Ending Affirmative Action Does Not End Discrimination against Asian Americans

Jerry Kang

Table of Contents

Introduction

In *SFFA v. Harvard*,[1] the Supreme Court effectively overruled forty-five years of precedent and held that the educational benefit of racial diversity is no longer a "compelling interest."[2] This decision effectively ends race-conscious college admissions. Interestingly, Asian Americans featured prominently in the litigation. The plaintiff, Students for Fair Admissions

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). The Court issued a consolidated ruling in parallel cases involving Harvard and UNC. My focus will be on the Harvard case.

2. The Court declined to be explicit about whether it was overruling precedent. *See, e.g.*, Reginald Oh, *What the Supreme Court Really Did to Affirmative Action*, Washington Monthly (July 20, 2023), *https://washingtonmonthly.com/2023/07/20/what-the-supreme-court-really-did-to-affirmative-action/* [https://perma.cc/DEJ7-J6GP]. But in my view, that's mostly wordplay. It's hard to see how diversity will be considered a "compelling interest" in future cases. Both Justices Sotomayor and Thomas agree with me in stating that the majority opinion effectively overruled Supreme Court precedent. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 318 (2023) (Sotomayor, J., dissenting) ("Today, this Court stands in the way and rolls back decades of precedent and momentous progress."); *see* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 232 (2023) (Thomas, J., concurring) ("I have repeatedly stated that *Grutter* was wrongly decided and should be overruled . . . . Today, and despite a lengthy interregnum, the Constitution prevails.").

(SFFA),[3] specifically emphasized the plight of Asian Americans as innocent victims of discrimination.[4]

SFFA is no NAACP. It is neither a household name nor a storied civil rights organization. It is instead an entity created by Ed Blum, a California businessperson who has long litigated against affirmative action and voting rights laws.[5] Blum is recorded on video saying "I needed plaintiffs; I needed Asian plaintiffs . . . "[6] Why seek Asians? It's because Asian Americans can be framed as especially sympathetic victims, "model minorities" cruelly harmed by affirmative action.

Given this framing, with its long pedigree,[7] Asian American ambivalence about affirmative action should not be surprising. Indeed, after the *SFFA* opinions came down, a UCLA colleague reached out to celebrate that the Supreme Court had just struck down discrimination against Asian Americans. I felt disheartened to suggest that he was mistaken.

I. Discrimination Against Asian Americans

Before we even ask whether the Supreme Court struck down discrimination against Asian Americans, we should first ask whether any discrimination had even been legally found. This is a complex question that demands clarity in both legal definition and empirical investigation. We confront at least four difficulties.

A. *Two Conceptions of Discrimination*

First, we need to settle on the appropriate legal definition of "discrimination." Within anti-discrimination law, there are at least two prominent conceptions of discrimination. On the one hand, discrimination could mean *different treatment* of otherwise identical individuals on the basis of some social category, such as race, with some state of mind (e.g., purposeful, deliberate intention). On the other hand, discrimination could mean *different outcomes* between racial groups caused by some policy or practice regardless of whether there was any different treatment of individuals on the basis of race.

3. Students for Fair Admissions, *https://studentsforfairadmissions.org* [*https://perma.cc/UQ6U-XS5H*] (Mar. 3, 2024).

4. For thoughtful discussion of the treatment of Asian Americans in the *SFFA* litigation, see Vinay Harpalani, *The Need for an Asian Americans Supreme Court Justice*, 137 Harv. L. Rev. F. 23 (2023); Jonathan Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 Calif. L. Rev. 707 (2019).

5. *See* Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. Times (July 8, 2023), *https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html* [https://perma.cc/95UA-K8GK].

6. Blum told a group gathered by the Houston Chinese Alliance in 2015. OiYan Poon, *Edward Blum: "I needed Asian plaintiffs,"* YouTube, at 18:44 (July 30, 2018), *https://www.youtube.com/watch?v=DiBvo-05JRg&t=1124s* [*https://perma.cc/ZPM3-GU8C*].

7. *See, e.g.*, 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).

