COMMENT

REQUISITE REALIGNMENT: AFFIRMATIVE ACTION, ASIAN AMERICANS, AND THE BLACK–WHITE BINARY

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When Asian immigrants first reached American shores in substantial numbers during the late 1800s, they were faced with a country that barely recognized Black citizens and a system that continually reinforced a Black–White binary. If Asian Americans wanted to attempt to obtain protections for themselves, they could not do so by asserting that those protections had to extend to Asian Americans—instead, they had to box themselves into the Black–White binary, often aligning with Whiteness to claim both citizenship and equality. While this White alignment in the late nineteenth and early twentieth centuries can be explained by legal realities that made it impossible for Asians to plausibly assert themselves as Black, such White alignments continue to occur in the contemporary era, most prominently displayed through affirmative action and the strides that some Asian American organizations have taken to topple the institution. By examining the amicus briefs filed by various Asian American organizations against affirmative action, we can trace a pattern of White alignment that dangerously serves to create greater divides between Asian Americans and other minorities in the States. More perilous, however, is that such White alignment only reinforces the White supremacist state, which thrives on the division of minorities to keep itself as the dominant power. This Comment seeks to explain the above phenomena and highlight the affirmative action briefs filed by amicus curiae in the Students for Fair Admissions v. President & Fellows of Harvard

† J.D., 2022 University of Pennsylvania Carey Law School; B.A., 2019, Cornell University. I am grateful to Professor Karen Tani, who has tirelessly provided guidance, mentorship, and support during the entire process of writing and editing; to all the editors of the University of Pennsylvania Law Review, especially Sabrina Minhas and Jacob Burnett for their fantastic contributions that have made this piece substantially better; to Shivank Singh and Yaseen Islam for helping edit; and to friends and family, who have listened to me “think out loud” about this piece for months now, with never-ending patience and love. Thank you all for your encouragement.
College litigation, as they serve as an example of how Asian Americans can create a space for themselves to claim equality while also creating bridges of solidarity between minorities. Not only does this raise up Blacks, Hispanics, Native Americans, and other racial minorities, but it also fully recognizes the diversity of experiences within the large tent of “Asian American.” Eliminating the White supremacist state is not to align with it—as some Asian American organizations have done—but instead to create solidarity movements that affirm the enormous power of the minority in the U.S.

I. INTRODUCTION

On January 6, 2021, a violent mob stormed the American Capitol building, intent on subverting the Congressional vote that would finalize the November 2020 election results. Believing that the election was stolen from

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1 See Laurel Wamsley, What We Know So Far: A Timeline of Security Response at the Capitol on Jan. 6, NPR (Jan. 25, 2021, 5:00AM), npr.org/2021/01/25/956824958/what-we-know-so-far-a-timeline-of-security-at-the-capitol-on-january-6 [https://perma.cc/8KJ8-D3CY] (“Convinced the election was stolen, thousands of Trump supporters storm the U.S. Capitol building on Jan. 6 as Congress counts and certifies the Electoral College vote.”). Various Congressional speeches and reports have also sought to detail the “intent” of those present for the January 6th insurrection. See, e.g., 167 CONG. REC. E1133-34 (daily ed. Oct. 22, 2021) (statement of Rep. Sheila Jackson Lee) (“We must understand that day in order to prevent the intended purpose of the January 6th insurrection—to disrupt the Joint Meeting of Congress to tally the votes of presidential electors and announce the results to the Nation and the world—from ever occurring again . . . .”); Confronting Violent White
former President Trump, mobs of mostly White, right-wing extremist groups gathered outside the Capitol and then ravaged its halls shortly after a Trump rally. The Confederate flag flew proudly over the crowd. Although the mob celebrated breaking into the building as a victory, many others saw it as a siege on American democracy. To some, it was the culmination of various agitations from a White supremacist majority who believed they had been wronged, demonstrated by symbols of White supremacy and anti-government extremism that lined the posters, banners, and clothing of those

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2 A study by University of Chicago Professor Robert A. Pape found that of the over 400 rioters already arrested or charged, 93% of them were White. See generally Amanpour and Company, Studies Show Capitol Rioters Were Majority White Men, WETA, https://weta.org/watch/shows/amapour-and-company/studies-show-capitol-rioters-were-majority-white-men-ryn3m2 [https://perma.cc/5DLPE-ETB4]. Even more interestingly, Professor Pape has found that over half of the rioters that broke into the Capitol building came from counties where there were large declines in non-Hispanic White populations. Id.

3 Pete Williams, Feds Charge Over 200 in Capitol Riot. We’ve Learned a Lot About Why It Happened, NBC NEWS (Feb. 8, 2021, 1:11 PM), https://www.nbcnews.com/politics/justice-department/feds-charge-over-200-capitol-riot-we-ve-learned-lot-n1256799 [https://perma.cc/qHVB-RVZG]; see also, Confronting Violent White Supremacy, supra note 1, at 2 (“[S]torm troopers of violent white supremacy act as the vanguard of a mass violent political insurrection against the Government of the United States that smashed our windows, invaded our Capitol, wounded and injured more than 140 Capitol Police officers and Metropolitan Police Department officers, and left several people dead. The protest that turned into a riot and an insurrection had been promoted and incited by then-President Donald Trump.”).

4 See 167 CONG. REC. E1133-34 (daily ed. Oct. 22, 2021) (statement of Rep. Sheila Jackson Lee); see also infra note 7; Confronting the Violent White Supremacy, supra note 1, at 6 (“[T]he battle flag of the Confederacy, the symbol of white supremacy, was brought into the halls by force for the first time in American history.”).


6 See Confronting Violent White Supremacy, supra note 1, at 6.
in the riot. But the Confederate flag—a symbol that harkens back to White supremacism and dangerous discrimination—was not the only flag that was flying proudly that day. To the surprise of some, South Asian American supporters of the insurrection waved the Indian flag alongside the Confederate one, blatantly stating their support of Trump and expressing their belief that rampant voter fraud in the 2020 election had led to antidemocratic results.

The coalition between White supremacist movements and some of those within minority groups, including South Asians, is certainly puzzling to those who know and understand the history of discrimination against Asian Americans in the States. As one article argues, the irony of South Asians wearing “Make America Great Again” hats is particularly comical because the America that South Asians want back is the same one that did not let many Asian Americans enter its ports. This clear alignment with Whiteness—with the White supremacist state—is not new, however. Not just South Asians but Asian Americans as a whole have often aligned themselves with Whiteness to fit into American society. This Comment will trace and explain this aspiration, while proposing that the key to Asian American equality is not striving towards a structure that has never and will never embrace them. Instead, it is solidarity movements between Asian Americans, Blacks, Hispanics, and other minorities.

As an introductory note, I acknowledge that the term “Asian American” is too broad to encompass the nuances of the different kinds of people that

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10 For examples of the history of discrimination against Asian Americans, see infra Part V.

11 See Cross, supra note 9. For a brief introduction to the policies that kept Asians from immigrating to the United States, see IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27-28 (10th ed. 2006).

12 Note that there is a difference between “aligning” with Whiteness, which is what I am focusing on, and “claiming” Whiteness, which other scholars have focused on in their works. See Kim D. Chanbonpin, Between Black and White: The Coloring of Asian Americans, 14 WASH. U. GLOB. STUD. L. REV. 637, 648 (2015) (arguing that Asian Americans “attempted to claim a stake in Whiteness” in their various arguments in front of the Supreme Court). My formulation of aligning with Whiteness means to align with White causes and beliefs, making oneself akin to the White supremacist majority. Claiming Whiteness, by contrast, entails actually claiming to be White.
supposedly fit underneath that tent. Indeed, the term “Asian American Pacific Islander” constitutes East Asian, Southeast Asian, South Asian, West Asian, Micronesian, and Polynesian, which can then be further broken down by nationality, such as Asian Indian, Bangladeshi, Burmese, Chinese, Filipino, Guamanian, Indonesian, Iwo Jima, Japanese, Korean, Lao, Malaysian, Maldivian, Marshallese, Native Hawaiian, Nepalese, Okinawan, Pakistani, Palauan, Singaporean, Samoan, Tahitian, Taiwanese, Thai, Tibetan, and Vietnamese. By using one broad term, I do not mean to erase the unique characteristics and cultures of these different groups or to expunge the moves made by them throughout the period discussed in this Comment. However, because most available data involves “Asian Americans” as a catch-all category, I will use the term throughout the argument, knowing that dialogue may become complicated if I choose to break down the term into its disaggregated parts.

Part II of this piece begins by explaining the formation of the Black–White binary and Asian Americans’ place within it. While Asians had entered the American stage in substantial numbers by the late nineteenth and early twentieth centuries, the laws surrounding criminal protections and naturalization did not extend to them. Despite attempts by Asian American litigants to force a unique space for themselves, the Black–White binary remained firmly intact, most saliently within citizenship cases in front of the federal courts. When Asian Americans found themselves without a place in the law, they sought to box themselves into the “White” category, aligning themselves with Whiteness so that they could achieve the protections guaranteed towards this class of citizens.

