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Vinay Harpalani

University of New Mexico - School of Law, harpalani@law.unm.edu

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RACIAL TRIANGULATION, INTEREST-CONVERGENCE, AND THE DOUBLE-CONSCIOUSNESS OF ASIAN AMERICANS

Vinay Harpalani*

ABSTRACT

This Essay integrates Professor Claire Jean Kim's racial triangulation framework, Professor Derrick Bell's interest-convergence theory, and W.E.B. Du Bois's notion of double-consciousness, all to examine the racial positioning of Asian Americans and the dilemmas we face as a result. To do so, this Essay considers the history of Asian immigration to the United States, the model minority and perpetual foreigner stereotypes, Asian Americans' positioning in the affirmative action debate, COVID-19-related hate and bias incidents, and Andrew Yang's 2020 Democratic presidential candidacy. The Essay examines how racial stereotypes of Asian Americans have emerged through historical cycles of valorization and ostracism, as analyzed through the racial triangulation framework. It analyzes how the political interests of the U.S. government converged with those of educated professionals in Asian countries, leading to changes in immigration policy and the emergence of the model minority stereotype. The Essay considers various ways that Asian Americans have been simultaneously valorized as model minorities and ostracized as perpetual foreigners. It highlights the affirmative action debate, where Asian Americans have been cast as high-achieving victims of race-conscious university

*Associate Professor of Law and Henry Weihofen Professor, University of New Mexico School of Law. J.D., New York University School of Law; Ph.D., University of Pennsylvania. This Essay was the basis for my presentation at the 26th Annual *Georgia State University Law Review* Symposium, "Social Justice and Racial Equality: What's Next?" I thank the editors of the *Georgia State University Law Review* for inviting me to present and to write this Essay. Additionally, Jeff Hoagland provided valuable research assistance during the writing process.

admissions policies and pitted against other groups of people of color, culminating with the current Students for Fair Admissions, Inc. v. President of Harvard College lawsuit. Finally, the Essay focuses on Andrew Yang's presidential bid—particularly how his navigation of racial stereotypes reflected a double-consciousness that parallels the dilemmas faced by many Black Americans. The Essay concludes by arguing that to build coalitions and work toward racial justice, Asian Americans, Black Americans, and other people of color need to recognize our own double-consciousness and also see how it relates to the double-consciousness experienced by others.

INTRODUCTION

Twenty-one years into the twenty-first century, America continues to grapple with what the renowned Black scholar W.E.B. Du Bois called the “problem of the twentieth century . . . the problem of the color line.”¹ Although his 1903 classic *The Souls of Black Folk* focused on the plight of African Americans, Du Bois recognized that racial inequality and injustice in America involved many groups. He noted that the “problem of the color line” was “the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the seas.”² And among different groups of people of color, Asian Americans find ourselves in an unusual position—one that is privileged in some ways and precarious in others.

A number of happenings during this past year brought to light the positioning of Asian Americans within the U.S. racial landscape. *Students for Fair Admissions, Inc. v. President of Harvard College (SFFA v. Harvard)*,³ a lawsuit with Asian American plaintiffs challenging affirmative action, began to garner significant attention. This suit, sponsored by the anti-affirmative action group SFFA, pits Asian Americans against Black, Latina/o, and Native American applicants and employs the model minority stereotype of Asian Americans as high achievers to cast the group as victims of affirmative action. Second, Andrew Yang’s bid for the 2020 Democratic presidential nomination made him the most visible Asian American political candidate in U.S. history.⁴ Through his campaign,

1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 10 (Bantam Books 1989) (1903).

2. *Id.*

3. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA II)*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (U.S. Mar. 1, 2021). For general analysis of this lawsuit, see Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590 (2017); and Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

4. Vinay Harpalani, *Racial Stereotypes, Respectability Politics, and Running for President: Examining Andrew Yang’s and Barack Obama’s Presidential Bids*, L. PROFESSOR BLOG: RACE & L. PROF BLOG (June 14, 2020), <https://lawprofessors.typepad.com/racelawprof/2020/06/racial-stereotypes-respectability-politics-and-running-for-president-examining-andrew-yangs-and-bara.html> [<https://perma.cc/LT6N-W2GB>].

Yang brought together different racial characterizations of Asian Americans in both positive and negative ways. And third, the COVID-19 pandemic led to an increase in hate and bias crimes against Asian Americans.⁵ These crimes are rooted in the notion that Asian Americans are not “real Americans” but rather perpetual, menacing foreigners.⁶

These events bring to light different aspects of the racial positioning of Asian Americans and the dilemmas faced by the group based on this positioning. This Essay examines these events and their historical underpinnings to elucidate Asian Americans’ place in the broader U.S. racial landscape and structure. It highlights the racial stereotypes and ideologies that come into play through this process and the dilemmas that Asian Americans face as a result. It illustrates these phenomena through historical and political analyses of issues such as immigration and affirmative action, along with recent happenings such as Andrew Yang’s bid for the 2020 Democratic presidential nomination and anti-Asian American hate and bias crimes in the wake of the COVID-19 pandemic.

To do so, the Essay takes an interdisciplinary lens, drawing upon three insights from different times and different academic traditions. Two decades ago, political scientist and Asian American Studies scholar Claire Jean Kim devised the racial triangulation framework to examine the simultaneous valorization and ostracism of Asian Americans as part of the broader rubric of U.S. racial dynamics.⁷ Two decades before that, legal scholar and critical race theorist

5. Li Zhou, *The Long History of Anti-Asian Hate in America, Explained*, VOX, <https://www.vox.com/identities/2020/4/21/21221007/anti-asian-racism-coronavirus-xenophobia> (Mar. 5, 2021, 5:45 PM). In particular, the killing of six Asian American women in the Atlanta metropolitan area garnered national attention. See Jiayang Fan, *The Atlanta Shooting and the Dehumanizing of Asian Women*, NEW YORKER (Mar. 19, 2021), <https://www.newyorker.com/news/daily-comment/the-atlanta-shooting-and-the-dehumanizing-of-asian-women> [<https://perma.cc/V8Y2-E8JH>].

6. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) (noting that “foreignness is a crucial dimension of the American racialization”). See generally Frank H. Wu, *Where Are You Really From? Asian Americans and the Perpetual Foreigner Syndrome*, C.R.J., Winter 2002, at 14.

7. See generally Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105 (1999).

Derrick Bell posited the notion of interest-convergence to analyze how advances toward racial equality really benefited elite white Americans and the U.S. government more than they benefited Black Americans and other people of color.⁸ And back at the turn of the twentieth century, in *The Souls of Black Folk*, Du Bois—who is now a central figure in sociology, history, and African American studies—not only articulated the “problem of the color line” but also eloquently laid out the “peculiar sensation” of “double-consciousness”: the “sense of always looking at one’s self through the eyes of others.”⁹

Each of these ideas has been influential in its own right, but only Professor Kim’s framework has been consistently applied to Asian Americans.¹⁰ This Essay aims to illustrate the synergy that can exist between Asian American studies, African American studies, and critical race theory—a synergy that can illuminate the experiences of all groups. By integrating the scholarly work of Professors Kim, Bell, and Du Bois, this Essay sheds further light on how Asian Americans fit into America’s racial structure and ideology,¹¹ and on the path toward attaining racial equality and justice for all groups.

Part I gives a basic overview of racial triangulation, interest-convergence, and double-consciousness. These are theoretical tools to analyze how racial groups are positioned in relation to each other, how this process leads to the creation of racial ideologies, and how people of color experience dissonance when navigating the racial terrain that results. Part II gives a historical view of Asian American immigration and racial stereotypes. Applying

8. See generally Derrick A. Bell, *Brown v. Bd. of Educ. and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017).

9. DU BOIS, *supra* note 1, at 3.

10. Previously, Professor Robert Chang applied racial triangulation to examine Asian Americans’ position in the affirmative action debate. See Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 959 (2013).

11. For more discussion of racial structure and racial ideology as concepts, see generally EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* (2001); and MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

Professor Kim's racial triangulation framework, it considers how U.S. immigration policy and reactions to it created a racial ideology that casts Asian Americans as both model minorities who are high achievers and perpetual foreigners who can never truly be American. This Part also applies Professor Bell's notion of interest-convergence to U.S. immigration policy after World War II, underscoring how this policy brought about the model minority stereotype of Asian Americans. Part III illustrates how the model minority stereotype led to another round of racial triangulation on college campuses, where Asian Americans were valorized as high achievers and also ostracized as foreigners. This Part considers campus xenophobia and anti-immigration sentiments in the 1980s, along with growing emphasis on diversity at elite universities and Asian Americans' concerns about discrimination in admissions—noting how conservative opponents of affirmative action framed the narrative around these phenomena to cast Asian Americans as victims of affirmative action.

Part IV continues this analysis and focuses on affirmative action and university admissions—arguably the most salient policy area where Asian Americans have been positioned against other people of color. It traces the role that Asian Americans have played in major lawsuits involving race-conscious admissions, up to the current *SFFA* case. Part V examines how the model minority and perpetual foreigner stereotypes intersected in 2020 through Andrew Yang's presidential campaign and COVID-19-related hate crimes against Asian Americans. This Part also applies Du Bois's notion of double-consciousness to the dilemmas that Asian Americans and other people of color face when negotiating our own identities and when trying to advance in America while confronting stereotypes and other manifestations of racism. The Essay concludes by arguing that the “peculiar sensation” of double-consciousness itself is a common ground that can unify people of color in the quest for racial justice.

I. RACIAL TRIANGULATION, INTEREST-CONVERGENCE, AND
DOUBLE-CONSCIOUSNESS

The three insights that this Essay draws upon all illuminate different aspects of America’s racial landscape. The focus here is on Asian Americans, but these insights raise important issues for all racial groups. Professor Kim’s racial triangulation framework allows for a nuanced analysis of different racial groups’ relative positioning within the racial structure of a society.¹² It is one of the few racialization theories devised specifically with Asian Americans in mind. Professor Kim posits a “racial geometry” by which different groups are positioned in comparison with each other and racialized accordingly.¹³ She defines the axes of this geometry in terms of statuses accorded to the different groups: “superior/inferior” and “insider/foreigner.”¹⁴ Further, she contends that racial groups are linked by processes of “relative valorization” and “civic ostracism.”¹⁵ Relative valorization involves the dominant group (usually white Americans) exalting one minority group over another (e.g., valorizing Asian Americans over Black Americans) as a means to dominate both groups (and especially Black Americans).¹⁶ Civic ostracism involves defining the valorized group (Asian Americans) as foreign to provide justification for marginalizing them in the privileges of citizenship and political participation.¹⁷ Figure 1, *infra*, depicts the racial triangulation framework:

12. Kim, *supra* note 7, at 106.

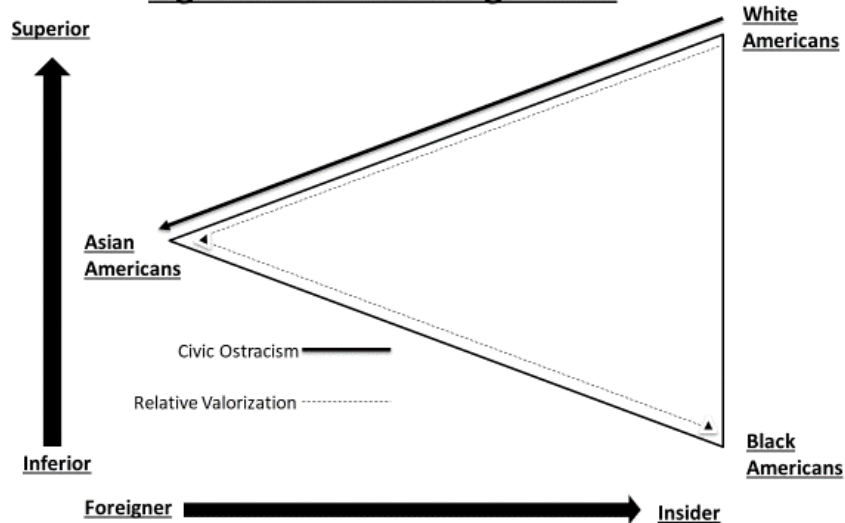
13. *Id.* at 106–07.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Figure 1: Racial Triangulation

Applying racial triangulation, the model minority stereotype—the idea that Asian Americans’ high academic and professional achievement denote that they are culturally superior to Black, Latina/o, and Native Americans—represents the relative valorization for Asian Americans. The perpetual foreigner stereotype—the assumption that Asian Americans have more ties and loyalties to their ancestral homelands than to the United States—has been the dominant form of civic ostracism.