The former conception captures what legal doctrine often calls "intentional discrimination" or "disparate treatment." By contrast, the latter conception captures what is often called "disparate impact." Different bodies of law recognize different conceptions of discrimination. For example, the Equal Protection Clause recognizes only *different treatment*;[8] the same goes for the statutory obligations under Title VI of the 1964 Civil Rights Act,[9] and the "disparate treatment" theory of liability under Title VII of the 1964 Civil Rights Act.[10] By contrast, the *regulations* authorized under Title VI[11] as well as the "disparate impact" theory of liability under Title VII[12] proscribe *different outcomes* (regardless of different treatment) that cannot be well-justified.

In *SFFA*, the private plaintiff was suing under Title VI (the statute)[13] and the Equal Protection Clause.[14] As such, only the *different treatment* conception of discrimination was legally available. Although the general public and lay-commentators may not appreciate the difference among different conceptions of discrimination, legal analysts should be careful to understand what was precisely at issue. Merely different outcomes between Asian American and White student applicants (without a showing of different treatment) were never legally relevant. Instead, the question presented was solely whether Harvard had engaged in *different treatment* of Asian Americans.

B. *Baseline of Comparison*

Second, we should lock down the specific racial group for comparison. After all, any reference to different treatment begs the question: As compared to whom? For race discrimination, it's always useful to start with the default comparator group of White people, who historically have enjoyed most favored racial status. This is why important civil rights statutes, passed during Reconstruction, specifically guarantee the same rights "as is enjoyed by white citizens."[15]

In its briefing, SFFA did not object to this baseline and specifically invoked Whites as the proper comparator group. In other words, SFFA specifically pointed out that Asian Americans were being treated *worse than similarly situated White* students.[16] Such a practice is what I labelled long

8. Washington v. Davis, 426 U.S. 229, 236 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 256 (1979).

9. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

10. *See* 42 U.S.C. § 2000e-2(a)(1).

11. *See* Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y., 463 U.S. 582, 607 n.27 (1983).

12. Griggs v. Duke Power, Inc., 401 U.S. 424 (1971). This theory of liability was codified by Congress in the 1991 Civil Rights Act. *See* 42 U.S.C. §§ 2000e-2(k)(1)(A).

13. *See* Sandoval, 532 U.S. at 293 (holding that private plaintiffs could not sue to enforce disparate impact regulations adopted by agencies).

14. U.S. Const. amend. XIV, § 1.

15. *See, e.g.*, 42 U.S.C. § 1981(a) (guaranteeing various rights, including contracting rights, "as is enjoyed by white citizens"); 42 U.S.C. § 1982 (guaranteeing property rights "as is enjoyed by white citizens").

16. Compl. ¶¶ 205–08, Students for Fair Admissions, Inc. v. President & Fellows of

ago "negative action against Asian Americans."[17] Suppose instead Asian Americans were treated identically to Whites, no better and no worse, but that both groups were excluded from a school's affirmative action program. Such a regime would constitute what I called "neutral action."[18] I have argued that negative action poses greater ethical and legal concerns than neutral action.[19]

C. *Statistics*

Third, having clarified the conception of discrimination at issue in *SFFA* and having chosen White people as the racial baseline for comparison, we now must turn to the empirical complexities. The question can be posed generally: How can we detect whether a university has treated Asian Americans worse than similarly situated Whites because of race?

Sometimes, clear signals of different treatment appear in the record, for example through racial epithets or smoking gun memoranda laced with animus (highly negative attitude) or racial caricatures (exaggerated negative stereotypes). But such cases are rare, especially in higher education. Even if Harvard admissions officials disliked or crudely stereotyped Asians, they would be foolish to write such views down. Instead, the biases would be kept covert.

Courts have long provided guidance on how factfinders should review the products of discovery or evidence at trial to detect covert racial motivations. This guidance has included using multi-factor tests[20] and intricate burden-shifting regimes.[21] But in modern times, especially when addressing claims of subtle discrimination across large populations, the best way to detect different treatment on the basis of race (or any other variable) is to use statistics.