Part III further discusses this “aspiration” for Whiteness, acknowledging that Asian Americans in the nineteenth century did not have much room to argue that they were instead Black. However, their lawyers made purposeful strides to distance Asian Americans from other minorities. Asian American

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16 See infra notes 22–28 and accompanying text.
17 The move to capitalize both “White” and “Black” throughout this piece is a deliberate one. As Ian Haney López noted in his work WHITE BY LAW, “White” is capitalized “to indicate its reference to a specific social group” which also inherently acknowledges that the group is fluid and heterogeneous. Ian Haney López, supra note 11, at xxi. I capitalize “Black” in this work for the same reason, but also to acknowledge the power that these groups hold, despite their changing definitions and borders.
18 See infra notes 49–54 and accompanying text.
litigants cleaved a space for themselves within Whiteness by explicitly distancing themselves from other non-White peoples, a phenomenon that can be seen most prominently through separate-but-equal and the naturalization cases from the nineteenth century that I first discuss in Part II. Part IV illuminates how this aspiration for Whiteness at the expense of other minorities has carried over into the twenty-first century, using the amicus curiae briefs filed by Asian American organizations in cases like Fisher v. University of Texas and Students for Fair Admissions v. President & Fellows of Harvard College as primary sources. Part V will explain why such alignment is dangerous: Asian Americans have never been and can never be considered White, except when the alignment would support White supremacist goals. When Asian Americans align with Whiteness in the hopes of achieving their own equality, they do so by spurning solidarity movements with other minorities that would both subvert the White supremacist state and lead to more powerful advocacy for all minority groups. Part VI points to an example of this in an amicus curiae brief in Students for Fair Admissions v. President & Fellows of Harvard College, encouraging litigants to use such lawyering as an example of how solidarity movements can better achieve equality and equity not just for Asian Americans, but also for other minorities like Blacks and Hispanics.

II. WHICH ONE DOESN’T BELONG?: ASIAN AMERICANS AND THE BLACK–WHITE BINARY

In the founding era, only “free white persons” were guaranteed the formal privileges of citizenship. If the laws discussed Black people, it was almost exclusively in the context of slavery. During Reconstruction, the

19 While minorities together constitute a large part of the United States population, Asian Americans themselves only make up a small percentage. Cf. Maggie Blackhawk, Federal Indian Law as Paradigm within Public Law, 132 HARV. L. REV. 1789, 1797 n.32 (noting that while the term “minorities” is a short-hand term for marginalized and subordinated groups, as a whole, “minorities” are not a numerical minority at all).

20 See, e.g., An Act to Establish an Uniform Rule of Naturalization, ch. 3, sec. 1, 1 Stat. 103, 103 (1790) (repealed 1795) (stating that only a “free white person” could become a naturalized citizen); The Founders and the Vote, LIBR. OF CONG., https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote [https://perma.cc/QDZ3-ZA3S] (explaining that during the Founding Era, most states restricted voting to free white men who owned property).

21 State constitutions reflect this point very well. See, e.g., GA, CONST. art. IV, §§11–12 (1798) (discussing the rights of free White people, but making no mention of Black citizens, except to prohibit the future importation of slaves from “Africa, or any foreign place,” emancipation without the consent of an “owner,” and any “malicious dismember[ing]” of slaves, unless they had participated in “insurrection”); DEL. CONST. art. 26 (1776) (making no mention of people of color, except to hold that “[n]o person hereafter imported into this State from Africa ought to be held in slavery under any presence whatsoever”). For a full list of which states discussed slavery in their constitutions during the founding era, and for a provocative argument that “[i]n slave states, the
government began extending protections to Black men, as exemplified by the Naturalization Act of 1870, but state and federal systems simultaneously passed and interpreted laws that sought to exclude Black Americans from judicial proceedings, accommodations, schools, and more. Within these statutes and amendments, there was very little, if any, mention of Asian Americans, even though Asians had first begun to immigrate to the United States in substantial numbers from the late 1800s to the mid-1900s. In fact, as Dr. John Hayakawa Torok argues, the Reconstruction Congress made deliberate choices to use language like “citizens” and “inhabitants” in Reconstruction statutes and amendments to prevent Chinese immigrants from claiming the protections of citizenship bestowed on Black Americans. State legislatures also did not explicitly provide protections to Asian Americans for decades. Because the laws were so ambiguous, Asian immigrants initially attempted to carve out a place for themselves within the judicial sphere to either set themselves apart from discriminatory legislation or to claim protection under laws that benefited them. That endeavor ultimately failed, resulting in Asian Americans being forced to “box” themselves into either Whiteness or Blackness to obtain any sort of identity under the law.

The criminal sphere is a particularly stark example of the existence of the Black–White binary and the way Asians were forced to fit themselves into it. In 1850, California passed a law restricting any “Black,” “Mulatto,” or “Indian” from serving as a witness against a White man. Presumably, such laws

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23 See The Civil Rights Cases, 109 U.S. 3, 25 (1883) (declaring parts of the 1875 Civil Rights Act, which prohibited racial discrimination in inns, public conveyances, and places of public amusement, unconstitutional).


25 See John Hayakawa Torok, Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws, 3 ASIAN L.J. 55, 56, 67-69, 77-92 (1996) (discussing the Congressional debates surrounding the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the 1870 Enforcement Act and the 1870 Naturalization Bill). Torok does acknowledge that some parts of the Reconstruction amendments and statutes provided protections to Asian immigrants, but that the lack of citizenship forced mostly Chinese immigrants to turn to the courts, which did not often extend protections to them either. Id. at 68, 71.

26 California actually passed a slew of laws during this time that explicitly diminished the protection of Asian immigrants See, e.g., infra note 57; see also Act of April 18, 1860, ch. 329, 1860 Cal. 321, invalidated by Sing v. Washburn, 26 Cal. 534 (1862).

27 People v. Hall, 4 Cal. 399, 399 (1854).
existed to protect the White man, reflecting the belief that a White citizen should not be punished for harms he perpetuates against minorities. It could also reflect the belief that minorities could not be trusted, especially against the word of White persons. Unfortunately, California’s statute was just one of many that exemplified how unequal the system was between those in power and those not and how protections differed greatly depending on the color of one’s skin.28

The prevalence of these statues does not mean, however, that such legislation was not challenged by litigation. Four years after the California legislature passed the statute, the state supreme court decided People v. Hall.29 There, it was forced to confront whether a Chinese man who was attempting to testify against a White man would be barred from doing so under the 1850 statute.30 Because the law did not encompass Asians, the most obvious answer for the California court was to hold that the statute did not apply as a restriction against Asian witnesses. Instead, the California court decided that the Chinese witness could fit under the definition of “Indian” because “this continent was first peopled by Asiatics, who crossed Behring’s Strait . . . .”31 Given this reasoning, it held the man’s testimony inadmissible under the California statute.32 As Robert Chang, a professor of Asian American studies at Seattle University argued, the court “shoehorned the Chinese into the existing subordinate racial categories.”33

Although People v. Hall is a criminal case in California in which Asian Americans were forced into the Black–White binary, we can also find the same dichotomy in civil cases brought to the Supreme Court. In 1922, George Wickersham, a former U.S Attorney General, brought Takao Ozawa’s plea for naturalization to the Supreme Court’s doorstep.34 Ozawa was born in Japan,
but had moved to the United States as a young man, where he attended the University of California, Berkeley and eventually settled down in Hawaii.\(^{35}\) He applied for naturalization in 1914, highlighting how deeply he thought of himself as an American and how thoroughly he had cut ties with his Japanese origins.\(^{36}\) His suit became the first Asian naturalization case before the Supreme Court. Although Ozawa might have originally relied on his own patriotic ideals to claim citizenship, his lawyers eventually pointed to the Naturalization Act of 1906 as the primary statutory base for his claim.\(^{37}\) The original Naturalization Act, passed in 1790, had restricted naturalized citizenship to free White persons.\(^{38}\) In 1870, in the aftermath of the Civil War and in the depths of Reconstruction, Congress amended the 1790 statute to extend naturalization to “aliens of African nativity and to persons of African descent.”\(^{39}\) And the Naturalization Act of 1906 ostensibly further extended that original 1790 statute, deleting any mention of race within the body and outlining more detailed proceedings and processes before someone could file for citizenship.\(^{40}\)

Most scholarship focuses on Ozawa’s argument regarding skin color,\(^{41}\) but he was also pragmatic enough to include other claims supporting his assertions, one of which I call a “race-neutral” argument. Ozawa alleged that because the 1906 Naturalization Statute provided for uniform rules and read “[t]hat an alien may be admitted to become a citizen of the United States in the following manner and not otherwise,” the Act implicitly modified the 1870 Naturalization Statute, making it so that all immigrants—not just those descended from Africans or aliens of African nativity—could become citizens.\(^{42}\) In doing so, Ozawa attempted to carve out a place for at least Japanese Americans within the citizenship construct without attempting to align himself with either White or Black citizens. He acted outside the Black–White binary that the American political system had created and perpetuated. But the Supreme Court rejected Ozawa’s argument, holding that the Act of 1906 was merely about procedure and did not substantively limit the 1870.