While racial triangulation highlights the relational salience of Asian Americans’ racial positioning, interest-convergence helps to explain the historical emergence of this positioning through political influences and interests.¹⁸ The late Professor Bell, one of the founders of critical race theory in the legal academia, devised the idea of interest-convergence to analyze how these changes occurred.¹⁹ As one of the central tenets of critical race theory, interest-convergence is the notion that both racism and anti-racist

18. See sources cited *supra* note 8.

19. See generally Bell, *supra* note 8.

measures advance the overall interests of the U.S. government, which coincide with those of elite white Americans.²⁰ Such interests may include increasing America's global military and economic influence as a whole. When social progress appears to benefit particular groups of people of color, it is because the interests of those groups have converged temporarily with the interests of elite white Americans. Once the interest of the government and people of color diverge, anti-racist measures do not advance further and may even regress. Professor Bell applied his interest-convergence framework to the advancement of civil rights after World War II.²¹ As the Cold War took hold and the United States competed with the Soviet Union for global influence, the visibility of domestic racism hindered America's prospects. Desegregation and civil rights advances were important measures to counter communism's emphasis on economic and social equality.²² Once the United States began winning the Cold War, efforts to promote desegregation and civil rights were curbed because they no longer served the government's broader interests.²³ Interest-convergence is equally applicable to the resurgence of immigration from Asian countries to America during the Cold War. The U.S. government needed scientifically trained immigrant professionals from Asian countries to build America's technological infrastructure.²⁴ The government opened immigration to such professionals when they served the government's interests and then curbed their immigration later.²⁵ This interest-convergence helped create the model minority stereotype and set the stage for its juxtaposition with stereotypes of other groups and of Asian Americans ourselves.

20. See DELGADO & STEFANCIC, *supra* note 8, at 22. See generally Bell, *supra* note 8.

21. See Bell, *supra* note 8, at 519.

22. See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

23. See DELGADO & STEFANCIC, *supra* note 8, at 40.

24. Vinay Harpalani, *Simple Justice or Complex Injustice?: American Racial Dynamics and the Ironies of Brown and Grutter*, 3 PENN. GSE PERSPS. ON URB. EDUC., Fall 2004, at 1, 4, <https://urbanedjournal.gse.upenn.edu/archive/volume-3-issue-1-fall-2004/simple-justice-or-complex-injustice-american-racial-dynamics-and-> [<https://perma.cc/Q6AU-NPU4>].

25. *Id.*

While racial triangulation and interest-convergence focus on the larger social forces that mold the racial landscape, people of color must also navigate the stereotypes and the racial positioning that emerges from these social forces individually. This creates psychological dissonance for people of color, who often have to strike a balance between maintaining their own identities and conforming to particular mainstream (white American) norms. Over a century ago, Du Bois described the dilemma of “double-consciousness”:

[T]his sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness[]—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.²⁶

Although Du Bois was focusing on Black Americans, the dilemma of double-consciousness applies in its own way to different groups, including Asian Americans.²⁷ And in addition to framing our history and racial positioning, double-consciousness can help illuminate the path that Asian Americans can take to recognize our position in America’s racial structure and build coalitions with other people of color, all in the quest for racial justice.

II. MODEL MINORITY AND PERPETUAL FOREIGNER

Professor Kim applies her racial triangulation framework to the history of Asian American immigration. Immigrant laborers from

26. DU BOIS, *supra* note 1, at 3.

27. See, e.g., Qun Wang, “Double Consciousness,” *Sociological Imagination, and the Asian American Experience*, 4 RACE GENDER & CLASS 88, 88 (1997); Vandana Pawa, *Double Consciousness of the South Asian Identity*, SAALT (Apr. 4, 2016), <https://saalt.org/double-consciousness-of-the-south-asian-identity/> [<https://perma.cc/9EJL-Z6WX>].

Asia in the late 19th and early 20th centuries were simultaneously valorized as compared to Black Americans and ostracized as foreigners. For example, Chinese immigrant laborers were said to be smarter and more hardworking than Black Americans.²⁸ Professor Kim notes that in an 1879 Congressional hearing on immigration from China, there was testimony that Chinese immigrants were “far superior . . . physiologically and mentally” to Black Americans and possessed “a great deal more brain power.”²⁹ For a time, Southern plantation owners thought that Chinese American laborers might be a superior replacement for free Black Americans.³⁰ These views portended the model minority stereotype that emerged after the Civil Rights Era.

At the same time, however, Asian Americans were seen as “perpetual foreigners”³¹—an alien race that was incapable of assimilation and that could never be truly American. In the late 19th and early 20th centuries, immigrants from China and Japan were dubbed the “Yellow Peril.”³² Similarly, migrant laborers from India were dubbed “Hated Hindoos.”³³ These Asian American immigrant groups were frequently targets of violence as they competed with white Americans in the labor market.³⁴ In 1885, a mob of white miners attacked Chinese American laborers, killing twenty-eight, wounding fifteen, and driving hundreds away.³⁵ Similarly, in

28. Kim, *supra* note 7, at 110.

29. *Id.*

30. *Id.* at 111.

31. See sources cited *supra* note 6; Harpalani, *supra* note 4.

32. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 474–84 (1989); GARY OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 141–47 (1994).

33. *Workingmen Driving Out the Hated Hindoo*, S.F. CHRON., Sept. 6, 1907, at 1; Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 157 (2013). These immigrants from British India were called “Hindoos” even though many of them were Sikh. Harpalani, *supra*.

34. Harpalani, *supra* note 33.

35. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1254–55 (1993).

September 1907, there was a major riot against South Asian American immigrant workers in Bellingham, Washington.³⁶

The Chinese Exclusion Act of 1882 banned immigrants from China,³⁷ and the United States eventually excluded all Asian immigrants with the Immigration Act of 1917.³⁸ Those Asian Americans who remained in the United States continued to be treated as foreigners. They were not eligible for naturalization, which was limited to “free, [w]hite persons” by the Naturalization Law of 1790.³⁹ The U.S. Supreme Court ruled in *Takao Ozawa v. United States* that Japanese Americans were not “Caucasian” and thus not “[w]hite, rendering them ineligible for citizenship.”⁴⁰ Under the pseudoscientific racial frameworks accepted by many at the time, this ruling would also apply to Chinese Americans and other immigrants from East and Southeast Asia. Less than a year later, in *United States v. Bhagat Singh Thind*, the Supreme Court ruled that although Asian Indian Americans were “Caucasian,” we too were not “white” because we did not fit the common person’s understanding of whiteness.⁴¹

Ostracism of Asian Americans took various forms throughout the first half of the 20th century, such as the well-known internment of Japanese Americans during World War II.⁴² But after the war, the status of Asian Americans began to change. In 1946, the Luce-Celler bill opened small annual immigration quotas from countries in Asia.⁴³ The 1952 McCarran-Walter Act replaced the 1790

36. Gerald N. Hallberg, *Bellingham, Washington’s Anti-Hindu Riot*, in *THE NORTHWEST MOSAIC: MINORITY CONFLICTS IN PACIFIC NORTHWEST HISTORY* 140 (James A. Halseth & Bruce A. Glasrud eds., 1977).

37. Chinese Exclusion Act, ch. 126, Pub. L. No. 47-126, § 9, 22 Stat. 58 (1882) (repealed 1943).

38. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917) (repealed 1952).

39. Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (1790). For an analysis of litigation over the meaning of “white” under this Act, see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

40. 260 U.S. 178, 198 (1922).

41. 261 U.S. 204, 342 (1923).

42. See *Korematsu v. United States*, 323 U.S. 214, 247 (1944) (upholding internment of Japanese Americans during World War II).

43. Act of July 2, 1946, ch. 534, Pub. L. No. 79-483, 60 Stat. 416 (repealed 1952).

Naturalization Law and removed racial restrictions on immigration.⁴⁴ And the Immigration Act of 1965 would greatly reshape the demographics of America.⁴⁵

These changes in immigration policy were ultimately tied to the same U.S. global interests. As the Cold War began to escalate, the Soviet Union launched Sputnik I in 1957, becoming the first nation to send a satellite into space. This sparked great fears among American leaders that the United States was losing the Cold War and that communism could gain the upper hand around the world.⁴⁶ To keep up with the Soviet Union, American leaders saw the need for skilled professionals in scientific and technical occupations.⁴⁷ At the same time, Asian countries with large populations, such as China and India, contained an excess of scientists, engineers, physicians, and other educated workers who had limited economic opportunities in their homelands.⁴⁸ The interests of the U.S. government and educated workers in Asia converged with the Immigration Act of 1965, which significantly increased annual immigration quotas and created an immigration preference system that favored skilled professional workers.⁴⁹

Interest-convergence between these groups was responsible for the rapidly growing Asian American population after 1965. Professor Vijay Prashad describes this process as “*state selection* whereby the U.S. state, through the special-skills provisions in the 1965 Immigration Act, fundamentally reconfigured the demography of Asian America.”⁵⁰ Although educated Asian American immigrants faced various forms of discrimination, they were also structurally situated for upward mobility and achievement. They often did not go through the more transient enclave status of many immigrant groups, or the long-term residential segregation experienced in many Black

44. McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

45. Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

46. Harpalani, *supra* note 24.

47. *Id.*

48. *Id.*

49. *Id.*

50. VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* 4 (2000).

and Latina/o communities.⁵¹ Many of them have been able to assimilate socially and economically into predominantly white communities with greater ease than other minority groups, even as they maintain distinct cultural identities.