Both parties in the litigation employed multiple regression. In a regression, one selects a specific set of predictor variables—such as test scores, grade point averages, personal ratings, and race—and then calculates how much each variable predicts the admissions decision (the outcome variable) controlling for all other predictor variables.[22] Selecting the right set of predictor variables in any model is part art and part science. On the one hand, if you omit a relevant variable, such as standardized test scores, you'll get an inaccurate understanding of what factors are actually driving the admissions outcome. On the other hand, adding too many variables—especially variables

Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023).

17. *See* Kang, *supra* note 7, at 3.

18. *Id.* at 45.

19. *See id.*

20. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

21. McDonnell Douglas v. Green, 411 U.S. 792, 801–03 (1973).

22. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 158–59 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023).

that correlate with each other—can end up hiding or diluting the importance of the truly relevant factor.

To appreciate this last point, consider the following silly hypothetical. Suppose under a simple model that included only (1) standardized test scores, (2) high school GPAs, and (3) Asian (versus White) race, "race" did in fact predict admissions in a statistically significant way. What would happen to the strength of that relationship between race and admissions if we added more obviously irrelevant predictor variables such as (4) having brown eyes and (5) having dark hair? These two variables are not unique to Asians; plenty of White people also have brown eyes and dark hair. But these factors do correlate with being Asian. Even without formal statistical training, one might worry that adding these overlapping variables will dilute the importance of the variable of being Asian. As the district court explained, in more opaque terms, "to limit the impact of variables affected by bias, variables that are themselves impacted by the independent variable of primary interest, which is race, should generally be excluded from regression models. Including such variables dilutes the implied effect of race by allowing that effect to be partially captured by the race-influenced variable itself."[23]

Because the parties wanted different predictor variables to be included, they fought over various statistical specifications, two of which bear mention. First, should the dataset include students admitted under the extremely generous preferences given to athlete, legacies, and faculty children (a group in which Asians are underrepresented as compared to Whites)?[24] Second, should personal ratings be included as a predictor variable (a variable in which Asians score lower than Whites)?[25] Without getting further into the statistical weeds, Harvard wanted to *include* the athletes, legacies, and faculty children into the model and *include* personal ratings as a predictor variable. And under these specifications, being Asian produced no statistically significant negative impact.[26] By contrast, SFFA wanted to *exclude* the athletes and legacies from the model and also to *exclude* personal ratings as a predictor variable. Under SFFA's model, being Asian sometimes predicted a statistically significant negative impact on admissions.

The trial court sided with Harvard.[27] In effect, it was agreeing that athlete status, legacy status, and personal ratings were valid considerations for admissions and not necessarily connected to race discrimination against Asians. Adopting Harvard's regression model, the court agreed that being Asian had no impact on admissions.[28] In other words, there was no statistical case of *different treatment* on the basis of race. As such, the trial court found no intentional discrimination against Asians.

23. *Id.* at 166.
24. *See id.* at 160 n.42.
25. *See id.* at 162.
26. *See id.* at 172–73.
27. *Id.* at 173–74.
28. *Id.* at 175 ("The model does not demonstrate any intent by admissions officers to discriminate based on racial identity . . . .").

D. *Pass Through of Implicit Bias*

Finally, we should reckon with the possibility of subtle discrimination caused by implicit bias at multiple points of the admissions decision process. Over the past three decades, the field of implicit social cognition[29] has developed an improved, more behaviorally realistic model of how discrimination actually takes place. According to this upgraded understanding, implicit biases are attitudes and stereotypes that are only partially introspectively accessible. In other words, we cannot easily sense whether we have them simply by asking ourselves. Implicit biases are pervasive, often stronger in magnitude than explicit biases, and predictive of discriminatory judgments and behavior (to a small degree).[30] This empirical understanding has diffused broadly throughout society and legal culture.