\(^{35}\) Id. at 56.
\(^{36}\) Id. at 56–57.
\(^{37}\) Ozawa v. United States, 260 U.S. 178, 179 (1922) (identifying the Naturalization Act of 1906 as the basis for the case).
\(^{38}\) An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).
\(^{39}\) Act of July 13, 1870, ch. 254, 16 Stat. 254, 256 (1870).
\(^{40}\) See generally Act of June 29, 1906, ch. 3592, 34 Stat. 596 (1906).
\(^{41}\) Most scholars focus on Ozawa’s claim that he, and other Japanese peoples like him, should be considered “white” because of his fair skin. See, e.g., LÓPEZ, supra note 11, at 57.
\(^{42}\) Ozawa, 260 U.S. at 192.
In this way, the Supreme Court forced future litigants to conform to and contend with the Black–White binary. It ultimately foreclosed future Asian Americans from attempting to carve out their own space in the citizenship context—something we see happen in subsequent cases.

One such case is United States v. Thind, wherein the plaintiff did not even bother to make a race-neutral argument. In Thind, the plaintiff, a South Asian man who had lived in the United States for ten years, attempted to argue that he should be considered a “white person . . . entitled to naturalization” because he was descended from the Aryan race. The Supreme Court rejected his claim, stating that even though the “blond Scandinavian and the brown Hindu” might have “a common ancestor in the dim reaches of antiquity,” that did not mean that a Hindu—using “Hindu” to refer to all South Asian men—was White within the meaning of the statute. Equally noteworthy was the Court’s statement that even if descent from an “Aryan” line was an acceptable rationale for naturalization purposes, there was a high chance that the blood in Thind’s “Aryan invader” line “intermix[ed]” with the “darkskinned Dravidian,” nullifying any claims to citizenship. Here, again, the Supreme Court implicitly acknowledged that in the United States there were two races that were important: Black and White. Those who fell in between—those who were of an “intermixed” blood, as suggested by the Supreme Court’s language in Thind—did not fit into these two races, and thus could not be given protections that only explicitly extended to Blacks and Whites. The Black and White binary is enforced, albeit in a subtler way, with Asian Americans left out.

Ultimately, if Asian Americans wanted the benefits of citizenship and personhood in the United States, they had to make arguments that conformed to the existing legal structures and identify themselves as White or Black, erasing the Asian American identity in both civil and criminal contexts. But Asian Americans could not successfully identify as Black during the pre-Civil Rights era. The naturalization statues that expanded citizenship to Black men were explicitly meant to extend the right to those descended from “Africans,” most obviously newly freed slaves. There was not much scope in arguing that Asians

43 Id. at 194 (holding that the Court could not substantially alter the statute when there was no clear Congressional intent to do so).
44 261 U.S. 204 (1923).
45 Id. at 210.
46 Id. at 209.
47 Id. at 212-13.
48 In fact, Congress had expressly rejected Senator Charles Sumner’s attempts to expand citizenship to all races. See Earl M. Maltz, The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment, 17 HARV. J.L. & PUB. POLY 223, 237, 239 (1994) (“[T]he proposal for race-blind naturalization was defeated by a vote of 30–14.”).
fit under this definition, and we can see examples of how readily even the state systems accepted that Asian immigrants were not Black. Litigants in the pre-Civil Rights era thus had more range of argument when aligning with Whiteness, and it was the most successful claim that Asian American plaintiffs could make when they were forced into the binary.

Moreover, I would be remiss not to recognize that some Asian American immigrants might have sought to align themselves with Whiteness because they understood “the social stigma and harsh discrimination” imposed on Black citizens. Scholars of history and law today understand race as a social construct, which means that racial constructions can be veiled in social institutions like citizenship. In this circular reasoning, what rights a person obtained was informed by their race, and their race also informed the rights a person obtained. Race and social institutions were thus intimately entwined. For example, in the early twentieth century, to be White and suited for citizenship meant being morally mature, self-assured, personally independent, and politically sophisticated; in contrast, to be anything but White “implied a certain degeneracy of intellect, morals, self-restraint, and political values.” In this era, when explicit racism, Jim Crow, and separate-but-clearly-not-equal were rampant, Asian Americans understood the value of being White and casted themselves as such to garner more protections. If they wanted equality in the land of the supposedly free, Asian Americans did not have a viable legal or social choice when deciding to align with Whiteness in the early twentieth century.

Although Asian Americans might not have had much breadth in who they could align with, they did have range in how to make their arguments.

49 LÓPEZ, supra note 11, at 37 (arguing that Asian Americans did not attempt to litigate “Blackness” in the same way they sought to litigate “Whiteness” because the Naturalization Statutes specifically extended the right of citizenship to people of “African nativity, or African descent”).

50 See United States v. Ali, 7 F.2d 728, 731 (E.D. Mich. 1925) (accepting readily that Ali was not of “African nativity or descent”). In re Po, 28 N.Y.S. 383, 385 (City Ct. 1894) (holding that the petitioner, a Burmese immigrant to the United States, did not fall within the naturalization statute, as he was “certainly neither” “white” nor a person of “African nativity” nor “African descent”); In re Kanaka Nian, 21 P. 993, 994 (Utah 1889) (“We are of the opinion that the law authorizes the naturalization of aliens of Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded.”). Note that Hawaii was not admitted as a state until 1959.

51 See LÓPEZ, supra note 11, at 37 (explaining how the Naturalization Statutes refer to “white persons” instead of specifying where White people came from, while contrastingly, Black people are referred to specifically by descent i.e. “African nativity, or African descent”).

52 Id..

53 See, e.g., Chang, supra note 34, at 950 (“It has become standard in legal and sociological literature to refer to race as a social construct . . . .”); LÓPEZ, supra note 11, at xxii, 78 (acknowledging both that race is “highly contingent, specific to times, places, and situations,” and that “legal institutions and practices” have constructed race).

54 LÓPEZ, supra note 11, at 11-12.

55 Id. at 37.
Unfortunately, in numerous instances, we see Asian American plaintiffs and their lawyers aligning with Whiteness in this era by explicitly distancing themselves from other minorities. I turn to this next.

III. ASIAN AMERICANS AND “ASPIRATIONS” FOR WHITENESS WITHIN THE BLACK–WHITE BINARY

As noted above, Asian Americans were faced with a false choice when it came to existing within the Black–White binary. Legislative histories and court decisions made it clear that Asian Americans could not be deemed Black, and social realities of stigma and discrimination ensured that Asian Americans would not have aligned with Blackness even if doing so legally had been an option. In this Part, however, I highlight that while the choice may have been forced, Asian Americans made their arguments about Whiteness in a way that often left behind other minorities who also did not fit neatly into the Black–White binary. Such analysis calls for a closer look at some of the early educational segregation cases, as well as a return to the naturalization cases touched upon in the previous section.

The arguments made in separate-but-equal cases, particularly Gong Lum v. Rice, exemplify how lawyering in this period sought to divorce Asian Americans from other minorities in the country. In 1927, after the California legislature had passed acts segregating “Mongolian” children from White students, Martha Lum, an elementary school girl of Chinese descent, petitioned the Court to admit her to a White school. Because there were no Chinese schools in her area, Lum argued that she should be allowed to attend a White institution “in preference to the colored public schools.” Professor Sora Y. Han of U.C. Irvine argues that Lum’s argument illustrated how Asian Americans and their lawyers were not battling the White supremacist structure that had implemented the separate-but-equal narrative, but instead

56 275 U.S. 78 (1927).
57 Act of Apr. 28, 1860, ch. 329, 1860 Cal. Stat. 321, 325 (“Negroes, Mongolians and Indians shall not be admitted into the public schools; and whenever satisfactory evidence is furnished to the Superintendent of Public Instruction to show that said prohibited parties are attending such schools, he may withhold from the district in which such schools are situated all share of the State School Fund . . . . Trustees of any district may establish a separate school for the education of Negroes, Mongolians, and Indians, and use the public school funds for the support of the same.”). The California statute is also an example of the way that the Black–White binary was not so rigid. Clearly, there were instances where legislatures accepted that there were other races, but when it came to extending protections for those other races, the legislatures fell short. For the most part, however, Asian Americans were not encompassed or explicitly called out in the law.
59 Id.
were asserting that they were White. And indeed, when Lum advocated for acceptance to the White school, she was aligning with, and aspiring for, Whiteness, instead of fighting the entire separate-but-equal system. Of course, some of Martha Lum’s argument may have stemmed from an understanding that schools were not separate and equal, and that being classified as a person of color carried weighty stigmas. Regardless, the lack of any argument to break down the separate-but-equal system indicates that while some Asian Americans and their lawyers were ready to step up into Whiteness, they were not equally ready to pull others up with them.