Educated Asian American immigrant families translated this capital into educational, occupational, and economic success. Their children had the advantage of growing up in educated home environments with various forms of social and cultural capital.⁵² First- and second-generation Asian Americans often became high academic achievers; this helped to create the “model minority” stereotype—the notion that Asian Americans have been more educationally and economically successful than other minority groups because of their cultural upbringing, work ethic, and perseverance rather than through structural advantages.⁵³

All of this began another round of racial triangulation. The model minority stereotype replayed the valorization of Asian Americans. In 1966, sociologist William Petersen wrote an influential article in the *New York Times* discussing the success of Japanese Americans.⁵⁴ Professor Roger Daniels notes how Peterson’s article laid the foundation for the model minority stereotype:

[F]irst, as a way of praising the superior performance of Japanese Americans; and second, as a way of suggesting that other ethnic groups should *emulate* the Japanese American example. The unstated major premise of Petersen’s argument was that Horatio-Alger-bootstrap-raising was needed for success by such “non-achieving” minorities as blacks and Chicanos,

51. Harpalani, *supra* note 33, at 141–42.

52. *Id.*

53. *Id.*; see also sources cited *supra* note 32. For more on the history of the model minority, see generally ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* (2015).

54. William Petersen, *Success Story, Japanese American Style*, N.Y. TIMES, Jan. 6, 1966, at 20.

rather than the social programs of Lyndon Johnson's Great Society.⁵⁵

This juxtaposition of Japanese Americans and Black and Chicana/o Americans parallels Professor Kim's critical analysis of the exaltation of nineteenth-century Chinese American laborers over freed Black Americans. Since the 1960s, conservatives and even some liberals have contrasted the upward mobility of first- and second-generation Asian Americans with the lower socioeconomic positions of Black and Latina/o Americans, arguing that the latter groups need only work harder to achieve success.⁵⁶ But this view ignores the structural advantages that educated Asian American immigrants have because they came to the United States voluntarily with the skills and opportunities to succeed.⁵⁷

Additionally, the model minority stereotype masks within-group inequalities. Some Asian American groups, such as Filipino Americans, are not viewed as model minorities.⁵⁸ Also, many more recent immigrants from Asian countries and their children do not have the educational advantages of the immediate post-1965 immigrants. As America built up its scientific and technical infrastructure and began winning the Cold War, the United States no longer needed as many educated immigrants.⁵⁹ Immigration law changed as American foreign policy interests diverged from those of educated professionals in Asian countries, making immigration based

55. ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 318 (1988).

56. Kat Chow, *'Model Minority' Myth Again Used As a Racial Wedge Between Asians and Blacks*, NPR (Apr. 19, 2017, 8:32 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks> [<https://perma.cc/ARZ2-RZEC>].

57. See Harpalani, *supra* note 24; Harpalani, *supra* note 33; PRASHAD, *supra* note 50.

58. See Louise Hung, *Who Is Forgotten in the "Model Minority" Myth?*, GLOB. COMMENT (Dec. 7, 2017), <http://globalcomment.com/forgotten-model-minority-myth/> [<https://perma.cc/V9FX-M42Y>] ("Filipino-Americans do not garner the same social status as Chinese-Americans or Japanese-Americans might. They are often stereotyped as less qualified, less educated, and more prone to crime—stereotyping more in keeping with Latinx, Native American, and Black experiences.").

59. See Harpalani, *supra* note 24.

on educational and occupational preferences more difficult.⁶⁰ Just as desegregation and civil rights advances stopped once they no longer served larger government interests, immigration from Asia was curbed when it became less important to winning the Cold War.

The 1965 Act also created a family preference system that is still used by immigrants from Asian countries.⁶¹ To an extent, these newer immigrants have been able to draw on ethnic, social, and economic networks as an alternative form of social capital—e.g., in forming and maintaining businesses. However, many of these newer immigrants also lack the privileges of the immediate post-1965 wave, and some live in poverty.⁶² Even the skilled professionals from Asian countries who now come to the United States do so mostly on temporary H1-B visas. They earn lower wages than U.S. citizens and often lack benefits. They must also leave the United States when employers no longer want their services.⁶³ Many of them live with uncertainty in their professional and personal lives.

Nevertheless, the growing population of Asian American high achievers led to a new narrative where Asian Americans were valorized as model minorities and cast as victims of affirmative action. Framed by xenophobia and opposition to growing racial diversity, this narrative seemingly brought together the interests of white conservatives and Asian Americans and pitted them against other people of color.

III. VALORIZATION AND VICTIMHOOD

The model minority and perpetual foreigner stereotypes intersected on college campuses in the 1980s, as large numbers of Asian

60. The Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976), and the Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243 (1976), both required that prospective immigrants secure jobs in the United States before they could immigrate. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), also placed more stringent demands on employers.

61. Harpalani, *supra* note 33, at 143.

62. *Id.* at 142–43.

63. *Id.*

American students began enrolling at elite universities.⁶⁴ Asian Americans were valorized as high achievers but ostracized through xenophobia. As Professor Dana Takagi notes in her book, *The Retreat from Race*, various campuses that had large numbers of Asian American students were labeled with epithets.⁶⁵ MIT became “Made in Taiwan,” and UCLA became “University of Caucasians Lost among Asians.”⁶⁶ White students also advised each other not to take classes with large numbers of Asian Americans. Asian American students at elite universities were viewed as “hordes” of “unfair competition”⁶⁷—reminiscent of racist attitudes toward late nineteenth- and early twentieth-century immigrant laborers from Asian countries.⁶⁸

Some Asian Americans also perceived that they were being ostracized in a more subtle way: not only by students but by university admissions committees. Numerically, Asian Americans were well represented at elite universities in proportion to the general population. Nevertheless, there was a sense that these institutions did not want their campuses to look too “foreign.” Asian Americans believed that universities wanted to limit their enrollment—akin to the insidious practice of many elite American universities in the early and mid-twentieth century to exclude or limit the number of Jewish students who were admitted.⁶⁹

64. See generally DANA TAKAGI, *THE RETREAT FROM RACE: ASIAN PACIFIC AMERICAN ADMISSIONS AND RACIAL POLITICS* (1998).

65. *Id.* at 60.

66. *Id.*

67. *Id.*

68. The model minority and perpetual foreigner stereotypes are related in some ways. Both have links to U.S. immigration policy. See Harpalani, *supra* note 33, at 140. Professor Gary Okihiro has noted how Asian Americans have been viewed as a “yellow peril” (emphasizing threats to white Americans due to economic competition) and a “peril of the mind” (emphasizing threats to white Americans due to educational and occupational success). *Id.*; see also OKIHIRO, *supra* note 32. Many white parents view Asian American students in a similar light and have fled suburbs where the Asian American population has become large. See Suein Hwang, *The New White Flight*, WALL ST. J. (Nov. 19, 2005, 11:59 PM), <https://www.wsj.com/articles/SB113236377590902105> [<https://perma.cc/T6YQ-DKAZ>]; Anjali Enjeti, *Ghosts of White People Past: Witnessing White Flight from an Asian Ethnoburb*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/ghosts-of-white-people-past-witnessing-white-flight-from-an-asian-ethnoburb> [<https://perma.cc/8S59-QST5>].

69. TAKAGI, *supra* note 64, at 36.

Professor Takagi discusses how Asian Americans accused several elite universities of discrimination in admissions, leading to various investigations by the universities and by government agencies.⁷⁰ Universities claimed that Asian American applicants were “flat” and “not well rounded”⁷¹; that the “model minority” was really a one-dimensional “academic nerd” without social skills or other talents.⁷² In 1985, the *New York Times Magazine* reported that “[a] Princeton study indicated that the admissions office had rated Asian-Americans below average on the ‘nonacademic’ portion of the admissions process.”⁷³ One Princeton faculty member suspected that there “may be subconscious [discrimination].”⁷⁴ Another faculty member said flatly that when discussing a “clearly qualified Asian-American student,” his fellow admissions committee members said “[w]e have enough of them” and “you have to admit, there are a lot”⁷⁵—augmenting suspicions of an Asian American quota. And in a 1989 *New York Times Magazine* article, the admissions dean at Brown University even stated that Asian Americans’ worries about bias in the admissions process were “founded on a justifiable sense of concern.”⁷⁶

Racial triangulation became even more complex due to other developments in the 1980s. Anti-immigrant sentiments also expanded throughout American society as the Asian American and Latina/o populations grew rapidly, leading to more resentment and violence against Asian Americans. Two of the most high-profile incidents were the 1982 murder of Chinese American Vincent Chin in Detroit,

70. *Id.* at 57–83. The U.S. Department of Education, Office of Civil Rights, investigated Harvard and UCLA. *Id.* at 161–64. Harvard was cleared of wrongdoing, but UCLA was ordered to admit five Asian American applicants who had originally been rejected. *Id.* at 164.

71. *Id.* at 57.

72. *Id.* at 58.

73. Michael Winerip, *Asian-Americans Question Ivy League’s Entry Policies*, N.Y. TIMES, May 30, 1985, at 1.

74. *Id.*

75. *Id.*

76. Julie Johnson, *Wider Door at Top Colleges Sought by Asian-Americans*, N.Y. TIMES, Sept. 9, 1989, at 1.

Michigan,⁷⁷ and the 1987 murder of Asian Indian American Navroze Modi in Jersey City, New Jersey.⁷⁸ Additionally, diversity became a growing emphasis on college campuses, particularly after the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke* deemed that the educational benefits of diversity were a compelling interest that could justify race-conscious admissions policies.⁷⁹ Universities began emphasizing diversity and subjective factors more in admissions and placing reduced weight on academic criteria such as grades and test scores. Some perceived that this was also a reaction to increasing numbers of high-achieving Asian American students.⁸⁰

In this milieu, Professor Takagi discusses how the anti-affirmative action movement took off.⁸¹ Conservatives attacked race-conscious university admissions policies that benefitted Black, Latina/o, and Native American applicants. They also began linking race-conscious admissions policies to the allegations of discrimination against Asian Americans in university admissions⁸²—allegations that seemed credible to Asian Americans given the historic and ongoing xenophobia they faced. The conservative narrative capitalized on Asian Americans' concerns generated by campus xenophobia and broader anti-immigration sentiments, even as many conservatives shared these sentiments. The narrative also played to Asian Americans' suspicions that elite universities did not want their campuses to look too “foreign.” Valorization and victimhood came together in this narrative, where Asian Americans were heralded as

77. See Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, HISTORY (May 5, 2020), <https://www.history.com/news/vincent-chin-murder-asian-american-rights> [https://perma.cc/NRG4-AADD] (describing the 1982 murder of Chinese American Vincent Chen in Detroit, Michigan, after he was mistaken for Japanese).

78. See Deborah N. Misir, *The Murder of Navroze Mody: Race, Violence, and the Search for Order*, 22 AMERASIA J. 55, 55 (1996) (describing the 1987 murder of Indian American Navroze Modi in Jersey City, New Jersey, by the “Dotbusters” gang). After September 11, 2001, Arab and South Asian Americans were perceived as terrorists and targeted for hate crimes. See Harpalani, *supra* note 33.

79. 438 U.S. 265 (1978).