Most vulnerable to implicit biases are highly subjective evaluations, such as interviews, recommendations, and personality assessments, all of which can feed into "personal ratings." Interestingly, the trial court recognized this danger:

> [I]t is possible that implicit biases had a slight negative effect on average Asian American personal ratings, but the Court concludes that the majority of the disparity in the personal rating between white and Asian American applicants was more likely caused by race-affected inputs to the admissions process (e.g. recommendations or high school accomplishments) or underlying differences in the attributes they may have resulted in stronger personal ratings.[31]

Notwithstanding this acknowledgement, the court reasoned that implicit bias likely infects the "race-affected inputs" further upstream, *before* the application hits Harvard's admissions office.[32] As such, the trial court reasoned that even if implicit bias hurts Asian Americans as compared to similarly situated Whites, Harvard should not be held responsible.

* * *

Before celebrating that the Supreme Court somehow struck down discrimination against Asian Americans, we should ask the logically prior question: Was discrimination found against Asian Americans in the first place? As a legal matter the only discrimination at issue in the litigation was intentional discrimination—*different treatment* of individual applicants based

29. Implicit social cognition is a field of experimental social psychology that explores how implicit attitudes and stereotypes influence judgment, decisionmaking, and behavior across social categories. *See generally* Kristin A. Lane, Jerry Kang, & Mahzarin Banaji, *Implicit Social Cognition and the Law*, 3 Annu. Rev. Law Soc. Sci. 427–51 (2007).

30. *See generally* Jerry Kang, *Little Things Matter a Lot: The Significance of Implicit Bias, Practically and Legally*, 153 Daedalus 193 (2024).

31. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 171 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023).

32. *Id.* At the end of the quoted text, the court also suggests that there may actually be "underlying differences" between White and Asian Americans that warrant stronger personal ratings for the White students.

on race. To help answer the question of whether different treatment took place, both parties deployed statistical analysis as a sensor to detect subtle discrimination across a large population. Not surprisingly, the parties offered competing models, and the court sided with Harvard's. This choice meant that, in a comparison between an Asian and a similarly situated White applicant, the applicant's *race did not matter* in a statistically significant way. Thus, the trial court found no discrimination. Also, according to the court, if any of the predictor variables (such as personal ratings) were infected with implicit bias, that was probably a small effect injected mostly upstream and thus wasn't really Harvard's problem.

The trial court's finding of no discrimination against Asians was affirmed on appeal by the First Circuit Court of Appeals,[33] and the Supreme Court barely discussed much less overturned that finding.[34] The upshot is that it's simply wrong to think that the Supreme Court struck down discrimination against Asian Americans. The truth is that none was ever (legally) found.

II. Ending Affirmative Action

Having lost on the *facts* of discrimination against Asians, SFFA petitioned the Supreme Court to attack the *law* of affirmative action.[35] In truth, although the lawsuits emphasized harm against Asian Americans, SFFA's real target was the use of race in affirmative action programs that benefit underrepresented racial minorities.

Over the past forty-five years, the Supreme Court had cobbled together a compromise on affirmative action in higher education. On the one hand, explicit race-conscious admissions must satisfy "strict scrutiny" under the Equal Protection Clause, with a requirement that it further a "compelling interest" through "narrowly tailored" means.[36] On the other hand, in the rarefied domain of higher education, diversity would count as a "compelling interest."[37]

This diversity rationale was introduced by Justice Lewis Powell in his opinion in *Regents of the University of California v. Bakke* back in 1978.[38] In his analysis, Powell rejected the more obvious but politically controver-

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

34. We should be careful to understand what the majority means when it writes that "the First Circuit found that Harvard's consideration of race has *led to* an 11.1% decrease in the number of Asian-Americans . . . [a]nd the District Court observed that Harvard's 'policy of considering applicants' race . . . overall *results in* fewer Asian American and white students being admitted.'" SFFA v. Harvard Coll., 143 S. Ct. 2141, 2147. Remember that the only legal question presented was *intentional* discrimination, and the courts below did not find intentional discrimination against Asian Americans.

35. Brief for Petitioner at 49, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 191 (2023) (No. 20–1199) ("*Grutter* should be overruled.").

36. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

37. *Id.* at 329.