Arguments that aligned Asian Americans with Whiteness were not relegated to the education sphere, however, and were arguably more prominent within the citizenship and naturalization context. As discussed in Part II, while the Naturalization Act of 1870 extended citizenship to those of African ancestry, it did not reach as far as Asian Americans. An attorney would be laughed out of court if they argued that their Asian client could fit under the definition of Black. Asian American aspirations for Whiteness, then, cannot be faulted in this era when the choice between Black and White often presented a false dichotomy. However, while this aspiration for Whiteness was clearly a forced choice in many ways, it was still the case—just as it was in Gong Lum—that some plaintiffs made their arguments by explicitly distinguishing themselves from other minorities, a maneuver they did not have to undertake when aligning with Whiteness.

The case of Takao Ozawa is a particularly good example of this, and thus, I return to it briefly to highlight how arguments other than the “race-neutral” one espoused in Part II sought to align Japanese Americans with Whiteness. When bringing Ozawa’s citizenship claim to court, his lawyer did what all good lawyers do: he made multiple arguments. One of those arguments was the race-neutral one I discussed above, but the second was more racially charged. Wickersham, Ozawa’s lawyer, argued that because of Ozawa’s skin color, he should be considered White. Here, we see the explicit alignment with Whiteness to obtain citizenship, a course we can understand given that

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60 Sora Y. Han, The Politics of Race in Asian American Jurisprudence, 11 UCLA ASIAN PAC. AM. L.J. 1, 8 (2006) (“[T]he Gong Lum plaintiffs chose not to challenge the racial category of whiteness or the legal framework of separate-but-equal but rather chose to argue within the framework by protesting their own categorization as colored.” (internal quotation marks omitted) (quoting Gong Lum, 275 U.S. at 81)).

61 See supra notes 52–55 and accompanying text.

62 See supra Part II; Act of July 13, 1870, ch. 254, sec. 7, 16 Stat. 254, 256 (1870).

63 See, e.g., Gong Lum, 275 U.S. at 82; Ozawa v. United States, 260 U.S. 178, 185 (1922).

64 Ozawa, 260 U.S. at 197 ("Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations . . . ").
Ozawa was clearly not a descendent of African slavery and thus could not seek rights under the secondary part of the statute.\(^{65}\)

Ozawa, however, also appealed to the Court to view the naturalization statute from the eyes of the founders when they wrote it in 1790, a maneuver that sought to place Asians in a position above other minorities.\(^{66}\) In 1790, the statute allowed naturalization to extend to “free” White men only. Ozawa argued that this phrase was employed “for the sole purpose of excluding the black or African race and the Indians then inhabiting”—because he was neither Black nor Indian, Ozawa asserted that the founders could not have intended to exclude Asian Americans from the naturalization fold.\(^{67}\) Just like the plaintiff in Gong Lum, Ozawa was explicitly distancing himself from other minorities in the United States and implicitly arguing that while Blacks and indigenous peoples were not worthy of American citizenship in the founding era, Asians were. The Court summarily rejected Ozawa’s arguments.\(^{68}\)

Similar alignments are seen in United States v. Thind. As discussed, Thind was of South Asian origin, but made the argument that he should be considered White because of his Aryan lineage.\(^{69}\) In making an ancestry argument, Thind relied on racist rhetoric, dividing himself and other South Asians who shared his lineage from other minorities. By arguing that his line was “pure” and thus White, Thind implied that “pure” South Asians were of a different kind than Black men who could not claim to have an equal “purity.”\(^{70}\) More insidiously, Thind also removed himself from other South Asians who did not have the same ancestors as he did, again implicitly claiming that some South Asians could be citizens, but others, who lacked this racial purity, could not. Again, we see plaintiffs who are willing to step up into Whiteness, even if it means making arguments that leave behind other minorities who are similarly situated.

We are not only limited to the Supreme Court when considering Asian Americans and their forced aspiration for Whiteness. Similar stories can be

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\(^{66}\) Ozawa, 260 U.S. at 192 (“But it is insisted by appellant that [the naturalization statute] . . . should be confined to the classes provided for in the unrepealed sections of that title, leaving the Act of 1906 to govern in respect of all other aliens . . . .”).

\(^{67}\) Id. at 195.

\(^{68}\) Id.

\(^{69}\) See United States v. Thind, 261 U.S. 204, 210 (“The eligibility of this applicant for citizenship is based on the sole fact that he is . . . classified by certain scientific authorities as of the Caucasian or Aryan race.”).

\(^{70}\) Id. at 212-13 (“In the Punjab and Rajputana . . . [despite] the effort to preserve their racial purity, intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the ‘Aryan’ blood.”).
found within district courts. In 1925 in the Eastern District of Michigan, two years after the decision in *Thind* and three years after the decision in *Ozawa*, John Mohammad Ali attempted to argue that he could be naturalized because he was an “Arabian of full Arabian blood,” and thus was a “Caspian Mediterranean,” which at the time was considered Caucasian. Ali had previously asserted he was a high caste Hindu but had shed that identity after seeing the outcome in the *Thind* decision. To differentiate himself after *Thind*, Ali argued that he was Arabian and that his ancestors—despite moving to Punjab, India where Ali had been born—had been careful not to “intermarry with the native stock of India.” Thus, like Thind and Ozawa before him, Ali attempted to align with Whiteness by dissociating himself from other minorities, including a minority identity he had previously adopted.

The American legislature created a Black–White binary that courts then upheld and reinforced. As a result, Asian Americans were obligated to align with Whiteness if they wanted to obtain naturalization rights. But in doing so, Asian Americans sometimes made their arguments at the expense of other minorities, inciting division between minority groups. In the modern era, and particularly in affirmative action cases, we see the same pattern of aligning with Whiteness at the expense of other minorities. However, it is perhaps more damning because Asian Americans are no longer faced with this false dichotomy. They now have a choice to freely align themselves with other minorities; yet, they still choose not to do so, inciting further unnecessary division.

IV. A MOVE INTO THE PRESENT: AFFIRMATIVE ACTION, ASIAN AMERICANS, AND ASPIRING FOR WHITENESS

The separate-but-equal and citizenship cases exemplified that if Asian Americans wanted equality, they had to litigate within a Black–White binary. Calling it a binary might even be an exaggeration because Asian Americans could not credibly argue that they were Black and were instead forced to litigate in innumerable ways that they were White. Over time, these barriers changed in some ways and were reinforced in others. The Immigration and

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71 While I only discuss *United States v. Ali* at length in the foregoing paragraph, I also want to highlight *In re Dow*, 213 F. 355, 357 (E.D. S.C. 1914), rev’d, *Dow v. United States*, 226 F. 145, 148 (4th Cir. 1915), which detailed the argument of a Syrian American who admitted that he was of “Asiatic nativity,” but claimed that he was still White because he was Caucasian.


73 See *id.* at 731-32 (admitting Ali’s citizenship but arguing, post-*Thind*, that his ancestry and Hindu status were controlling).

74 *Id.* at 732 (arguing that his “pure” Arabian blood line, maintained by intermarriage within the family, warranted classification as Caucasian).

75 Indeed, Ozawa rested his argument on skin color, Thind on lineage, and Ali on family history.
Nationality Act of 1952, amended multiple times over the years, now guarantees that anyone can be naturalized as long as they meet the criteria, none of which rest on anyone’s race.\textsuperscript{76} And the Immigration and Nationality Act of 1965 opened American harbors to more Asian American immigrants for the first time since the 1924 Immigration Act originally restricted most Asian immigration.\textsuperscript{77} Both these changes to immigration laws suggest that the barriers Asian Americans battled to take down in the nineteenth and twentieth centuries have been mostly eradicated. It further indicates that Asian Americans have carved a place for themselves among the various minority groups throughout the country. And yet, when Asian Americans feel threatened, they often still align themselves with Whiteness to argue for their own equality. I discuss this phenomenon through the affirmative action cases, in which Asian American organizations have both advocated for and against affirmative action.

There is little doubt that many Asian Americans genuinely feel that affirmative action is a threat to their success.\textsuperscript{78} There has been great scholarship by a plethora of authors regarding both why affirmative action is good for Asian American applicants\textsuperscript{79} and why it is bad and should be

\textsuperscript{76} For the revision of the laws relating to immigration, naturalization, and nationality, and for other purposes, see Immigration and Nationality Act, ch. 477, 66 Stat. 163, 239 (1952) ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.").

\textsuperscript{77} See generally An Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). For a history of Asian American immigration in this country, along with the often restrictive legislation that accompanied it, see LÓPEZ, supra note 11, at 27-28 where López describes the progression of immigration laws from the Chinese exclusion laws of the 1880s to the dismantling of exclusionary laws of the 1960s.