80. See TAKAGI, *supra* note 64, at 101.

81. See *id.* at 109–39.

82. *Id.*

model minorities and simultaneously cast as victims of affirmative action.⁸³

California was ground zero for these battles. It was (and still is) one of the most racially diverse states, with large Asian American and Latina/o populations.⁸⁴ California's Republican Governor, Pete Wilson, campaigned successfully as a supporter of both anti-immigration and anti-affirmative action laws.⁸⁵ In 1994, California voters passed Proposition 187 (also known as the "Save Our State Initiative"), an anti-immigrant referendum that denied government services to undocumented immigrants and required local law enforcement to report them to the Immigration and Naturalization Service.⁸⁶ A majority of Asian Americans had opposed this law and organized against its passage.⁸⁷ Two years later, in 1996, California voters approved Proposition 209 (also known as the "California Civil Rights Initiative").⁸⁸ Proposition 209 was an anti-affirmative action constitutional amendment which eliminated affirmative action at California public universities and other government institutions.⁸⁹ As with Proposition 187, a majority of

83. See generally Claire Jean Kim, *Are Asians the New Blacks? Affirmative Action, Anti-Blackness, and the 'Sociometry' of Race*, 15 DU BOIS REV. 217 (2018).

84. *Race and Ethnicity in California (State)*, STAT. ATLAS, <https://statisticalatlas.com/state/California/Race-and-Ethnicity> [<https://perma.cc/S3ZJ-KJG9>].

85. See Mario Koran, 'A Failed Experiment': The Racist Legacy of California Governor Pete Wilson, THE GUARDIAN (July 31, 2020), <https://www.theguardian.com/us-news/2020/jul/31/california-pete-wilson-governor-affirmative-action> [<https://perma.cc/CLB6-U7DD>].

86. See CAL. HEALTH & SAFETY CODE § 130(c)(3) (West 1996) (repealed); CAL. WELF. & INST. CODE § 10001.5(c)(3) (West 1996) (repealed).

87. See John S. Park, *Race Discourse and Proposition*, 2 MICH. J. RACE & L. 175, 187 (1996). Parts of Proposition 187 were later deemed unconstitutional. See *California: Proposition 187 Unconstitutional*, 4 MIGRATION NEWS, Dec. 1997, at 1, 1, https://migration.ucdavis.edu/mn/more.php?id=1391_0_2_0 [<https://perma.cc/XCX9-VGQ9>]. Unenforceable parts of it were also repealed. Patrick McGreevy, *Gov. Brown Signs Bill Repealing Unenforceable Parts of Prop. 187*, L.A. TIMES (Sept. 15, 2014), <https://www.latimes.com/local/politics/la-me-pol-brown-bills-20140916-story.html> [<https://perma.cc/X8Q9-DNHD>].

88. CAL. CONST. art. I, § 31(a).

89. In 2020, a ballot initiative to repeal Proposition 209 and reinstate affirmative action in California failed at the polls. See Vinay Harpalani, *What the California Vote to Keep the Ban on Affirmative Action Means for Higher Education*, THE CONVERSATION (Nov. 10, 2020), <https://theconversation.com/what-the-california-vote-to-keep-the-ban-on-affirmative-action-means-for-higher-education-149508> [<https://perma.cc/P57S-CPTK>].

Asian Americans opposed Proposition 209.⁹⁰ Similar anti-affirmative action state constitutional amendments in other states followed,⁹¹ and these were eventually upheld by the U.S. Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*.⁹²

There have also been more government investigations of elite universities' admissions practices. In 2006, the George W. Bush Administration's Department of Education Office of Civil Rights started investigating Princeton University's admissions policies for allegedly discriminating against Asian American applicants.⁹³ Nine years later, the Obama Administration, which by now had taken over the investigation, found no wrongdoing by Princeton.⁹⁴ However, President Donald Trump's Department of Justice Civil Rights Division worked vigorously to attack affirmative action. It investigated race-conscious admissions policies at Harvard and Yale and accused both universities of discriminating against Asian Americans.⁹⁵

The Biden Administration dropped the Yale investigation,⁹⁶ but soon thereafter, SFFA filed its own lawsuit against Yale.⁹⁷ And SFFA's lawsuit against Harvard continues, building on all of this history and on prior Supreme Court affirmative action cases. These cases illustrate how Asian Americans came into the current legal

90. *State Propositions: A Snapshot of Voters*, L.A. TIMES (Nov. 9, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-11-07-mn-62330-story.html> [https://perma.cc/H286-75E7].

91. See generally *Affirmative Action in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Affirmative_action_in_the_United_States [https://perma.cc/48E8-M53R].

92. 572 U.S. 291 (2014).

93. Scott Jaschik, *Anti-Asian Bias Claim Rejected*, INSIDE HIGHER ED (Sept. 24, 2015), <https://www.insidehighered.com/news/2015/09/24/ocr-clears-princeton-anti-asian-discrimination-admissions> [https://perma.cc/V2N9-F4FL].

94. *Id.*

95. See generally Vinay Harpalani, *"Trumping" Affirmative Action*, 66 VILL. L. REV. ONLINE: TOLLE LEGE 1 (2021).

96. *Id.*

97. See Amelia Davidson, *Students for Fair Admissions Sues Yale, Petitions to Escalate Harvard Case to Supreme Court*, YALE DAILY NEWS (Feb. 25, 2021, 11:58 PM), <https://yaledailynews.com/blog/2021/02/25/students-for-fair-admissions-sues-yale-petitions-to-escalate-harvard-case-to-supreme-court/> [https://perma.cc/4Z8J-N87Q].

narrative, which has conflated affirmative action with “negative action.”⁹⁸

IV. AFFIRMATIVE ACTION AND “NEGATIVE ACTION”

Professor Jerry Kang differentiates between “affirmative action” and “negative action.”⁹⁹ Affirmative action refers to policies that improve opportunities for marginalized groups such as Black, Latina/o, and Native Americans in college admissions and other areas.¹⁰⁰ Although these policies may marginally affect enrollment of Asian Americans, they do so to aid marginalized groups, not privileged white Americans. Conversely, negative action refers to admissions policies or practices that disadvantage Asian American applicants in comparison to privileged, white applicants.

Professor Kang and other progressive Asian Americans have worked to emphasize the difference between negative action and affirmative action.¹⁰¹ Many Asian Americans have noted that some of their communities can benefit from affirmative action.¹⁰² Some have even contended that Asian Americans should support race-conscious admissions policies as a matter of social justice, even if they do not directly benefit.¹⁰³ But other Asian Americans have opposed affirmative action,¹⁰⁴ viewing their own interests as converging with those of the conservative anti-affirmative action movement.

Affirmative action cases before the U.S. Supreme Court have illustrated the divisions among Asian Americans over race-conscious admissions policies, along with the gradual conflation of affirmative

98. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.–C.L. L. REV. 1 (1996).

99. *Id.*

100. *Affirmative Action*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/affirmative%20action> [https://perma.cc/NJ68-6FKQ]. In common parlance, “affirmative action” is often used to refer specifically to race-conscious university admissions.

101. *See generally, e.g.*, Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice*, 4 UCLA ASIAN PAC. AM. L.J. 129 (1996).

102. *Id.*

103. *Id.*

104. *See id.*

action and negative action. In its 1978 *Bakke* ruling,¹⁰⁵ the Court outlawed racial set-asides in admissions. However, Justice Powell's opinion, which was treated as controlling, allowed universities to use race as a "plus factor" to promote the educational benefits of diversity.¹⁰⁶ On the surface, *Bakke* did not focus on Asian Americans.¹⁰⁷ Nevertheless, *Bakke* also rejected the remedying of societal discrimination as a rationale for race-conscious admissions policies, and Professor Kim notes how this rejection was intertwined with the model minority stereotype and the idea that minorities can overcome discrimination on their own.¹⁰⁸

Twenty-five years after *Bakke*, in *Gratz v. Bollinger* (2003), which involved the University of Michigan College of Literature, Arts, and the Sciences (LSA), the Court struck the LSA admission program's race-conscious point system, which gave a fixed number of points to all underrepresented minority applicants.¹⁰⁹ But simultaneously, in *Grutter v. Bollinger* (2003), it upheld the use of race as a flexible, individualized factor as part of a holistic admissions program.¹¹⁰ *Grutter* also brought five votes to Justice Powell's view in *Bakke* that the educational benefits of diversity are a compelling interest.¹¹¹ *Grutter* (and later *Fisher I* and *II*) also gave deference to universities to define how diversity fits into their educational missions.¹¹²

105. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

106. *Id.* at 317 ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.").

107. Justice Powell's opinion alluded to admission of Asian Americans along with other underrepresented groups. *Id.* at 275 (noting that from "1971 . . . through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians").

108. See Kim, *supra* note 83, at 223–24 ("Justice Powell invokes Asian Americans repeatedly in his effort to discredit the 'societal discrimination' rationale."). Professor Kim notes that footnotes in Justice Powell's *Bakke* opinion suggest that Asian Americans have been able to overcome discrimination. *Id.*; see also *Bakke*, 438 U.S. at 296 n.36, 297 n.37, 309 n.45.

109. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

110. 539 U.S. 306 (2003).

111. *Id.* at 325 ("[The Court] endorse[s] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

112. *Id.* at 328. *Grutter* itself reflected an interest-convergence between elite universities, underrepresented applicants of color, and U.S. global interests. See Harpalani, *supra* note 24. When explaining why diversity is a compelling interest, Justice O'Connor noted that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be

Numerous Asian American civil rights groups, including the National Asian Pacific Legal Consortium and Asian American Legal Defense Fund, filed amici briefs in favor of race-conscious admissions programs,¹¹³ while some, such as the Asian American Legal Foundation, opposed such policies.¹¹⁴

Fisher v. University of Texas at Austin I (2013)¹¹⁵ and *II* (2016)¹¹⁶ essentially reiterated the *Grutter* framework with some elaboration on narrow tailoring standards.¹¹⁷ The *Fisher* litigation further illustrated the division over affirmative action among Asian Americans, as many Asian American organizations filed amicus briefs in the case. In support of Plaintiff Abigail Fisher were the Asian American Legal Foundation (which represented 117 Asian American organizations) and the 80-20 National Asian-American Educational Foundation.¹¹⁸ Conversely, several organizations filed amicus briefs in support of University of Texas at Austin: the Asian American Legal Defense and Education Fund, Asian/Asian American Faculty and Staff Association of the University of Texas at Austin, and Asian Desi Pacific Islander American Collective of the University of Texas at Austin, and Asian Americans Advancing Justice.¹¹⁹

developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 330. She also cited national security interests: “[H]igh-ranking retired officers and civilian leaders of the United States military assert that . . . a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” *Id.* at 331 (internal quotation omitted).

113. For a list of filings, see *Search Results*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?FileName=/docketfiles/02-241.htm> [<https://perma.cc/UJZ6-QT3E>].

114. *Id.*; see also Kim, *supra* note 83, at 218, 229–31.

115. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013).

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

117. *Id.* at 2208 (“Narrow tailoring . . . does impose ‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’” (quoting *Fisher I*, 570 U.S. at 312); see also Shakira D. Pleasant, *Fisher’s Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) (“The holding in *Fisher II* unquestionably outlined the Court’s expectation that [universities] collect, scrutinize, and utilize data to evaluate and refine [their] race-conscious admissions process[es].”).

118. See *Fisher v. Univ. of Tex. at Austin*, SCOTUS BLOG, <https://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/> [<https://perma.cc/QBE7-VCV9>].