38. 438 U.S. 265 (1978).

sial justification for affirmative action: a remedy for centuries of past societal discrimination.[39] He considered such a justification "an amorphous concept of injury that may be ageless in its reach into the past."[40] Instead, Justice Powell turned away from a backward-looking remedial justification to a forward-looking concept of educational diversity.[41] Although no other justice joined Justice Powell's opinion, it broke the tie and decided the case. It's this understanding of diversity-as-a-compelling-interest, which eventually garnered majority support decades later in *Grutter v. Bollinger*[42] and *Fisher v. University of Texas,*[43] that allowed race to be considered in college admissions.

In *SFFA*, the Supreme Court tore up this long-standing but delicate truce. Writing for the majority, Chief Justice John Roberts explained that the educational benefits of diversity were now too unmeasurable to be compelling.[44] Whether the benefit was framed as training future leaders, better educating students through diversity, or preparing engaged and productive citizens, Chief Justice Roberts wrote that these interests were "not sufficiently coherent for purposes of strict scrutiny."[45] Chief Justice Roberts's opinion effectively ended racial affirmative action in higher education.

III. Stopping Discrimination

So far, we've learned that none of the courts in the *SFFA* litigation ever found that Harvard had discriminated against Asian Americans. You and I may disagree with that finding (at least a little bit), depending on our ethical and legal conception of discrimination, and our views, if any, about the proper way to run multiple regressions. Still, it is what it is: the courts did what they d*id*. But maybe there is some good news to celebrate. The Supreme Court in *SFFA* effectively struck down race-based affirmative action. Could ending affirmative action have the collateral effect of stopping discrimination against Asian Americans as compared to similarly situated Whites? Consider the following hypothetical.

Suppose you are an Asian American parent anxious about whether your kid has a fair shot to get into an elite college. Should you celebrate the Supreme Court ruling against affirmative action? Well, suppose you learned the following. Legacies (a.k.a. nepo-babies) are granted huge advantages in admissions. Unfortunately, you yourself never attended college and certainly not an elite one that your child will be applying to. Legacy preferences do not help you. You also learn that legacies are overwhelmingly White.

39. *Id.* at 307.
40. *Id.*
41. *Id.* at 312–13.
42. Grutter v. Bollinger, 539 U.S. 306 (2003).
43. Fisher v. Univ. of Tex., 579 U.S. 365 (2016).
44. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 214 (2023).
45. *Id.*

Next, you find that athletes are granted huge advantages in admissions.[46] But your kid is not a varsity-level athlete or did not participate in country club sports, such as fencing and lacrosse. You might assume that athletes who receive an admissions advantage are mostly racial minorities. After all, that's what comes to mind when you think of televised sports, such as basketball and football. But you are surprised to discover that varsity-level athletes are also overwhelmingly White.[47]

Finally, you learn that personal ratings are generated through highly subjective interviewing processes. Also, recommendations are vulnerable to implicit biases that frame Asians as technically competent but not affable, grinding not creative, mathematically precise but not charismatic, and not the stuff of leaders. Your kid tries hard to counter these stereotypes in interviews and to change the first impressions of teachers, guidance counselors, and supervisors. But you worry that they compete at a disadvantage because they aren't White.

Each of these factors contribute to what ordinary Asian American parents understand as discrimination against their children in college admissions.[48] If admissions are felt to be "rigged" against Asians, surely these are relevant factors. Does ending affirmative action for underrepresented minorities somehow disrupt these factors? No. After *SFFA*, legacy preferences, athlete preferences, and personal ratings persist. If our objective were to end discrimination against Asian Americans vis-a-vis Whites, we would end legacy preferences. We would end athletic preferences. We would also build guardrails to lessen the impact of implicit bias in personal ratings.

Unfortunately, ending race-conscious affirmative action accomplished none of these. And it speaks volumes that in the litigation, SFFA asked for none of these.

IV. Objection: Zero-Sum Game

Of course, the final objection could be raised—as the Chief Justice did—that "college admissions is a zero-sum game." In other words, "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[49] In other words, if Asian

46. *See* Uma Mazyck Jayakumar, William Kidder, Eddie Comeaux & Sherod Thaxton, *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Case*, 70 UCLA L. Rev. Discourse 230, 236 (2023).

