The Misuse of Asian Americans in the Affirmative Action Debate

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ABSTRACT

Opponents of affirmative action often claim that Asian Americans are injured by affirmative action. This argument is both inaccurate and strategic rather than motivated by real concern for Asian Americans. This Essay explains how Asian Americans in fact benefit from affirmative action. It also exposes the way that framing opposition to affirmative action as concern for Asian Americans serves the interests of mostly-white affirmative action opponents rather than the interests of Asian Americans.

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Opponents of affirmative action have recently taken a great interest in Asian Americans. In *Fisher v. University of Texas (Fisher I)*, for example, Justice Thomas wrote: “There can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race.” Conservative activist Edward Blum recently backed a lawsuit alleging discrimination against Asian Americans at Harvard. And many conservative scholars have expressed concern that Asian Americans are harmed by affirmative action.

At first such solicitude might seem odd. The conservatives who oppose affirmative action have not, generally speaking, taken an interest in other issues affecting the well-being of Asian Americans, including voting redistricting, racial profiling, employment equality, fair housing, poverty, and mental health services. Indeed, the standard conservative position on those issues is typically one of indifference or antipathy, which likely explains why 65 percent of Asian Americans identify as Democrats while only 23 percent identify as Republicans.

So why the groundswell of conservative concern for Asian Americans when it comes to affirmative action? The answer is that Asian Americans provide a convenient opportunity for affirmative action opponents to disguise their underlying motives. The true, unstated concern of such opponents is that affirmative action would disrupt the existing racial hierarchy—one that primarily benefits

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2. *Id.* at 2431 (Thomas, J., concurring).
5. For purposes of this piece, I mostly bracket the group of self-professed liberals who also oppose affirmative action, as the response of conservatives provides a more obvious example of the phenomenon I am discussing. See, e.g., David Leonhardt, *The Leading Liberal Against Affirmative Action*, N.Y. TIMES (Mar. 9, 2013, 6:06 PM), http://economics.blogs.nytimes.com/2013/03/09/the-leading-liberal-against-affirmative-action/?_r=0 [https://perma.cc/4LUX-PYQM].
white people\textsuperscript{7} by preserving the disproportionate share of social resources and opportunities available to them. Of course, opposition to affirmative action cannot be framed this way because to do so would make transparent a commitment to maintaining white supremacy. So Asian Americans allow for a reframing of such opposition. That is, opposition to affirmative action seems less racist if affirmative action programs can be characterized as harmful to both white and Asian American people, rather than something that is good for everyone but white people.

Speaking both as a law professor and as an Asian American person, I simply disagree that affirmative action injures Asian Americans. Asian Americans are not injured by affirmative action in the sense of being harmed or left worse off. Rather, affirmative action benefits Asian Americans in the same way as other groups, and in some ways benefits us more so.

First, research shows that diversity improves the educational experience at colleges and universities both within and outside the classroom for everyone, including Asian Americans, and the U.S. Supreme Court accepted diversity as a compelling state interest in \textit{Grutter v. Bollinger}.\textsuperscript{8} It is difficult to claim, without much more evidentiary support, that Asian Americans are automatically injured by a policy that has demonstrated educational benefits for everyone—at most, we might ask whether the costs of affirmative action to Asian Americans outweigh the demonstrated benefits.

Moreover, Asian American behavior reflects an understanding of and appreciation for such racial diversity. If we assume that people are rational decisionmakers who know their own preferences, the question is whether people would still choose to go to their top choice school if it had no racial diversity. Would I rather go to my top choice school with 5 percent diversity or my second choice school with 30 percent diversity? As Adriane Peralta has convincingly argued, the market demonstrates that, in the aggregate, people of color prefer diverse schools because diversity will improve their educational experience.\textsuperscript{9} Attending a diverse school will better prepare students for the real world. Considering a hypothetical extreme is instructive: If the choice is between a world in which a student gets into her top choice school but that school is all white, and a world in which she doesn’t get into her top choice school because of affirmative

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  \item \textsuperscript{7} And selected people of color, such as Clarence Thomas, whose views do not threaten to disrupt the status quo.
  \item \textsuperscript{8} 539 U.S. 306, 328 (2003).
  \item \textsuperscript{9} Adriane Kayoko Peralta, \textit{A Market Analysis of Race-Conscious University Admissions for Students of Color}, 93 \textit{DENVER L. REV.} 173, 190 (2015).
\end{itemize}
action but her second choice school is racially diverse, my sense is that most people would balk at attending an all-white school.

Of course, my hypothetical is deliberately exaggerated. Right now students don’t have to make this choice because of affirmative action. Still, the hypothetical demonstrates two things. First, our reaction to attending an all-white school tends to support the idea that almost all of us value diversity even if some of us don’t really like to admit it. And second, we don’t actually know whether Asian American students, in the aggregate, are injured by affirmative action policies because we don’t know what choices people would make without them. At best, then, claims that Asian American students are injured by affirmative action are an overgeneralization. At worst, they are a deliberate and cynical distortion of available information.