119. *Id.*; see also Kim, *supra* note 83, at 234. For a complete listing of Asian American amici in

In his *Fisher II* dissent, Justice Alito addressed how Asian Americans fit into the notion of diversity. Citing the amicus brief of the Asian American Legal Foundation, which supported Plaintiff Abigail Fisher, Alito contended that the University of Texas at Austin (UT) did not value the diverse perspectives brought by Asian Americans as much it did those brought by other groups of students of color.¹²⁰ Alito also accused UT of ignoring the long history of discrimination against Asian Americans.¹²¹ Further, Alito questioned why UT “lumped . . . together” a diverse array of Asian Americans who are “individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population” and why they suggested this group is “overrepresented” and has “similar backgrounds and similar ideas and experiences to share.”¹²²

All of these cases set the backdrop for the current lawsuits by Students for Fair Admissions, Inc. (SFFA) against Harvard University and the University of North Carolina at Chapel Hill (UNC).¹²³ SFFA has devised a litigation strategy which centers on linking affirmative action with negative action.¹²⁴ It contends that Harvard University discriminated against Asian Americans not only through their race-conscious admissions policies but also via legacy preferences for children of alumni and other evaluations used by admissions reviewers.¹²⁵ The UNC lawsuit does not center on Asian American plaintiffs; it went to trial in November 2020, with a ruling expected in 2021.¹²⁶ But much more attention has focused on *SFFA*

Fisher, see Chang, *supra* note 10, at 948 n.3.

120. *Fisher II*, 136 S. Ct. at 2227 (Alito, J., dissenting).

121. *Id.*

122. *Id.* at 2229. For more on diversity among Asian Americans, see Vinay Harpalani, *Can “Asians” Truly Be Americans?*, 27 WASH. & LEE J.C.R. & SOC. JUST. (forthcoming 2021).

123. SFFA is an anti-affirmative action organization led by attorney Edward Blum, who was responsible for the *Fisher* litigation. See generally STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/> [<https://perma.cc/FA86-XFZU>].

124. See West-Faulcon, *supra* note 3, at 598, 620; Feingold, *supra* note 3, at 708.

125. Feingold, *supra* note 3, at 708, 719, 729.

126. Kate Murphy, *Trial on UNC-Chapel Hill’s Race-Related Admissions Ends, but Ruling Could Take Months*, THE NEWS & OBSERVER (Nov. 19, 2020, 7:14 PM), <https://www.newsobserver.com/news/local/education/article247284969.html>.

v. Harvard,¹²⁷ which has brought Asian Americans to the forefront of the affirmative action debate. Although Harvard prevailed at both the U.S. District Court for the District of Massachusetts,¹²⁸ and the U.S. Court of Appeals for the First Circuit,¹²⁹ SFFA is appealing its lawsuit to the U.S. Supreme Court.¹³⁰ On June 14, 2021, the U.S. Supreme Court issued a Call for Views of the Solicitor General (CVSG) in the case, requesting that the Biden Administration weigh in on whether the Supreme Court should grant SFFA’s petition for a writ of certiorari.¹³¹ This will effectively delay the Court’s decision on whether to hear the case until the October 2021 term.¹³² If cert is granted, the oral argument and decision might still be delayed until the following term.¹³³

The Plaintiffs in *SFFA v. Harvard* are anonymous Asian American applicants who were rejected from Harvard.¹³⁴ In its case, SFFA treated negative action and affirmative action as part of the same process, but the first part of its argument at the district court focused solely on negative action: discrimination by Harvard against Asian Americans vis-à-vis white Americans.¹³⁵ The second part of SFFA’s argument contended that Harvard’s race-conscious admissions policies, which aim to benefit Black, Latina/o, and Native

127. *SFFA II*, 980 F.3d 157, 163 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (U.S. Mar. 1, 2021). *SFFA v. Harvard* involves Title VI of the Civil Rights Act of 1964 rather than the Equal Protection Clause, but the role of Asian Americans is essentially the same. *Id.*

128. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA I)*, 397 F. Supp. 3d 126, 203 (D. Mass. 2019) (holding that “Harvard’s admissions process survives strict scrutiny”), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (U.S. Mar. 1, 2021).

129. *SFFA II*, 980 F.3d at 157.

130. *See generally* *Petition for Writ of Certiorari, SFFA II*, 980 F.3d 157 (No. 20-1199), 2021 WL 797848.

131. *See* Amy Howe, *Justices Request Government’s Views on Harvard Affirmative-Action Dispute*, SCOTUS BLOG (June 14, 2021, 12:40 pm), <https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/> [<https://perma.cc/7UZ6-A67Z>].

132. *Id.*

133. *Id.*

134. P.R. Lockhart, *The Lawsuit Against Harvard That Could Change Affirmative Action in College Admissions*, 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/ER8A-JP2C>] (“SFFA represents a group of anonymous Asian-American plaintiffs rejected from Harvard.”).

135. Plaintiff’s Memorandum of Reasons in Support of its Motion for Summary Judgment at 1, *SFFA I*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-CV-14176-ADB).

American applicants, also illegally discriminate against Asian Americans.¹³⁶

Although Harvard prevailed in the district court, U.S. District Court Judge Burroughs noted that Harvard's admissions process might capture unconscious, implicit biases against Asian Americans.¹³⁷ Implicit bias is not legally actionable, but Judge Burroughs noted that it may affect the "personal ratings scores" of applicants, where Asian American applicants are indisputably rated lower than others.¹³⁸ Personal ratings scores are derived from various sources, including alumni interviews and teachers' and guidance counselors' recommendations.¹³⁹ Admissions officers determine applicants' personal ratings score by assessing character and personality traits, including "humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities."¹⁴⁰ Judge Burroughs stated pointedly that "the disparity between white and Asian American applicants' personal ratings has not been fully and satisfactorily explained."¹⁴¹ She thought the data suggested that external factors, such as recommendations from high school teachers and counselors, might be sources of bias rather than Harvard's own

136. *Id.*

137. *SFFA I*, 397 F. Supp. 3d at 171. Implicit bias refers to "attitudes or stereotypes that affect . . . understanding, actions, and decisions in an unconscious manner." *Understanding Implicit Bias*, KIRWAN INST. FOR STUDY RACE & ETHNICITY (May 29, 2012), <https://kirwaninstitute.osu.edu/article/understanding-implicit-bias> [<https://perma.cc/M2M5-PY39>]. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

138. *SFFA I*, 397 F. Supp. 3d at 161–62, 171.

139. *Id.* at 162.

140. *SFFA I*, 397 F. Supp. 3d at 171.

141. *Id.* ("Overall, the disparity between white and Asian American applicants' personal ratings has not been fully and satisfactorily explained. Because some of the disparity in personal ratings is due to teacher and guidance counselor recommendations, the issue becomes whether the remaining disparity reflects discrimination. The disparity in personal ratings between Asian American and other minority groups is considerably larger than between Asian American and white applicants and suggests that at least some admissions officers might have subconsciously provided tips in the personal rating, particularly to African American and Hispanic applicants, to create an alignment between the profile ratings and the race-conscious overall ratings that they were assigning. . . . It is also possible, although unsupported by any direct evidence before the Court, that part of the statistical disparity resulted from admissions officers' implicit biases that disadvantaged Asian American applicants in the personal rating relative to white applicants . . ." (citation omitted)).

admissions officers.¹⁴² Nevertheless, Judge Burroughs stated that “Harvard’s admissions program . . . would likely benefit from conducting implicit bias trainings for admissions officers.”¹⁴³

In affirming Judge Burroughs, the First Circuit noted that implicit bias by Harvard’s admissions reviewers was “possible” but not “likely” (as contended by SFFA).¹⁴⁴ The First Circuit discounted racial stereotyping by Harvard admissions officers, and they noted other possible explanations for the personal ratings score disparities, such as the fact that Asian American applicants are more likely to attend larger, more crowded schools where teachers and counselors give more “perfunctory recommendations.”¹⁴⁵

Nevertheless, it is noteworthy that the personal rating score supposedly measures qualities such as leadership and social skills—the very attributes in which Asian Americans are stereotyped to be deficient. During the admissions controversies of the 1980s, elite university administrators alluded to these purported deficiencies when noting why some high-achieving Asian Americans were denied admission.¹⁴⁶ The idea that Asian Americans are passive and socially inept was linked to the model minority stereotype.¹⁴⁷ All of these

142. *Id.*

143. *Id.* at 204.

144. *SFFA II*, 980 F.3d 157, 201 (1st Cir. 2020).

145. *Id.* The First Circuit’s explanation is supported by a recent study by Professor Julie Park and Ph.D. candidate Sooji Kim. Drawing from a large, national data set, Park and Kim found that “approximately 56 percent of [w]hite students whose first-choice college was Harvard or a similarly hyper-selective institution (i.e., ‘most competitive’ institution defined by Barron’s) attended public high schools. In contrast, a much higher proportion of Asian students with similar aspirations (nearly 75 percent) went to public high schools.” Julie J. Park & Sooji Kim, *Harvard’s Personal Rating: The Impact of Private High School Attendance*, 30 *ASIAN AM. POL’Y REV.* 2, 2 (2021). Park and Kim note that public schools have much higher student-to-counselor ratios than private schools. *Id.* at 3. This allows counselors in private schools to give more personalized recommendations and to work with students more closely on college applications. *Id.* On average, all of this can lead to higher personal ratings scores for white applicants. *Id.*

146. See TAKAGI, *supra* note 64, at 82 (noting that “[s]ome university officials perceived Asian students as . . . ‘below average in personal ratings’”); see also *supra* notes 71–72 and accompanying text.

147. *Id.*; see also Annabel Li, *Perfect but Passive: The Problem with the ‘Model Minority,’* DAILY NEXUS (Mar. 17, 2019, 9:05 AM), <https://dailynexus.com/2019-03-07/perfect-but-passive-the-problem-with-the-model-minority/> [<https://perma.cc/5TRM-G4AC>]. These traits are also related to perpetual foreigner stereotype, as seen in portrayals of new Americans as awkward and socially inept. For example, the character Apu in *The Simpsons* is a recent immigrant from India who reflects these traits

stereotypes resonate in the everyday lives of Asian American students.¹⁴⁸ And in its appeals, SFFA has relied more on Asian American racial stereotypes to push both its legal case and its public relations effort.

SFFA v. Harvard illustrates the complex amalgam of racial stereotypes and political interests that can come into play in the process of racial triangulation.¹⁴⁹ Professor Kim posits the “two-staged development of an ‘Asian spoilers’ narrative” in the affirmative action debate.¹⁵⁰ First, by casting Asian Americans as model minorities, this narrative “undercuts the ‘societal discrimination’ rationale for race-conscious admissions.”¹⁵¹ Second, by casting Asian Americans as victims in a holistic admissions process aimed at admitting a diverse student body, the narrative also threatens diversity as a compelling interest.¹⁵² This conservative victimhood narrative comes amidst a long historical backdrop of discrimination against Asian Americans, including xenophobia and anti-immigrant sentiment promoted by White conservatives. But by conflating affirmative action and negative action, White conservatives have tried to create the illusion that their interests converge with those of Asian Americans. The conservative narrative has “bolstered the ideological project of despecifying Black subjection and disavowing racial positionality in U.S. society.”¹⁵³ It has positioned Asian Americans against Black, Latina/o, and Native

and who, for many years, was perhaps the most widely viewed image of anyone of South Asian descent in the United States. See *Apu Nahasapeemaitilon*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Apu_Nahasapeemaitilon&oldid=574869748 [https://perma.cc/PF9V-GT9H].