\textsuperscript{79} See, e.g., Christopher Atlee F. Arcitio, Unraveling the Inequitable Nature of the Model Minority: Asian-Americans Deserve Affirmative Action, 5 TENN. J. RACE, GENDER, & SOC. JUST. 113, 116 (2016) ("As a minority group, struggling Asian-Americans may deserve a policy such as affirmative action. Affirmative action would provide Asian-Americans with an opportunity to compete equally with those who have had ‘doors that have been historically closed to’ them.” (quoting Harvey Gee, Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate, 32 GONZ. L. REV. 621, 636 (1997))); cf. Frank H. Wu, Asian Americans and Affirmative Action—Again, 26 ASIAN AM. L.J. 46, 51 (2019) (highlighting that the affirmative action litigation against Harvard simply uses Asian Americans as a “means to an end,” and is not to the benefit of Asian Americans seeking to end anti-Asian bias).
eliminated. I am not passing judgment on either view. But I would like to interrogate the arguments that Asian American organizations have made for and against affirmative action and explore how, despite not being forced to align with Whiteness, Asian Americans continue to do so. Indeed, affirmative action cases are the clearest instances in the contemporary era of Asian Americans seeking to distance themselves from other minorities, while simultaneously aligning themselves with Whiteness.

A. Asian American Alignment with Whiteness in the Fisher v. University of Texas at Austin Saga

A Comment on affirmative action would be incomplete without a discussion of Fisher v. University of Texas at Austin, both I and II, which were pivotal cases regarding affirmative action in the twenty-first century. In the late 1990s, the Texas Legislature adopted the Top Ten Percent law, which guaranteed college admission to those who graduated in the top ten percent of their class at any Texas high school. To select the remainder of their incoming class, the University adopted a holistic measure of evaluation to determine who would be accepted. This holistic evaluation included race as a plus factor, which meant that while race could be considered in evaluating admissions, it could not form the entire basis for acceptance or rejection. The White plaintiff, Abigail Fisher, was not in her school's top ten percent, and thus did not qualify for the Top Ten Percent Program. Fisher's main contention, however, was that the affirmative action policies that the


81 Abigail Fisher’s case came up before the Supreme Court twice (thus Fisher I and Fisher II). The Supreme Court originally remanded the case because the appellate court did not correctly assess whether the University had offered sufficient evidence of narrow tailoring. See Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 303 (2013) [hereinafter Fisher I] (“Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court’s grant of summary judgment to the University was incorrect.”). It then granted certiorari to the same case a few years later. Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198, 2207 (2016) [hereinafter Fisher II].

82 Fisher II, 136 S. Ct. at 2205.

83 See id. (“After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant’s . . . scores . . . without considering race.”).

84 See id. at 2206 (“To change its system, the University submitted a proposal . . . to begin taking race into consideration . . . ”); see also Grutter v. Bollinger, 539 U.S. 306, 369 (2003) (noting that a plus factor must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualification of each applicant, and to place them on the same footing for consideration, although not necessarily accord them the same weight”).

85 Fisher II, 136 S. Ct. at 2207.
University of Texas implemented disadvantaged her and other White applicants similarly situated. Embarking on a crusade to take down affirmative action policies nationwide, Fisher sparked debate regarding the value of race-based selection. She was ultimately unsuccessful in her suit, but the arguments made in her favor by various Asian American organizations provide key insight into their White alignment in the contemporary era.

Asian American aspiration for Whiteness can be seen particularly in the briefs filed against affirmative action by the Asian American Legal Foundation (AALF) and the Asian American Coalition for Education (AACE). Both organizations are concerned with education rights, and, as such, both groups have been heavily involved in the affirmative action cases facing courts around the country. Based in San Francisco, California, AALF was founded in the late 1990s with a mission to “protect and promote the civil rights of Asian Americans.” AACE has a similar mission of “promoting equal rights for Asian-Americans in education and education related activities.” The brief—co-written by both AACE and AALF—claimed to represent affiliated Asian organizations. The sheer number of parties that lent their weight to the arguments illuminates how pervasive the thoughts of the brief may be among Asian American citizens. Most interesting, however, is that amici make the same kinds of arguments that the plaintiffs in Gong Lum and Ozawa tried: to first set apart their Asian American identity from Whiteness and then align with the same Whiteness from which they intended to originally distance themselves.

86 See id. at 2208 (“Petitioner then filed suit alleging that the University’s consideration of race . . . disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause.”).
87 Id. at 2215.
90 AALF and AACE Brief for Fisher II, supra note 89, at 2; see also ASIAN AM. COAL. FOR EDUC., https://asianamericanforeducation.org/en/home [https://perma.cc/654F-SNQT] (stating that the AACE is a non-political, nonprofit organization and the proven leader in fighting for equal education rights).
91 AALF and AACE Brief for Fisher II, supra note 89, at 2-5.
Amici began by highlighting the discrimination that Asian Americans have faced in the United States, particularly in the education sphere. By acerbically noting that “[i]f the Fifth Circuit’s failure to recognize the burden of the UT program on Asian Americans was inadvertent, and based on mistaken belief that somehow Asian Americans are ‘white’ and privileged, shame on that court,” the organizations clearly recognized the burdens and discriminations that Asian Americans have faced in the past.\textsuperscript{92} The remainder of the brief is then replete with instances in which Asian Americans have faced severe discrimination.\textsuperscript{93} From the language and the examples used, AALF and AACE unmistakably recognize the kinds of harm that have been perpetuated against them by the White supremacist majority. And yet, their briefs still indicate that they express more solidarity with that White community than with the minority one.

Both AALF and AACE were attempting to persuade the Court that affirmative action has been harmful to Asian Americans, and as such, should be discontinued. But they make their arguments by aligning themselves exclusively with White students who have faced discrimination, instead of analogizing to Black or Hispanic discrimination. The \textit{Fisher II} brief claims that the affirmative action policies the University of Texas implemented were like those implemented against Jewish students at Harvard in the early twentieth century.\textsuperscript{94} Harvard’s President, Abbott Lawrence Lowell, had pushed for a fifteen percent cap on enrolled Jewish students, though Harvard never officially implemented it.\textsuperscript{95} Drawing analogies between explicit statements of exclusion at Harvard in the early 1900s and the affirmative action policies at the University of Texas in the latter part of the same century, the Asian American organizations writing these briefs likened themselves to Jewish Americans.\textsuperscript{96}

The parallel to the Jewish-American experience, however, is not as apt as the organizations believe. The analogy may have been appealing to them because Jewish-Americans were not only considered racial minorities in the

\begin{footnotesize}
\textsuperscript{92} Id. at 8–9.
\textsuperscript{93} See generally id.
\textsuperscript{94} Id. at 23–24.
\textsuperscript{96} My intention is not to diminish the distinctive anti-Semitic views that the Jewish quota system exemplifies. It clearly was discriminatory. Rather, my suggestion is only that the Asian American organizations attempts to align themselves with the Jewish quota system in terms of parallel discriminatory behavior reveals their own self-perception.
\end{footnotesize}
early 1900s, but they were also combatting the collegiate system just like AACE and AALF. But as Frank H. Wu, former Chancellor and Dean of the University of California, Hastings College of the Law highlights, it “would be a non sequitur to attribute Jewish quotas to affirmative action, since the concept had not yet even been developed.” The Jewish quotas were clearly anti-Semitic because they sought to exclude Jewish Americans purely because they were Jewish, an instance of direct discrimination. What those against affirmative action wish to emphasize is instead “reverse discrimination”—that by supporting other minorities, the institution is inherently anti-Asian. Thus, the analogy is incomplete at best.

When AACE and AALF only use the Jewish-American example in their brief, they explicitly align themselves with Whiteness. While the history of Jewish people is complicated in the United States, there was a recognition even in the nineteenth century, when Jewish was considered a “race,” that “Jews . . . were overwhelmingly . . . white.” From the analysis above, we can see how AALF and AACE sought to align themselves with the White majority, even when the alignment by analogy did not make much sense.

The Asian American organizations could have instead aligned themselves with other minorities, whose similar situations would have provided for a far more powerful argument. AACE and AALF’s briefs did not mention the rampant instances of Black Americans being rejected from schools in the early to mid 1900s because of their skin color, even though it would have emphasized the same disgust for discriminatory practices as the example of Jewish Americans at Harvard. The briefs also ignored more contemporary instances in which both Black and Hispanic students may have endured the same discriminatory quota system. For example, until very recently, a Connecticut law mandated that magnet schools reserve 25% of admissions to White or Asian

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97 See ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY 16 (2006) (describing how by the 1850s, Jews were characterized in “explicitly racial terms”).

98 Wu, supra note 79, at 49.

99 See id. ("[A Jewish quota] is straightforward discrimination.").

100 See id. (stating that helping a historically excluded group cannot logically require the mistreating of another excluded group).