Perhaps more to the point, it is unclear to me why people who are not Asian Americans should get to decide whether Asian Americans are injured. That seems like a question that the community—and the individuals within that community—can decide for themselves. And in fact, polls show that, depending on how the question is asked, more than 75 percent of Asian Americans support affirmative action, and many Asian American affinity groups have also expressed support. Affirmative action is a disputed issue in the Asian American community, just as it is in other communities. This is, in itself, an important point: The Asian American community is quite heterogeneous, and people who mistakenly believe otherwise might have benefited from attending a more diverse college or institution where they could have gotten to know some Asian American people. But the very heterogeneity of the Asian American community is precisely the reason it is presumptuous for others to decide—for us—whether we are injured. Speaking for myself, both as a past student and as a current educator, I would consider it a much greater injury if affirmative action were discontinued.

In any event, even if we accept that the potential of an arguably slightly diminished chance of attending a particular school is an injury that outweighs the myriad benefits of diversity and other social benefits of affirmative action, the argument that affirmative action injures Asian Americans fails for other reasons. Historically, affirmative action programs were critical in making public higher education available to Asian Americans in the 1960s and 1970s, prior to

which Asian Americans had suffered exclusion and de jure segregation in public education like other people of color.\textsuperscript{12} In other words, Asian Americans are already the beneficiaries of affirmative action in education, both firsthand and as the children of people who benefited firsthand and who consequently had improved professional opportunities and greater economic security.

The argument that Asian Americans are injured by affirmative action also fails because many underrepresented Asian subgroups benefit directly from affirmative action.\textsuperscript{13} Cambodian, Vietnamese, Thai, Lao, Burmese, Filipino, Native Hawaiian, and Pacific Islander students, among others, are underrepresented at many or most colleges and universities.\textsuperscript{14} These groups overcome unique obstacles and unique forms of discrimination. Well-designed affirmative action programs can take account of intraracial diversity and can consider whether some subgroups might qualify for affirmative action even if others do not.\textsuperscript{15} In this way, affirmative action can benefit Asian American subgroups directly.

Finally, it is misleading to say that Asian Americans are injured by affirmative action because other non-white groups who benefit directly from affirmative action are allies of Asian Americans on a spectrum of important civil rights issues from voting to employment discrimination to fair housing. Historically, Asian Americans, Blacks, Latinas/os, Native Americans and other groups have been allies on important civil rights issues that profoundly affect us all.\textsuperscript{16} Racial minorities in America need one another’s support on a wide range of critical civil rights concerns.\textsuperscript{17} It is difficult to claim that affirmative action injures Asian Americans


\textsuperscript{14} See Filipinos Are Underrepresented at Most Selective UC Campuses, REAPPROPRIATE (Dec. 8, 2014), http://reappropriate.co/2014/12/filipino-are-underrepresented-at-most-competitive-of-uc-campuses-blockb/un-iamnotyourwedge [https://perma.cc/678Q-7MPF].

\textsuperscript{15} Of course, not every program is well-designed—some lump all Asian Americans together—but the fact that affirmative action programs are sometimes poorly executed is not a reason to declare such programs unconstitutional, let alone bad policy.


\textsuperscript{17} As just one example, consider recent racially charged incidents at UCLA directed at both Asian and Black students, exemplifying tensions present nationwide. See, e.g., Anonymous Racist Flyer Sent to UCLA Asian American Students, ANGRY ASIAN MAN (Feb. 7, 2014), http://blog.angryasianman.com/2014/02/anonymous-racist-flyer-sent-to-ucla.html [https://perma.cc/77T-S3B]; Julianne Hing, Racial Harassment Picks Up After Video About Being Black at UCLA Law School, COLORLINES (Feb. 27, 2014), http://colorlines.com/archives/2014/02/racial_harassment_picks_up_after_the_release_of_video_about_being_black_at_ucla_law_school.html.
if doing away with affirmative action comes at the cost of dismantling these alliances that on balance are beneficial to Asian Americans.

So, as I stated earlier, the reason that opponents of affirmative action are suddenly so worried about Asian Americans not getting into college is not that they are concerned about Asian American well-being. Affirmative action opponents wish to conscript Asian Americans into their opposition because doing so makes them look less racist. I have elsewhere articulated the process of “racial capitalism,” through which white people often derive value from non-white racial identity.18 “The misuse of Asian Americans in the affirmative action debate is a classic example.

So let us first dispense with the pretext that the true goal of affirmative action opponents is to protect the interests of Asian Americans. If affirmative action opponents really wanted to address the fact that Asian Americans with particular numerical indicators are statistically less likely to get into institutions of higher education, they could easily do so without changing affirmative action programs and causing the negative consequences I have described above.