148. See, e.g., Vinay Harpalani, *Ambiguity, Ambivalence, and Awakening: A South Asian Becoming “Critically” Aware of Race in America*, 11 *BERKELEY J. AFR.-AM. L. & POL’Y* 77, 77 (2009) (“As a student, our teachers seemed to like me, and some of them taught me very well in classes. But to them, I was the typical Asian American ‘model minority’—a nice kid who did well in school and stayed out of trouble, but who was rather dull on a personal level.”).

149. See Chang, *supra* note 10, at 960–63 (discussing racial triangulation in affirmative action debate). Professor Chang’s analysis occurred during the litigation in *Fisher I*.

150. Kim, *supra* note 83, at 238.

151. *Id.*

152. *Id.*

153. *Id.*

Americans, all by tying the histories and political interests of these groups into a Gordian knot.¹⁵⁴

Asian Americans and other people of color also have to cope with this complexity in our own lives, as we navigate a world of racial stereotypes that are tied to political interests. Visible public figures, such as presidential candidates, have to view themselves “through the eyes of others” to be successful, and this poses its own dilemmas. And 2020 also highlighted the “double-consciousness” of Asian Americans.

V. ANDREW YANG, “KUNG FLU,” AND “WHITE-PEOPLE PLEASER”

In addition to *SFFA v. Harvard*, the 2020 Democratic presidential primary season also displayed the racial positioning of Asian Americans. During his campaign, Andrew Yang became the most visible Asian American politician in U.S. history.¹⁵⁵ Although there were other Asian American presidential candidates in prior election cycles and even in this one,¹⁵⁶ Yang most visibly identified as, and was most visibly identified as, Asian American.¹⁵⁷ His candidacy illustrated the complex interplay between valorization and ostracism and the dissonance it produces for Asian Americans. Through his campaign and its aftermath, Yang exemplified Asian Americans’ double-consciousness.¹⁵⁸

Yang’s navigation of racial stereotypes highlighted this tension. In one sense, Yang attempted to claim these stereotypes. He sometimes

154. See *Gordian Knot*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gordian_Knot [<https://perma.cc/XB2U-2QGA>]. Recently, the debate over New York City’s Specialized High School Admissions Test (SHSAT) has also pitted Asian Americans against other groups of people of color. See Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.’s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html> [<https://perma.cc/HNC5-RGEM>].

155. See Harpalani, *supra* note 4.

156. *Id.* Both California Senator and now-Vice President Kamala Harris (one-half South Asian American) and Hawaii U.S. Representative Tulsi Gabbard (one-half American Samoan) sought the 2020 Democratic presidential nomination. *Id.*

157. See *id.* (offering a full discussion of past Asian American presidential candidates and those in 2020).

158. *Id.*

jokingly drew on the model minority. At one rally, Yang referred to his own presidential campaign “the nerdiest . . . in history.”¹⁵⁹ Further drawing on the image of Asian Americans as geeky tech whizzes, he pledged to use PowerPoint during his State of the Union address.¹⁶⁰ At the primary debates, Yang joked that “I am Asian, so I know a lot of doctors”¹⁶¹ and that “the opposite of Donald Trump is an Asian man who likes math.”¹⁶² “MATH”—Make America Think Harder¹⁶³—was also Yang’s campaign slogan: his signature was a “MATH” pin, playing again to the idea that Asian Americans excel at math and science. Some Asian Americans cringed at Yang’s employment of stereotypes in this fashion.¹⁶⁴

Nevertheless, Yang also wanted to defy racial stereotypes. Although he referred to himself and his campaign as “nerdy,” Yang was cool, poised, and humorous during his media and debate appearances—the opposite of “nerdy.” Some voters on the campaign trail thought that Yang was “too nice” to beat Trump,¹⁶⁵ espousing the notion that Asian Americans are passive.¹⁶⁶ But during his rallies, Yang’s walk-out song was Mark Morrison’s “Return of the Mack”¹⁶⁷—evoking a stereotypic masculinity that is not usually

159. Todd Bishop & Taylor Soper, *In Seattle Visit, Presidential Hopeful Andrew Yang Calls on Amazon to Admit Job Loss from Automation*, GEEK WIRE (May 4, 2019, 10:43 AM), <https://www.geekwire.com/2019/seattle-visit-presidential-candidate-andrew-yang-calls-amazon-admit-job-loss-automation/> [https://perma.cc/6GFM-MWUY].

160. *Id.*

161. Li Zhou, *Andrew Yang’s Use of Asian Stereotypes Is Reinforcing Toxic Tropes*, VOX (Sept. 17, 2019, 2:50 PM), <https://www.vox.com/policy-and-politics/2019/9/17/20864861/andrew-yang-debate-asian-stereotype-model-minority-myth>.

162. *Id.*

163. Matt Stevens, *Andrew Yang’s Quest to ‘Make America Think Harder,’* N.Y. TIMES, <https://www.nytimes.com/2019/09/06/us/politics/andrew-yang-2020.html> [https://perma.cc/DR2U-ZKTY] (Nov. 11, 2019).

164. *See* Zhou, *supra* note 161.

165. *See* Matt Stevens, *Is Andrew Yang ‘Too Nice’ to Beat President Trump?*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/andrew-yang-2020-president.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> [https://perma.cc/E34C-6NF7].

166. *See* sources cited *supra* note 147.

167. MARK MORRISON, RETURN OF THE MACK (Warner Music Group 1996); *see also* Mark Morrison, *Mark Morrison - Return of the Mack (Official Music Video)*, YOUTUBE (June 23, 2007), <https://www.youtube.com/watch?v=uB1D9wWxd2w>.

associated with Asian American men.¹⁶⁸ In subtle ways, Yang was trying to defy the same stereotypes of Asian Americans that have come up in *SFFA v. Harvard*. He wanted to show that not only was he smart, but that he also had the personal characteristics to be a leader. Notably, these are the same characteristics that have come into play in admissions controversies involving Asian Americans, from the 1980s to *SFFA v. Harvard*.

By playing on racial stereotypes in different ways, Yang was catering to predominantly White audiences and making them feel comfortable with their own biases: if he could joke about stereotypes, they did not have to feel so bad about holding those stereotypes. Another way that Yang made White Americans feel more comfortable was through his forgiveness of bigotry. During his campaign, he was forgiving of racial slurs made toward him and other Asian Americans by Saturday Night Live comedian Shane Gillis.¹⁶⁹ This demonstrated that Yang was gracious and forgiving toward White Americans.

But Yang also showed solidarity with other candidates of color. By the December 2019 Democratic primary debate, he was the only person of color who qualified to participate. At the debate, Yang lamented the absence of Kamala Harris and Cory Booker.¹⁷⁰ He recounted the bullying and racial epithets that he faced during his childhood,¹⁷¹ but he was also forthright in his acknowledgment that

168. See Andrew Kung, *The Desexualization of the Asian American Male*, CNN: STYLE (Mar. 3, 2020), <https://www.cnn.com/style/article/andrew-kung-asian-american-men/index.html> [https://perma.cc/M94R-D6BD]. Relatedly, the hypersexualization of Asian American women, who are viewed as submissive and exotic, garnered some national attention after the March 16, 2021, murders of six Asian American women in Atlanta. See Harmeet Kaur, *Fetishized, Sexualized and Marginalized, Asian Women Are Uniquely Vulnerable to Violence*, CNN (Mar. 17, 2021), <https://www.cnn.com/2021/03/17/us/asian-women-misogyny-spa-shootings-trnd/index.html> [https://perma.cc/LY53-NW7J]; see also Rachel Kuo, *5 Ways 'Asian Woman Fetishes' Put Asian Women in Serious Danger*, EVERYDAY FEMINISM (Dec. 25, 2015), <https://everydayfeminism.com/2015/12/asian-woman-fetishes-hurtful/> [https://perma.cc/G7R3-EEWH].

169. See Matt Stevens, *Andrew Yang Knows You May Disagree with Him About Shane Gillis*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/us/politics/shane-gillis-snl-andrew-yang.html> [https://perma.cc/5G5Q-LL9X].

170. See Harpalani, *supra* note 4.

171. Tim Hains, *Andrew Yang on Growing Up Asian-American, Being "Bullied" with Racial Slurs*, REALCLEARPOLITICS (Sept. 10, 2019), https://www.realclearpolitics.com/video/2019/09/10/andrew_ya

Black Americans and Latina/o Americans face more challenging barriers than he did as an Asian American.¹⁷² Although Yang had drawn upon the model minority stereotype, he rejected its explicit use as a weapon against other marginalized groups.

As he navigated this racial landscape, Yang made his mark. He gathered a following known as the “Yang Gang”—a group that included people of various political orientations and all racial backgrounds. Even after his campaign ended in February, Yang remained visible as a CNN political commentator. And in spring 2020, as the COVID-19 pandemic spread and shut down the U.S. economy, Yang’s signature policy proposal—the Universal Basic Income (UBI)—garnered more attention as a means to provide economic relief.

However, Yang misfired when he gave his views on how Asian Americans should respond to ostracism. With the onset of the COVID-19 pandemic, President Donald Trump repeatedly blamed China for the pandemic.¹⁷³ In the national media, Trump referred to novel coronavirus as the “Chinese virus.”¹⁷⁴ This defied World Health Organization (WHO) guidance against referring to viruses by geographic names.¹⁷⁵ Trump also used terms such as “Kung Flu”¹⁷⁶

ng_on_growing_up_asian-american_being_bullied_with_racial_slurs.html [https://perma.cc/A9XN-MQAZ].

172. See Harpalani, *supra* note 4.

173. See Allan Smith, *Photo of Trump Remarks Shows ‘Corona’ Crossed Out and Replaced with ‘Chinese’ Virus*, NBC NEWS, <https://www.nbcnews.com/politics/donald-trump/photo-trump-remarks-shows-corona-crossed-out-replaced-chinese-virus-n1164111> [https://perma.cc/6WYG-AKT4] (Mar. 19, 2020, 4:16 PM).

174. *Id.*

175. See WHO Director-General’s Remarks at the Media Briefing on 2019-nCoV on 11 February 2020, WORLD HEALTH ORGANIZATION [WHO] (Feb. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020> [https://perma.cc/V9NK-J8AW] (“[W]e now have a name for the disease: COVID-19 Under agreed guidelines between WHO, the World Organisation for Animal Health and the Food and Agriculture Organization of the United Nations, we had to find a name that did not refer to a geographical location, an animal, an individual or group of people, and which is also pronounceable and related to the disease. Having a name matters to prevent the use of other names that can be inaccurate or stigmatizing.”).