101 GOLDSTEIN, supra note 97, at 17.

102 See, e.g., Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 343 (1938) (illuminating an instance where an otherwise qualified Black candidate was refused admission into the University of Missouri School of Law because of his race); Tureaud v. Bd. of Sup’rs of La. State Univ. & Agri. & Mech. Coll., 116 F. Supp. 248, 250 (E.D. La 1953) (discussing a suit arising from the rejection of an otherwise qualified Black applicant to the Louisiana State University’s combined art and law degree because of the University’s policy of not admitting Black students to that area), rev’d, Bd. of Sup’rs of La. State Univ. & Agri. & Mech. Coll. v. Tureaud, 207 F.2d 807 (5th Cir. 1953); McKissick v. Carmichael, 187 F.2d 949, 950 (4th Cir. 1951) (accepting that four qualified Black students applying to the University of North Carolina School of Law were denied entrance “solely on account of their race and color by the school authorities”).
students, and 75% to African American and Hispanic students.\textsuperscript{103} When schools had enrolled enough African American and Hispanic students to reach the 75% cap, no more could be enrolled, even if the school did not admit enough Asian American students and White students to reach their 25% cap—this meant that there could be empty seats in the class.\textsuperscript{104} This cap system, which was overturned in 2020 in Hartford,\textsuperscript{105} exemplifies some of the same goals that Asian Americans want to highlight with affirmative action in the collegiate sphere. Black and Hispanic students here were battling a system that tracked their admissions and then shut them out after reaching a certain cap. While Asian American students at Harvard cannot point to the same kind of numerical quota system that the Connecticut Black and Hispanic students could, they could still analogize what they believe is happening at Harvard to what was happening in Connecticut. Asian Americans, too, were conceivably battling a system that tracked their admissions, and then shut them out after reaching a certain cap, the exact same thing that was happening to Black and Hispanic students in Connecticut.

The Jewish-American Harvard example is important to emphasize, but the silence about other minorities who have, and continue to, face quota systems in other educational tiers is more telling than the explicit statements.\textsuperscript{106} The above demonstrates the distancing of certain Asian American groups from minorities who face similar problems and the prioritization of associating with White people instead.

\textsuperscript{103} Joshua Thompson, \textit{Putting an End to a New Era of School Segregation}, \textsc{The Hill} (July 8, 2018, 8:00 AM), https://thehill.com/opinion/civil-rights/395259-putting-an-end-to-a-new-era-of-school-segregation [https://perma.cc/YF34-HKVV].

\textsuperscript{104} Id.


\textsuperscript{106} Silences are seen in the numbers as well. There was not a consolidated project to trace how many Asian Americans work in the legal profession until 2017. See generally ERIC CHUNG, SAMUEL DONG, XIAONAN APRIL HU, CHRISTINE KWON & GOODWIN LIU, \textsc{A Portrait of Asian Americans in the Law} (2017), https://www.apaportraitproject.org [https://perma.cc/8XD4-ABSU] (click “download full report”) (conducting a systematic analysis of the participation of Asian Americans in the legal profession). A similar exercise is now being undertaken by the University of Pennsylvania for South Asians in the law. This absence in the record might suggest that Asian Americans want to blend into the mix, instead of standing out, and want to be a part of the majority instead of revealing themselves as a “minority.”
Ultimately, then, some Asian Americans continue to align with Whiteness when fighting for their rights in the same way as the plaintiffs in the nineteenth and twentieth centuries. And these organizations align by explicitly driving a wedge between themselves and other minorities. For example, one of the main arguments propounded by amici in Fisher I is that affirmative action “will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans.”

The most subversive thing about such a statement is that it implicitly acknowledges that Asian Americans are a different “kind” of minority, and that any benefit to other minorities must come at the expense of Asian Americans. This kind of rhetoric reinforces the divide between minority groups. It evinces a separation by suggesting that the problems Asian Americans have faced are distinctly different from those of Black or Hispanic students. But this is not the case.

As seen from above, the parallels between discrimination and racism against Black citizens—to name one minority—and Asian citizens reach far. Separate-but-equal in the education context is one example, but to be even more pointed, so are the kinds of racist ideas espoused by those who do not support affirmative action. For example, while affirmative action policies are often criticized for taking space away from those who “deserve” places at colleges and instead giving them to “undeserving” Black and Hispanic students, Asian Americans are often seen as “taking away jobs” from struggling White Americans. The venue may be different, but the

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108 See, e.g., Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927) (rejecting an equal protection challenge to a school district’s decision to exclude Chinese students from exclusively white schools).


110 The murder of Vincent Chin, who was viciously killed by two White men who believed that Japanese success had usurped their own jobs, is a clear example of this. See Karen Grigsby Bates, How Vincent Chin’s Death Gave Others a Voice, NPR (Mar. 27, 2021, 7:00AM), https://www.npr.org/sections/codeswitch/2021/03/27/987188727/how-vincent-chins-death-gave-others-a-voice [https://perma.cc/Z4LA-NFY7] (highlighting the murderer’s motivations and describing how Chin’s death stimulated political action). And stemming into 2022, with the pandemic still pervasive, the idea that Asian Americans have “harmed” the “majority” is rampant. Cf. Alix Strauss, She’s Combating a Wave of Anti-Asian Hate, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/
sentiment is the same—some envision Asian Americans as snatching jobs from those more deserving, an opinion very similar to those who see Black and Hispanic students and affirmative action as stealing university seats from the more worthy. Racist ideas come up in different contexts, and Asian American organizations could have used this to show how affirmative action has engendered a belief that they are unduly represented in colleges, leading to stereotypes just as dangerous as those levied against Black and Hispanic students who are sometimes seen as undeserving of their college seats. In both instances, Asian American, Black, and Hispanic students are not considered worthy of the seats that they possess, albeit for different reasons. We can wonder how the argument that affirmative action is harmful would have been received had Asian American organizations sought to align themselves with other minorities when attempting to define their own place in society.

B. Asian Americans and Alignment with Whiteness in Students for Fair Admissions v. President & Fellows of Harvard College

The affirmative action case that has recently been in the news is Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, and it also illustrates the same findings as above. Students for Fair Admissions, Inc. (SFFA), an organization representing a group of anonymous Asian American students rejected from Harvard, pointed to data indicating that Harvard was penalizing Asians for their personalities in their applications. It also highlighted how the percentage of Asian Americans accepted to the school remained the same, despite rising numbers of applications, thus showing that affirmative action policies were actively harming Asian populations and that Harvard was engaging in an unconstitutional system of racial balancing.

This litigation against Harvard is not the first instance of Asian American students suing Ivy League schools for their affirmative action

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03/07/us/cynthia-choi-stop-aapi-hate.html [https://perma.cc/P522-MBQS] (interviewing Cynthia Choi, an activist who co-founded an anti-Asian hate coalition, who notes that the AAPI community was “being blamed and attacked” for the COVID-19 pandemic).

111 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022) [hereinafter Students for Fair Admissions].

112 Brief of Amici Curiae, The Asian American Coalition for Education & the Asian American Legal Foundation in Support of Petitioner at 7, Students for Fair Admissions, 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022) [hereinafter AACE & AALF Brief to the Supreme Court for Students for Fair Admissions] (claiming that Harvard use of personality ratings was “devalue[ing],” “demean[ing],” and “dehuman[izing]” Asian Americans by labelling them “deficient in character.”).

113 Id. (“Significantly, during a multi-decade period in which the percentages of qualified Asian Americans in the applicant pool steadily increased, the average Personal score given [to] Asian American applicants decreased relative to other races, so as to keep the percentage of Asian Americans in the Harvard student body relatively constant at around 20 per [sic] cent.”).
policies. In a brief written by the same organizations that wrote the Fisher briefs discussed above, the parties cited three previous similar instances challenging allegedly discriminatory admissions processes to highlight both that the “problem” spans the entire spectrum of people who come within the wide umbrella known as Asian Americans and that Harvard is clearly doing something wrong.

Asian American renunciation of affirmative action appears to have increased in the few years since Fisher had been brought to Court. The Students for Fair Admissions appellate brief was cosigned by a whopping 289 Asian American organizations, almost double that of the organizations that cosigned the Fisher II brief. This number increases to 346 in the Supreme Court brief filed the following year. The rise in signatories could be attributed to the fact that there are now Asian American plaintiffs litigating an affirmative action case, but it could also be the result of expanding views that affirmative action harms Asian Americans by creating more space for other minorities within the educational system.

