Americans are considered part of a wider and "shared interest" coalition politics because it assumes that every racial group faces the same kind of racism and discrimination in the legal market, politics and residential patterns.<sup>125</sup> Omi and Takagi maintain that liberals should not assume that all racial minorities share the same nature of racism in this country.<sup>126</sup> In applying their thesis to the examples of

121. See TAKAGI, *supra* note 118, at 8–9.

122. Edward Blum, Opinion, *Harvard's Discrimination Against Asian Americans Must End*, WASH. POST (Aug. 8, 2017), [https://www.washingtonpost.com/opinions/harvards-discrimination-against-asian-americans-must-end/2017/08/08/446ebd6a-7bb1-11e7-a669-b400c5c7e1cc\\_story.html?utm\\_term=.958821473e0e](https://www.washingtonpost.com/opinions/harvards-discrimination-against-asian-americans-must-end/2017/08/08/446ebd6a-7bb1-11e7-a669-b400c5c7e1cc_story.html?utm_term=.958821473e0e).

123. Nancy Leong & Erwin Chemerinsky, *Don't Use Asian Americans to Justify Anti-Affirmative Action Politics*, WASH. POST (Aug. 3, 2017), [http://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-to-justify-anti-affirmative-action-politics/?utm\\_term=.2a38bb29256e](http://www.washingtonpost.com/news/posteverything/wp/2017/08/03/dont-use-asian-americans-to-justify-anti-affirmative-action-politics/?utm_term=.2a38bb29256e).

124. *Id.*

125. See MICHAEL OMI & DANA Y. TAKAGI, SITUATING ASIAN AMERICANS IN THE POLITICAL DISCOURSE ON AFFIRMATIVE ACTION, IN RACE AND REPRESENTATIONS: AFFIRMATIVE ACTION 276 (Robert Post & Michael Rogin eds., 1998).

126. *Id.*

the opposing camps in the Liang case, and the Chinese American plaintiffs and the civil rights groups that opposed them in the Lowell high school litigation, the shortcomings of shared interest theory become more apparent.

With the Harvard bench trial's conclusion last fall, and a decision by Judge Allison D. Burroughs expected in early 2019, and the UNC case still in the early stages of litigation, it remains entirely unclear if or how they will be resolved. It is possible that the suits will reveal some evidence of discrimination by some universities or clear some of the universities of any wrongdoing, just like the admissions controversies of the 1980s did. Professor Takagi reports the Education Department's Office of Civil Rights absolved Harvard of charges of discrimination against Asian Americans, and internal investigations at Cornell, Princeton, found no evidence of bias.<sup>127</sup> However, Berkeley, UCLA, and Brown found problematic issues, and the schools were forced to modify their admission policies.<sup>128</sup> Whatever the outcome of the cases, hopefully at the very least, these challenges will encourage sufficient transparency and more accountability in the admission process, as well as bring attention to issues affecting Asian Americans.

Finally, speculation that the Harvard and the UNC cases are on the fast-track to the Supreme Court has been spurred on by Justice Kennedy's retirement and Justice Brett Kavanaugh's confirmation to the Court, which could tilt the Court to the right.<sup>129</sup> The anticipated new conservative wing of Thomas, Roberts, Alito, Gorsuch, and Kavanaugh may view the Harvard lawsuit as an opportunity to strike down affirmative action once and for all. With Alito's dissent available as a template, the Court could return to the traditionally rigid application of strict scrutiny as opposed to the seemingly more relaxed test in *Grutter v. Bollinger*<sup>130</sup> and *Fisher*, to challenge the defenses raised by Harvard concerning their admission policies and reject the diversity rationale for affirmative action. But maybe none of these predictions will come into fruition.

## CONCLUSION

In the end, *We Gon' Be Alright* successfully destroys the myth of a post-racial America by offering a snapshot of racial progress and contemporary race relations. By showing that race and privilege are embedded in our society, Chang reveals the fallacy of a color-blind society and provides solid reasons why Americans should act through activism and advocacy to address inequality.

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127. See TAKAGI, *supra* note 118, at 9.

128. *Id.*

129. See *e.g.*, Adam Liptak, *Trump Set to Tilt Court as Kennedy Retires*, N.Y. TIMES, June 28, 2018, at A1; Emily Bazelon, *How Bad Will It Get Without Kennedy*, N.Y. TIMES, June 28, 2018, at A27; Adam Liptak, *Former Bush Aide is Trump Pick for the Court*, N.Y. TIMES, July 10, 2018, at A1; Peter Baker, *A 3-Decade Dream for Conservatives is Within Reach*, N.Y. TIMES, July 10, 2018, at A1; Editorial: *Mr. Trump Courts the Right*, N.Y. TIMES, July 10, 2018, at A22..

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