176. Bruce Y. Lee, *Trump Once Again Calls Covid-19 Coronavirus The ‘Kung Flu,’* FORBES (June 24, 2020, 12:20 AM), <https://www.forbes.com/sites/brucelee/2020/06/24/trump-once-again-calls-covid-19-coronavirus-the-kung-flu/?sh=ba4c0051f59a> [https://perma.cc/P9A6-66ML].

and “China plague”¹⁷⁷ to refer to COVID-19. Other Republican politicians followed suit in pointing blame toward China.¹⁷⁸ Unsurprisingly, there was a large increase in violence against Asian Americans as the pandemic took hold in March 2020. Stop AAPI Hate, an organization that combats anti-Asian American hate incidents, reported 6,603 such incidents in the United States from March 19, 2020, to March 31, 2021.¹⁷⁹ Additionally, from 2019 to 2020, the New York Police Department reported a seven-fold increase in hate crimes with Asian American victims.¹⁸⁰

As these anti-Asian American hate incidents gained attention, Yang addressed them in an April 2020 *Washington Post* op-ed,¹⁸¹ after his presidential campaign had ended. But rather than sharply rebuking the perpetrators of these incidents, Yang focused on how Asian Americans should react. His op-ed stated that “Asian Americans need to embrace and show our American-ness in ways we never have before . . . step up, help our neighbors, donate gear, vote, wear red white and blue . . . show without a shadow of a doubt that we are Americans who will do our part for our country.”¹⁸² Yang noted that Japanese Americans volunteered for the military during World War II, implying that this was an exemplar response to the injustice of internment. He seemed to place responsibility for

177. Kimmy Yam, *Donald Trump Touts Racial Equality While Referring to COVID-19 As ‘China Plague,’* NBC NEWS (June 5, 2020, 3:55 PM), <https://www.nbcnews.com/news/asian-america/donald-trump-touts-racial-equality-while-referring-covid-19-china-n1226176> [<https://perma.cc/9QJD-35HX>].

178. See STOP AAPI HATE, THE RETURN OF “YELLOW PERIL”: ANTI-AAPI RHETORIC AND POLICIES LEADING UP TO THE 2020 ELECTION 1 (2020), <https://stopaapihate.org/wp-content/uploads/2021/04/Stop-AAPI-Hate-Report-2020-Candidates-and-Anti-Asian-Rhetoric-201021.pdf> [<https://perma.cc/NDX8-X97Z>] (cataloging anti-Asian and Asian American sentiment by politicians during the 2020 campaign season).

179. RUSSELL JEUNG ET AL., STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT 3/19/20–3/31/21 1 (2021), <https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate-Report-National-210506.pdf> [<https://perma.cc/NK2U-DM2J>].

180. Alexandra E. Petri & Daniel E. Slotnik, *Attacks on Asian-Americans in New York Stoke Fear, Anxiety and Anger*, N.Y. TIMES, <https://www.nytimes.com/2021/02/26/nyregion/asian-hate-crimes-attacks-ny.html> [<https://perma.cc/4CP7-DK7H>] (Apr. 4, 2021).

181. See generally Andrew Yang, *We Asian Americans Are Not the Virus, but We Can Be Part of the Cure*, WASH. POST (Apr. 1, 2020, 4:23 PM), <https://www.washingtonpost.com/opinions/2020/04/01/andrew-yang-coronavirus-discrimination/> [<https://perma.cc/2NQG-B5VX>].

182. *Id.*

overcoming racism and xenophobia on the actions of Asian Americans rather than on the perpetrators of hate incidents.¹⁸³

Various Asian American commentators criticized Yang's op-ed. Responding directly with a letter to the *Washington Post*, David Inoue, Executive Director of the Japanese Americans Citizens League, accused Yang of "blaming the victim" and "fail[ing] to recognize the fundamental reality of the racism" that leads to hate crimes.¹⁸⁴ Actor George Takei, of *Star Trek* fame, wrote in a tweet that "Yang is way off the mark" and that Asian Americans "don't have anything we need to prove."¹⁸⁵ Vox writer Li Zhou analyzed Yang's comments as a form of "respectability politics":¹⁸⁶ a term often applied to Black American communities, which refers to attempts by members of marginalized groups to show that their values, norms, and behaviors coincide with those of mainstream society and thus are not threatening to it.¹⁸⁷ Columbia university student Canwen Xu expressed the same sentiment more starkly: in a subsequent *Washington Post* op-ed, she referred to Yang a "white-people pleaser."¹⁸⁸

All of these critiques are valid. Asian Americans cannot overcome racism through displays of patriotism or any other actions intended to show our worth to this nation. But Yang's commentary also

183. *Id.*

184. David Inoue, *Blaming the Victim During a Time of Vulnerability*, WASH. POST (Apr. 8, 2020, 4:28 PM), https://www.washingtonpost.com/opinions/blaming-the-victim-during-a-time-of-vulnerability/2020/04/08/447f54a4-7811-11ea-a311-adb1344719a9_story.html [<https://perma.cc/24CT-RESM>] (accusing Yang of "blaming the victim" and "fail[ing] to recognize the fundamental reality of the racism").

185. @GeorgeTakei, TWITTER (Apr. 3, 2020, 12:16 PM), <https://twitter.com/georgetakei/status/1246139544115777542> [<https://perma.cc/G8MG-E929>].

186. *See, e.g.*, Li Zhou, *Andrew Yang Told Asian Americans to Prove Their Americanness. Here's Why That's Wrong.*, VOX (Apr. 3, 2020), <https://www.vox.com/2020/4/3/21206760/andrew-yang-washington-post-asian-americans-opinion> [<https://perma.cc/NHH6-BGDN>] (noting that "explicitly telling Asian Americans that we need to justify our Americanness reinforces" the notion that Asian Americans are "the other").

187. *See* Harpalani, *supra* note 4.

188. Canwen Xu, *Opinion: Andrew Yang Was Wrong. Showing Our 'Americanness' Is Not How Asian-Americans Stop Racism*, WASH. POST (Apr. 3, 2020, 4:35 PM), <https://www.washingtonpost.com/opinions/2020/04/03/andrew-yang-was-wrong-showing-our-american-ness-is-not-how-asian-americans-stop-racism/> [<https://perma.cc/NPC4-QF3B>] (calling Andrew Yang a "white-people pleaser").

highlighted another dilemma: how to be accepted as an American and climb the ladder of success while still confronting and addressing the problem of racism in American society. W.E.B. Du Bois first articulated the “two warring ideals” of Black Americans: the “wish[] to make it possible for a man to be both . . . [Black] and . . . American without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.”¹⁸⁹ Many scholars have pointed out how many Black Americans feel that they must distance themselves from Black communities to be successful and that they must “act white” in order to succeed.¹⁹⁰ During the process of attaining success, this leads many Black Americans to question their sense of self and purpose.¹⁹¹

Similarly, Andrew Yang had to contend with the perpetual foreigner stereotype: he had to show that he was patriotic and “American” to be a successful politician. Yang sometimes played up stereotypes such as the “model minority” that could benefit him,¹⁹²

189. DU BOIS, *supra* note 1, at 3.

190. *See generally, e.g.,* Margaret B. Spencer & Vinay Harpalani, *What Does “Acting White” Actually Mean?: Racial Identity, Adolescent Development, and Academic Achievement Among Black Youth*, in *MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING* 222 (John U. Ogbu ed. 2008); DEVON CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2015).

191. Vinay Harpalani, *Climbing on the Backs of Others: A Critique of Randall Kennedy and Barack Obama’s Black Respectability Politics*, *BLACK COMMENTATOR* (Oct. 1, 2015), https://blackcommentator.com/623/623_black_respectability_politics_harpalani_guest.html [<https://perma.cc/MT42-QUXR>].

192. On occasion, the model minority stereotype has also been used against Yang. In January 2021, Yang began a campaign for Mayor of New York City, during which he faced critiques that drew upon the model minority stereotypes and stoked recent xenophobia against Asian Americans. *See* Erin Durkin, *‘A mini-Trump’: New York Mayoral Candidates Look to Take Down Yang*, *POLITICO* (Apr. 7, 2021, 7:57 PM), <https://www.politico.com/states/new-york/albany/story/2021/04/07/a-mini-trump-new-york-mayoral-candidates-look-to-take-down-yang-1371914> [<https://perma.cc/D79U-L4PQ>] (noting that one of Yang’s opponents in the New York City mayoral campaign, Brooklyn Borough President Eric Adams, claimed that “[t]his is a city where a leader must have been a worker [and] [p]eople like Andrew Yang never held a job in his entire life,” although Yang has worked several jobs). Adams, a former New York Police Department police captain, also noted that Yang graduated from Brown and Columbia and has worked at corporate law firms, startups, and a technology non-profit organization. *Id.* All of these reflect the model minority stereotype and can invoke its connection to xenophobia. *See supra* note 68. Yang’s campaign managers, Sasha Ahuja and Eric Coffey, noted the xenophobic context of Adams’ comments. *See* Durkin, *supra* (“The broadside drew a particularly pointed response from Yang’s camp, who accused him of hateful rhetoric amid a spike in anti-Asian attacks. ‘Eric Adams today crossed a line with his false and reprehensible attacks. The timing of his hate-filled vitriol toward Andrew should not

perhaps to compensate for the fact that he would always look “foreign” to many voters.¹⁹³ He simultaneously worked to counter stereotypes about Asian Americans’ passivity, social ineptness, and foreignness. Yang thus employed a strategic “double-consciousness” where he both adopted and defied racial stereotypes, as if he was “looking at [himself] through the eyes of others” and “see[ing] himself through the revelation of the other world.”¹⁹⁴ He was forgiving of racist comments when they were directed at him, but he also showed solidarity with other candidates of color and spoke about the racism that they faced. All of this was a delicate balance, and even when it was effective, Yang’s approach was sometimes problematic.¹⁹⁵ Asian Americans themselves had conflicting views on Yang’s navigation of racial stereotypes.¹⁹⁶

Reckoning with this double-consciousness, with the dilemmas it poses for Asian Americans and other people of color, is key to building progressive coalitions between these groups. People of color in America all have to navigate a society that is still white-dominated, even as it becomes more diverse. Different groups of people of color face these dilemmas in different ways, but identifying the commonality is the first step in coalition-building.

be lost on anyone” (quoting Sasha Ahuja and Eric Coffey)). The New York mayoral primary was held on June 22, 2021. Adams appeared to have a commanding lead, and Yang conceded that same night. See Sally Goldenberg, Tina Nguyen & Amanda Eisenberg, *Adams Has a Sizable Lead After Chaotic New York Primary*, POLITICO, <https://www.politico.com/news/2021/06/22/new-yorkers-new-mayor-primary-495591> [<https://perma.cc/MUW5-66HX>] (Jun. 22, 2021, 11:29 PM).

193. The perpetual foreigner stereotype has also come up during Yang’s mayoral bid. See *id.* Yang’s wife, Evelyn, also noted that “[e]very time you make a joke about Andrew not being a New Yorker, you are telling Asian Americans that they don’t belong.” Erin Durkin, *Yang Denounces Attacks on His New York Credentials As Racist*, POLITICO (quoting Evelyn Yang), <https://www.politico.com/states/new-york/albany/story/2021/05/25/yang-denounces-attacks-on-his-new-york-credentials-as-racist-1383940> [<https://perma.cc/LAQ6-8XD3>] (May. 25, 2021, 5:18 PM).