The easiest way to increase the likelihood that Asian Americans would be admitted to college would be to admit fewer white people. As a starting point, we could stop giving admission preferences to legacies. Such preferences continue to permeate the admissions process at many schools. One study found that at elite schools legacy applicants have a 45 percent better chance of getting admitted than people who are not legacies.19 Another study revealed that the legacy admission rate at Harvard is 30 percent, which is five times the overall admission rate. A third study found that at some schools simply being a legacy is the equivalent of 160 points on the SAT, which gives the legacy a marginal benefit equivalent to the benefit associated with being a top athlete or an underrepresented minority.

18. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2175–82 (2013) (defining racial capitalism as the process by which white people and predominantly white institutions derive value from non-white racial identity, providing examples from social settings, education, employment, and politics).


20. *Id.*
And research has shown that legacy preferences are particularly disadvantageous to Asian applicants. 21

Notice that most opponents of affirmative action are not critical of legacy admits, who are of course predominantly white given the history of higher education in our country. It is telling that legacies are not targeted in the same way that affirmative action programs are targeted. No one is suing to discontinue legacy admissions, even though such programs also might be said to be race-conscious: The shameful history of racial exclusion in higher education in America means that many schools excluded non-white people until relatively recently, and thus white people have a much greater likelihood of legacy status. It is equally revealing that opponents of affirmative action do not appear to worry that legacies might be mismatched beyond their abilities if they gain admission to elite schools that are too difficult for them. 22

Harvard's admissions dean commented in 2003 that the SAT scores of legacy admits were "just two points below the school's overall average." 23 Although the comment was likely intended to defend the use of legacy preferences, it might be said to have done the opposite. Given that the average legacy has enjoyed a lifetime of advantage as the result of their parents' educational opportunities, we'd expect legacy applications to outperform nonlegacy applicants at least a little. Yet instead they've done slightly worse. Where is the concern that these applicants—seemingly immune to all the benefits conferred by wealth, social status, parental educational attainment, and social capital—are simply not well qualified to succeed at their institution of choice? Indeed, the concern might extend to mediocre white students more generally: Where is the concern that Abigail Fisher—given her mediocre test scores, grades, and other activities—would have struggled or even failed at the University of Texas?

Yet opponents of affirmative action rarely mention mediocre white students, or legacies, instead training their laser-like focus on the very small number of Black, Latina/o, and Native American applicants who benefit from race-conscious admissions each year. As much as these opponents would like to claim that opposition to affirmative action is all about racial neutrality, their choice to single out non-white people with lower numerical indicators is quite telling, and really not at all race-neutral.


23. See Mandery, supra note 19.
Implicit, then, in lawsuits featuring Asian plaintiffs is an unspoken assumption: If we think of university admissions as a pie, the slice that’s for white people has to stay the same size, and if Asians are going to get a bigger piece, it automatically means that other people of color are going to get a smaller piece. Yet nothing constitutionally, legally, logically, or ethically requires that if Asian Americans are to have a larger share, their portion must be taken from other non-white groups. The unspoken belief of affirmative action opponents is that white people should not have to give up any pie. They think people of color should have to fight each other for the leftovers.

Moreover, affirmative action opponents’ solicitude for injuries to Asian American applicants reflects an underlying desire to pit different non-white groups against one another. As Jenn Fang has observed, “conservatives are unabashed about their exploitation of the Asian American community in service of the anti-affirmative action agenda. . . . [C]onservatives are quick to use Asian Americans as the classic wedge minority to underscore the achievement gap between the Asian American ‘model minority’ and those whom Model Minority Myth architect William Petersen pejoratively labeled in 1966 as so-called ‘problem minorities.’”24 By pointing to the success of some Asian Americans in some areas—and by advocating for policies that ostensibly benefit those select Asian Americans—affirmative action opponents attempt to divide non-white communities in service of the opponents’ own goals.

Affirmative action opponents’ professed concern for harm to Asian Americans is therefore strategic rather than sincere. It allows them to improve the optics of opposition. If white people can say that Asian Americans also oppose affirmative action, it looks less as though white people are simply concerned with maintaining their place at the top of the racial hierarchy at the expense of non-white groups.25 It’s not unlike the way that, when white people are worried about appearing racist, they bring up how many black friends they have or point out that their black friends agree with them.26

So in the effort to dismantle affirmative action, Asian Americans are currently being used as a defense against accusations of racism. If affirmative action opponents can frame their concern about affirmative action as concern for Asian

25. See Leong, supra note 18, at 2207.
26. Id. at 2207–08.
Americans, then they’ve succeeded in distracting everyone from the reality that what they truly want is to preserve a racial status quo that benefits white people. It is a cynical move. My hope is that people will see straight through it. Many already do. And ultimately this kind of shallow racial understanding is one of the key reasons we need affirmative action in the first place.

27. \textit{See, e.g.,} #IamNotYourWedge, \textsc{Twitter}, https://twitter.com/hashtag/iamnotyourwedge [https://pema.cc/6SM9-66MT?type=image]. The #iamnotyourwedge hashtag is used by Asian American supporters of affirmative action to resist opponents’ efforts to use Asian Americans to divide people of color on the issue of affirmative action. \textit{Id.}