AACE and AALF in the Harvard litigation continue to align with Whiteness when making their arguments against affirmative action, following the same pattern that generations of Asian American plaintiffs and their lawyers have before: They set apart Asian Americans first, distinguishing the group from both Whites and other people of color, only to double back and claim that Asian Americans are more akin to White people than any minority group. Amici in their appellate brief boldly claim that “Asian-American applicants are the most discriminated-against racial group at Harvard.” They point to the fact that the “[p]ersonal rating[s],” which are

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115 Though it is also important to note here that other minorities that are also under the band of “Asian American”—Filipino Americans and Bhutanese Americans to name a few—do not neatly fit into the stereotype of “successful.” See Alia Wong, 4 Myths Fueling the Fight Over NYC’s Exclusive High Schools, THE ATLANTIC (Mar. 21, 2019), https://www.theatlantic.com/education/archive/2019/03/stuyvesant-admissions-controversy-fact-or-fiction/585460 [https://perma.cc/D2V8-XNK8] (highlighting the socioeconomic disparities among different nationalities and ethnic groups in the Asian population); see also Magsaysay supra note 13, at 122 (emphasizing that “poverty rates for certain [Asian American] communities are devastatingly high” and that “AAPIs are also one of the fastest growing poverty populations since the Great Recession”).

116 AACE & AALF Brief for Students for Fair Admissions in the Appellate Court, supra note 114, at 1.

117 AACE & AALF Brief to the Supreme Court for Students for Fair Admissions, supra note 112, at 2.

118 AACE & AALF Brief for Students for Fair Admissions in the Appellate Court, supra note 114, at 9.
given to applicants and measure “integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, and grit,” are the lowest for Asian American students.¹¹⁹ Using these facts, the organizations claim that Asian Americans are being harmed over African American, Hispanic and White applicants. They do something similar when they argue that “[a]mici make no claim that Asian Americans are special, but it defies logic that applicants from their community can be that deficient in character compared with white, Hispanic, and African-American applicants.”¹²⁰ In noting how Asian Americans are being treated differently than all other applicants, amici are highlighting how much they think of affirmative action as a problem unique to Asian Americans, thus carving a place for themselves within the affirmative action dialogue. They are affirmatively asserting that the courts cannot forget about Asian Americans when making decisions regarding education, because those policies affect Asians in a way that it does not affect any other racial groups.

But a few pages later in the Supreme Court brief, it becomes clear that amici are more concerned with aligning with Whiteness than with continuing to foreground Asian American uniqueness. AACE and AALF write, “At trial, Harvard failed to provide any plausible race-neutral explanation for why African Americans and Hispanics are scored so much higher in their Personal ratings than whites and Asian Americans.”¹²¹ This suggests that amici believe the Personal ratings are discriminatory against both Whites and Asian Americans, clearly aligning with Whiteness. The brief builds on their claim that the Personal ratings for other minorities are much higher than the Personal ratings for Whites and Asian Americans. They find that the percentage by race of those who receive the highest Personal rating (a 1 or 2) is: 22% for Asian Americans, 30% for Whites, 34% for Hispanics, and 47% for African Americans.¹²² If we examine these percentages, amici’s decision to argue that Personal ratings harm both Whites and Asian Americans is more puzzling than illuminating. It does not make sense to group White students and Asian students together and argue that they rated so much lower than their other peers; the gap between Whites and Hispanics (4%) is half the gap

¹¹⁹ See id. at 3, 6-7 (describing how only 22% of Asian Americans were ranked a 1 or a 2 in the personality score, the highest one can achieve, while 30% of Whites, 34% of Hispanics and 47% of African American scored a 1 or 2). These numbers and words are repeated in the amicus brief to the Supreme Court as well. See AACE & AALF Brief to the Supreme Court for Students for Fair Admissions, supra note 112, at 8.

¹²⁰ AACE & AALF Brief for Students for Fair Admissions in the Appellate Court, supra note 114, at 7; see also AACE & AALF Brief to Supreme Court for Students for Fair Admissions, supra note 112, at 8 (stating the same argument).

¹²¹ AACE & AALF Brief to the Supreme Court for Students for Fair Admissions, supra note 114, at 10 (emphasis added).

¹²² Id. at 8.
between Asian Americans and Whites (8%). In making such arguments, then, the Asian American organizations align themselves with White students, even when White students score better than them and more in line with the other minority students that the organization claims benefit the most from these programs. Asian American organizations explicitly mentioning Whites in their argument—when doing so was unnecessary to support their assertions—further illustrates the organizations’ purposeful alignment with Whiteness.

The real question here is, could Asian Americans have aligned with minorities and made similar arguments about how affirmative action is detrimental? I believe the answer is yes. In the beginning of this Section, I highlighted how Asian Americans could have used examples of other Black and Hispanic students who have been negatively impacted by affirmative action adjacent policies instead of simply relying on one analogy that, while similar to the current situation, does not encompass the entire picture. And as seen from the previous paragraph, when organizations proposed that affirmative action policies were harmful to Whites and Asian Americans together, the numbers did not support that conclusion. The decision to still align with Whiteness represents a deliberate choice by amici, a choice that is far likelier to lead to dangerous division between Asian Americans and other minorities and perpetuate the White supremacist state.

V. DANGEROUS DECISIONS: HOW WHITE ALIGNMENT WILL NOT LEAD TO EQUALITY FOR ASIAN AMERICANS

The purposeful alignment with and aspiration for Whiteness within some of the Asian American community is particularly dangerous, not only because Asian Americans are further distancing themselves from other minorities when aligning with Whiteness, but also because history shows that Asian Americans have never been considered White. While there are instances where legislatures and courts have superficially recognized Asians as equal to Whites, such action has only been allowed when it is beneficial to the White supremacist state.

Since Asians began arriving on American shores, they have been discriminated against for being “morally inferior” or “savage.” The exclusion of Asian Americans from White spaces in the pre-Civil Rights era functioned

123 See supra notes 101–105 and accompanying text.

in much the same way as it functioned for other minorities — through the law. The Arizona legislature, for example, passed explicit statutes excluding “Mongolian[s]” and “Asiatic[s]” from testifying against White persons, inspired by the California Supreme Court’s holding in People v. Hall.125

Perhaps the most pertinent of these discriminatory statutes is § 1662 of the Political Code of the State of California, passed in 1899, which gave the trustees of California schools the power to establish separate institutions for children of “Mongolian or Chinese descent.”126 The statute further stated that when the state created separate schools, Chinese children could not be admitted into other schools, regardless of whether they were White or Black institutions.127 In 1902, a plaintiff of Chinese descent challenged § 1662, alleging that it was “arbitrary, and the result of hatred for the Chinese race.”128 The state court, relying mostly on rhetoric from Plessy v. Ferguson, held that minorities—which included Chinese and Mongolians—could be separated from Whites and dismissed the case for failure to state a claim.129 Both the statute and the ensuing case demonstrate how Chinese Americans were excluded by the Western courts and legislatures mirroring how governmental actors excluded Black students from the educational fold in the years before Brown v. Board of Education.130

The American West is one example of how the legislature worked to explicitly exclude Asian Americans from “normal” life. But this exclusion was ratified by more than just state legislatures. It found support in Congress, within the Oval Office, and most disconcertingly, widely across society.

The Chinese Exclusion Act, passed in 1882, suspended the immigration of Chinese laborers for ten years, and literally had “exclusion” in the name.131 The Act was the result of a huge xenophobic wave against immigrants and propaganda about “Chinese uncleanliness,” another example of the otherization of Asian American bodies.132 Japanese internment, which began

125 Act of Nov. 10, 1864, ch. 10, sec. 14, 1865 Ariz. Sess. Laws 50, 50 (repealed 1871); see also supra notes 27–34 and accompanying text.
126 CAL. POLITICAL CODE § 1662 (Deering 1899) (repealed 1947).
127 Id. (“When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school . . . .”).
128 Him v. Callahan, 119 F. 381, 382 (N.D. Cal 1902).
129 Id. at 383.
during World War II, was authorized via an executive order, and it resulted in the displacement and upheaval of hundreds of thousands of Japanese Americans who were shuttled away without due process or individualized suspicion of wrongdoing. The order was sanctioned by the Supreme Court in Korematsu v. United States, a decision not repudiated—despite wide public sentiment that it had been wrongly decided—until over sixty years later. In the early twentieth century, when the United States first invaded the Philippines, America justified its distinctly imperialist actions by both pointing to political unrest in the nation and by denigrating Filipinos for their "uncivilized bodies." And the 1924 Immigration Act made the ability to immigrate to the United States contingent upon eligibility for naturalization; a particularly clever way to keep Asians from immigrating to the United States since the Supreme Court had held that men of Chinese, Japanese, and South Asian descent could not be naturalized citizens. The systems of political exclusion were enacted against many within the Asian American community, with many more examples I have left out.

But even more shockingly, it is the implicit and violent exclusion—which continues to be pervasive—that truly highlights how much Asian Americans continue to be otherized, vilified, and scapegoated. Hate crimes against people of South Asian and Middle Eastern descent rose after September 11, 2001—Sikhs and Muslims were often the target and were also subjected to suspicions from the government itself. These hate crimes have continued

1, 4-5 (2000) (detailing the anti-Chinese racism, stemming from a belief that the Chinese were inferior, that underlaid the Act).