194. DU BOIS, *supra* note 1, at 3.

195. Conservative Asian American politicians such as former Louisiana Governor Bobby Jindal and former South Carolina Governor Nikki Haley have also been strategic and problematic in their navigation of the racial landscape in the United States. See generally Harpalani, *supra* note 33, at 149–58 (discussing racialization of Bobby Jindal and Nikki Haley in context of U.S. politics); Harpalani, *supra* note 4.

196. See Zhou, *supra* note 161.

The process of reckoning with double-consciousness itself can promote racial equity and justice.

CONCLUSION

Asian Americans, like all people of color, have to negotiate the conflict between our own identities and the expectations of a society dominated by white American norms and perspectives. This double-consciousness can manifest itself through cultural conflicts, pressures to assimilate,¹⁹⁷ and navigation of racial stereotypes. In the broader racial landscape and ideology of American society, the dilemma is compounded by the Asian Americans' racial positioning with respect to other groups and by the underlying political interests that created this positioning. All of this has consequences not only for Asian American identities but also for building coalitions with people of color and for pursuing racial justice more broadly.

Nevertheless, double-consciousness is also a strength. W.E.B. Du Bois stated that Black Americans were “gifted with second-sight in this American world,”¹⁹⁸ denoting the ability to see and experience different perspectives—particularly when it comes to racial identity and racism. Although Asian Americans are positioned differently and face different challenges than Black Americans, this ability to possess a “second-sight” is an important common ground. It involves looking at Asian Americans' racial positioning through a critical lens in the context of America's racial landscape. In doing so, Asian Americans can become more aware of our own marginal status and how our positioning not only keeps us marginalized but also contributes to the oppression of other groups.

Although Asian Americans are often valorized compared to other groups of people of color, Professor Kim articulates how this valorization is accompanied by ostracism. The model minority is also

197. See generally, e.g., BANDANA PURKAYASATHA, *NEGOTIATING ETHNICITY: SECOND-GENERATION SOUTH ASIAN AMERICANS TRAVERSE A TRANSNATIONAL WORLD* (2005).

198. DU BOIS, *supra* note 1, at 3.

the perpetual foreigner and the passive, socially inept college applicant. Racial stereotyping is inherently dehumanizing, even when it involves supposedly “positive” stereotypes such as the model minority because it takes away one’s individuality and replaces it with a simplified group caricature. Black Americans have encountered the greatest dehumanization through stereotyping and other means, but Asian Americans can draw upon our own experiences and history to see how stereotyping is the ideological basis of oppression—for Black Americans and for Asian Americans.

Sometimes the denial of humanity is subtle. The *SFFA v. Harvard* litigation itself shows how Asian Americans are not always viewed as fully humanized. The SFFA plaintiffs in the case are anonymous Asian Americans, with no names and faces attached to them.¹⁹⁹ This stands in contrast to prior plaintiffs in major affirmative action cases, who were white women and portrayed sympathetically. In the *Fisher v. University of Texas at Austin* litigation, the plaintiff Abigail Fisher was touted in the media as a sympathetic victim of “reverse discrimination”—the “perfect plaintiff.” Similarly, when *Gratz v. Bollinger* and *Grutter v. Bollinger* were litigated in the early 2000s, plaintiffs Jennifer Gratz and Barbara Grutter spoke at press conferences to try and evoke sympathy for their plights.

But SFFA’s plaintiffs in the Harvard case are an array of nameless and faceless Asian Americans whose individual identities are invisible. Perhaps SFFA believes that they would not appear as sympathetic as the prior white women plaintiffs.²⁰⁰ In light of the recent hate incidents during the COVID-19 pandemic, making Asian American plaintiffs more visible might even be detrimental to SFFA’s strategy. Remotely casting them as high-achieving victims of affirmative action without calling attention to their faces might be more effective for SFFA’s purpose. And this itself is telling about Asian Americans’ racial positioning.

199. See Lockhart, *supra* note 134.

200. *Id.* SFFA claims that the plaintiffs “are remaining anonymous to avoid harassment.” *Id.*

America's racial landscape is complicated, and valorization, victimhood, and ostracism can intersect in subtle ways. But COVID-19 related hate incidents, which have included violent murders, show that dehumanization of Asian Americans can also go far beyond the subtle. And 2020 brought greater attention to racist violence on many fronts—from COVID-19 related hate crimes against Asian Americans to police brutality against Black Americans. Recognizing the similar oppressions here could be another commonality for coalition-building.

Stepping back to look at history also shows how stereotypes such as the model minority were created by particular historical circumstances, and how these stereotypes are employed deceptively to serve particular political interests. The immigration policy that led to a class of high-achieving Asian Americans was a product of interest-convergence between the U.S. government and educated immigrants from Asian countries. Conservatives have used the model minority stereotype to attack affirmative action and link it to negative action, creating the perception that their interests align with those of Asian Americans. But a critical lens also shows how this view breaks down. As Professor Goodwin Liu has illustrated, race-conscious university admissions policies have a negligible impact on the admission of Asian American and white applicants.²⁰¹ Even if these policies were abolished, there would only be a slight rise of Asian American students at elite universities because there are so few Black, Latina/o, and Native American students under the status quo.²⁰²

The purported interest-convergence between white conservative opponents of affirmative action and high-achieving Asian Americans is thus an illusion. It does not even consider Asian Americans who do

201. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002); see also *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.” (quoting Liu, *supra*)).

202. Liu, *supra* note 201.

not fit the high-achieving profile. And it has been accompanied by white conservative opposition to immigration, rooted in ostracism of Asian Americans.

Andrew Yang's campaign and its invocation and balancing of racial stereotypes also provides lessons on the common ground of double-consciousness that Asian Americans and Black Americans share. A dozen years before Yang's bid, Barack Obama carefully navigated racial stereotypes during his 2008 presidential campaign. Obama had to demonstrate that he was the exception to the negative stereotypes that many white people held about Black Americans. His polished, "articulate" speaking style,²⁰³ along with many accomplishments such as being the first Black Editor in Chief of the *Harvard Law Review*, quelled most doubts about Obama's intellectual abilities.²⁰⁴ Also, in contrast to stereotypical images of absent Black fathers, Obama presented himself as family-oriented—an image buttressed by the strong presence of First Lady Michelle Obama, along with their daughters, Malia and Sasha.

Like Yang, Obama also made white people feel comfortable by joking about racial stereotypes. When asked if Bill Clinton was the "first Black President"—as Nobel laureate Toni Morrison had once stated—Obama quipped: "I would have to investigate more Bill's dancing abilities . . . before I accurately judged whether he was in fact a 'brother.'"²⁰⁵ Also like Yang, Obama was forgiving when white politicians made racially insensitive remarks toward him. He chose Joe Biden as his running mate, even after Biden had clumsily referred to him as "articulate" and "clean."²⁰⁶ Later, Obama forgave

203. The term "articulate" is often used toward Black Americans as a back-handed compliment, denoting surprise at their ability to speak well. See Lynette Clemetson, *The Racial Politics of Speaking Well*, N.Y. TIMES (Feb. 4, 2007), <https://www.nytimes.com/2007/02/04/weekinreview/04clemetson.html> [<https://perma.cc/7UDP-6QU4>]. See generally H. SAMY ALIM & GENEVA SMITHERMAN, *ARTICULATE WHITE BLACK* (2012).

204. See Harpalani, *supra* note 4. Unlike Obama, Yang did not have to counter stereotypes about his intelligence.

205. *Bill Clinton the First Black President? Bust a Move, Jokes Barack Obama*, N.Y. DAILY NEWS (Jan. 22, 2008, 12:59 AM), <https://www.nydailynews.com/news/politics/bill-clinton-black-president-bust-move-jokes-barack-obama-article-1.342196> [<https://perma.cc/VKH7-ZKZN>].

206. See Clemetson, *supra* note 203.

similar comments by Senate Majority Leader Harry Reid.²⁰⁷ Professor Randall Kennedy noted that at the same time Obama “assiduously cultivated a persona that is racially nonthreatening to many whites.”²⁰⁸ In that vein, Obama too was a “white-people pleaser.” But to be a viable candidate, Barack Obama—like Andrew Yang—had to employ a strategic double-consciousness around racial stereotypes.²⁰⁹

The very fact that Asian Americans and Black Americans are stereotyped in polar opposite ways, with regard to personal characteristics such as intelligence and masculinity, is noteworthy. It suggests that these stereotypes operate as part of a broader racial ideology—one that perpetuates processes such as racial triangulation and perceived interest-convergence between white conservatives and Asian Americans. It may also be unavoidable that people of color have to adopt a certain double-consciousness about racial stereotypes in order to navigate them and still be successful.

Nevertheless, to combat divisive racial ideology and to build coalitions, Asian Americans must also be aware of our relative racial positioning and how issues such as affirmative action attempt to pit different groups of people of color against each other. Asian Americans, Black Americans, and other people of color each need to not only recognize our own double-consciousness, but also to see how it relates to the double-consciousness adopted by others. By doing so, we can become aware of how all of our interests align and how racial triangulation keeps us apart. As Figure 2 shows, people of color can then work to reconfigure these processes to form mutually beneficial coalitions.²¹⁰ And by doing so, we can begin to work strategically toward racial justice.

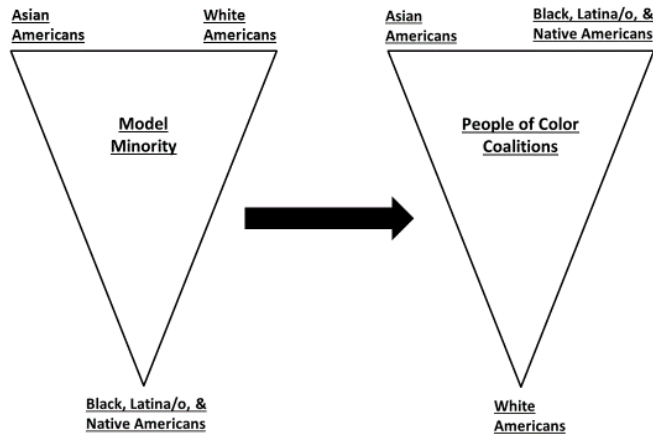
207. Mark Preston, *Reid Apologizes for Racial Remarks About Obama During Campaign*, CNN: POL. (Jan. 9, 2010, 11:32 PM), <https://www.cnn.com/2010/POLITICS/01/09/obama.reid/index.html> [<https://perma.cc/8M25-7ZG2>].

208. Randall Kennedy, *Lifting As We Climb: A Progressive Defense of Respectability Politics*, HARPER’S MAG. (Oct. 2015), <https://harpers.org/archive/2015/10/lifting-as-we-climb/> [<https://perma.cc/9UB9-6C5L>].

209. Harpalani, *supra* note 4.

210. See Chang, *supra* note 10, 962–63 (illustrating different racial positionings possible for Asian

Figure 2: Reconfiguring Interest-Convergence



Adapted from Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 962-63 (2013).

Americans and other groups of people of color); Robert S. Chang & Neil Gotanda, *The Race Question in Latcrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1025-26 (2007) (discussing different racial triangulation configurations involving different groups).