47. *See id.* at 243–45 ("Across . . . six Ivy League schools, white students make up 71 percent of athletes.").

48. To be careful, the legacy and athlete preferences speak to the *different outcomes* conception of equality (often called "disparate impact"), whereas the use of personal ratings speak more to the *different treatment* conception of equality (often called "intentional discrimination" or "disparate treatment"). In my experience, ordinary Asian American parents without legal or jurisprudential training do not sharply distinguish between the two when it comes to their child's chances of admission.

49. 143 S. Ct. at 2169.

Americans are displaced by both (1) preferences given to Whites (what I call "negative action against Asian Americans") *and* (2) affirmative action in favor of underrepresented minorities (that do not include Asian Americans), then one could argue that getting rid of the latter still benefits Asian Americans' admissions probability.

I can't reject this mathematical logic. Assuming a fixed number of admission slots, the ending of affirmative action given to underrepresented minorities does confer a modest benefit in admissions chances to all those previously not included in affirmative action programs, including Asian Americans. But remember that Whites receive the exact same probabilistic benefit. And legacy status, athlete status, and implicit biases will continue to favor Whites over Asian Americans. Moreover, at our elite institutions, there are far more White students than underrepresented minorities, which means that Asians are much more likely to be disadvantaged by the preference granted to Whites (over Asians) as compared to any preference granted to underrepresented minorities.

In the end, Asian Americans should ask ourselves whether this small benefit is worth the cost of decreasing the number of Black, Latinx, Native American, and underrepresented Asian and Pacific Islander students at elite colleges and universities. In my view, the answer is no, but that question merits a careful conversation about the policies and principles underlying a racially just society. This essay does not undertake that project. Still, to set the table for that discussion, I contribute two final points for consideration.

First, there is an ethical difference between "negative action" (treating Asians *worse* than Whites) versus "neutral action" (treating Asians the *same* as Whites) even though both groups are not included in affirmative action programs that benefit underrepresented minorities. There is absolutely no justification for the former. But in my view, there is often a strong case for the latter.

Second, there is value to analytic consistency. Remember how we struggled with detecting subtle discrimination against Asian Americans. That's because explicit bias is hidden, implicit bias is invisible, and the past continues to structure opportunity going forward (e.g., via the benefits of legacy status). The best way to detect subtle discrimination is to leverage our best social science, including statistics and implicit social cognition.

But here's the rub. Those same social scientific techniques that surfaced subtle discrimination against Asian Americans reveal generally more damaging explicit and implicit biases against other underrepresented minorities. They also show the importance of building a critical mass on campus, in order to resist a phenomenon called stereotype or identity threat. That phenomenon prevents students from performing and learning to the best of their abilities. In order to give every student—regardless of race—a fair shot at success, we need to establish a "critical mass" of them on a welcoming campus that emphasizes how hard work can generate educational success.[50] Meeting

50. The Supreme Court pointed out that neither Harvard nor UNC defended its

this objective will sometimes require us to take race into account. And in my view, a narrowly tailored admissions program, that allows us to consider race in this evidence-based way, should offend no reasonable ethical or legal conception of equality.

Conclusion

I close with two final observations. First, discrimination against Asian Americans is real. It has a long and ugly past, from the Chinese Exclusion Acts, to the Japanese American internment, to the uptick of hate crimes after the politicization of COVID-19. But the Supreme Court's recent decision will do little to decrease discrimination against Asian Americans in elite college admissions. To the extent that we as Asian Americans are individually treated worse than Whites or as a group have worse outcomes than Whites right now, those differences will likely persist.

Second, affirmative action is hard. It raises difficult ethical and policy questions. It requires Americans of good faith to transcend narrow self-interest, as we try to engineer a fair shot for all Americans. In doing this difficult work, we should not make things harder by equating affirmative action for underrepresented minorities as discrimination against Asian Americans. If that were the case, ending affirmative action would end discrimination against Asian Americans, and as I have shown, that is simply not the case.

program on "critical mass" terms. *See id.* at 2174. This suggests that the argument is potentially available for future litigation.