134 Compare Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding the exclusion order), with Trump v. Hawaii, 238 S. Ct. 2392, 2423 (2018) ("Korematsu was gravely wrong the day it was decided . . . .").

135 Leon, supra note 132.

136 JANE H. HONG, A TRANSPACIFIC HISTORY OF HOW AMERICA REPEALED ASIAN EXCLUSION 2 (2019); see also United States v. Thind, 261 U.S. 204, 207 (1923) ("If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not.").

137 See Cynthia Lee, Hate Crimes and the War on Terror, in HATE CRIMES: PERSPECTIVES AND APPROACHES 1, 1-3 (Barbara Perry ed., 2008) (arguing that though there were public announcements condemning hate crimes against Sikh and Muslim communities, the government still engaged "in its own acts of 'psychic' and physical violence"). One also only needs to turn to the story of Javaid Iqbal, whose case, Ashcroft v. Iqbal, 556 U.S. 662 (2009), is read by thousands of civil procedure students around the country to further understand the havoc wreaked by an overtly suspicious government. See generally Sharon Sinnar, The Lost Story of Iqbal, 105 GEO. L.J 379, 382 (2017).
post 9/11 and rise again whenever a terrorist attack occurs. Most saliently, the uptick in violence against Asian Americans since the start of the COVID-19 pandemic exemplifies how Asians are still considered other and foreign by American citizens. In the over two years I have been researching, writing, and editing this Comment, hate crimes against Asians in fifteen cities have risen almost 150%. A killing spree in a Georgia spa resulted in the death of eight Americans, six of whom were Asian women. A Filipina woman was brutally beaten outside of a luxury apartment building in Times Square, and a security guard witnessing the incident closed the door. More pervasive still is the fact that there are countless attacks against elderly Asian Americans, most of which never gain major media attention. The Asian American experience is still being erased, and these hate crimes exemplify how Asians are still being excluded.

Then why do Asian American organizations, who clearly understand the discriminatory history against their constituents, continue to align with Whiteness when they have always been excluded from that space? The answer may be that there have been instances in which both legislatures and courts have “lumped” Asian Americans and White people together, in a move that appears to equate Asian Americans with Whites. This lumping suggests that alignments with Whiteness can be successful and encourages Asian Americans to continue trying. On the contrary, the alignment is only successful when it is to the benefit of the White supremacist structure, which

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138 For a list of reported hate crimes that have been lobbied against South Asian, Sikh, Muslim and Arab communities following the Paris attacks on November 13, 2015, see Acts of Hate Database, SAALT, https://saalt.org/policy-change/post-9-11-backlash [https://perma.cc/AJ8U-U7UGZ].


142 See Cady Lang, Hate Crimes Against Asian Americans Are on the Rise. Many Say More Policing Isn’t the Answer, TIME (Feb. 18, 2021, 7:00 AM), https://time.com/5938482/asian-american-attacks [https://perma.cc/88JP-CX8R] (describing multiple different attacks against people of Asian descent and the very little media attention each event has gotten). Perhaps one of the most impactful stories is that of Muhammad Anwar, whose car was hijacked and then crashed when he was still in it. The video of the event shows people surrounding the car, but no one helping Mohammad Anwar who is lying yards from it. It seemed as if no one cared. See Caitlin O’Kane, Teen Girls Charged with Carjacking and Murder in Death of Uber Eats Driver in Washington D.C., CBS NEWS (Mar. 30, 2021, 1:16 PM), https://www.cbsnews.com/news/mohammad-anwar-ubereats-driver-carjacking-murder-girls-court [https://perma.cc/5SVR-UF2P].

143 Remember that the briefs filed in the appellate and Supreme Court discuss the discriminatory history against Asian Americans. See supra notes 89–94 and accompanying text.

144 See supra Part IV.
weaponizes the lumping to sow greater seeds of division between Asians and other minorities.

The best example of this perpetuated division is the Model Minority Myth. William Petersen, widely credited with the idea of the myth, compared Japanese and Black Americans in his 1966 *New York Times Magazine* article.\(^\text{145}\) Peterson stated that Japanese Americans, more than Blacks and Jews, have suffered the most injustice and discrimination.\(^\text{146}\) Comparing the plight of Japanese Americans to Black Americans, Petersen lauded the Japanese for having “risen above even prejudiced criticism,” and being “better than any group in our society, including native-born whites.”\(^\text{147}\) In contrast, Petersen claimed that despite all the strides toward guaranteeing equality for Black Americans, they had reacted negatively—the connotation being that this was the result of an inherent personality detriment.\(^\text{148}\) The article continued, stating that all European migrants who came to the States were able to achieve “social respect and dignity,” despite facing fierce discrimination initially, but that the same could not be said of “Negroes, Indians, Mexicans, Chinese and Filipinos.”\(^\text{149}\)

This article divided some Asian Americans and other minorities. Given that it was released during the Civil Rights era when Black men and women were taking to the streets to protest their societal treatment, the myth of the model minority surfaced at just the right time “to show up rebellious blacks for their attempts to redress power relations.”\(^\text{150}\) The derision and condescension for Black Americans is clear in Petersen’s article.\(^\text{151}\) Even more evident is the pride in Japanese Americans. And despite there being a time in the recent past when the American government had interned Japanese Americans, had banned Asian immigration, and had denied citizenship to all

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\(^{147}\) Id. at 21.

\(^{148}\) Id.

\(^{149}\) Id. at 40 (“Each new nationality that arrived from Europe was typically met with such hostility as, for example, the anti-German riots in the Middle West a century ago, the American Protective Association to fight the Irish, the national-quota laws to keep out Italians, Poles, and Jews.”). It is also particularly interesting that the article seeks to divide Japanese Americans from the umbrella of other Asian Americans that fit within the term, most specifically the Chinese and Filipino populations in America. This divide between Asian American populations, and the weaponization of such rhetoric, is best suited for another paper.


\(^{151}\) See Petersen, *supra* note 146, at 40-41 (emphasizing that non-White minorities, which included Blacks, Japanese, “Indians,” Mexicans, Chinese, and Filipinos usually do not surmount the prejudices levied against them in the United States, but that the Japanese are the exception to this rule because of their unique work ethic, family values, and respect for authority).
Asian people, Asian Americans and society bought into the Model Minority Myth, weaponizing it even in the amicus briefs filed in affirmative action cases. While AACE and AALF recognize the harms of the model minority in their Fisher I brief, the same organizations imply in their Supreme Court brief for Students for Fair Admissions that in no way could Asian American teens have underperformed Blacks, Hispanics and even Whites. In these ways, society has been pivotal in creating the divide between Asian Americans and other minorities. Although society has never equated Asian Americans with Whites, the implication is the same: Asian Americans may not be White, but at least they are as good as it can get.

The modern-day affirmative action court cases further highlight how much this coalition between Asian Americans and Whites has evolved but only when it is most beneficial to keep the status quo. The opinions sometimes mention White students and Asian American students together to highlight that the affirmative action programs would be equally discriminatory for both parties. For example, Justice Thomas’s concurrence in Fisher v. University of Texas discusses how the system discriminates against both Asian Americans and Whites. Similarly, Judge Boggs in Grutter v. Bollinger, one of the first affirmative action cases to be brought to the Supreme Court, highlights how the chances of admission for a White student are about the same as that for an Asian student—a percentage which is much lower than for other minority groups. Finally, the majority in Regents of the University of California v. Bakke is critical of the inclusion of Asian Americans as one of the favored groups for affirmative action policies, since they have been

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152 See AALF & AACE for Fisher I, supra note 107, at 30 (“But the ‘model minority’ stereotype of high-achieving Asians—particularly when used to raise the standards by which Asian-American applicants are judged—does an even greater disservice to such individuals by making it virtually impossible for an ‘average’ or disadvantaged Asian American to compete with others who are held to a lower standard.”).

153 See AACE & AALF Brief to the Supreme Court for Students for Fair Admissions, supra note 112, at 8; as an interesting sidenote, the model minority myth existed in another form even during the Gong Lum era, as evidenced by Martha Lum arguing that the Mongolian, Chinese, and Japanese people were “some of the most intelligent and enterprising.” Hyungtae Kim, Intimate Spaces and Unwanted Bodies: A Discourse on Racial Purity and the Chinese American in the Mississippi School System at 13 (Nov. 20, 2009) (Undergraduate Course Paper for HIST231-402, Civil Rights Movement, University of Pennsylvania), https://asam.sas.upenn.edu/sites/default/files/2020-04/IntimateSpacesUnwantedBodies_HyungtaeKim%20%281%29.pdf.

154 See Fisher I, 570 U.S. 297, 331 (2013) (Thomas, J., concurring) (“There can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race.”).

155 See Grutter v. Bollinger, 288 F.3d 732, 797 (6th Cir. 2001) (Boggs, J. dissenting) (“Taking a middle range applicant with an LSAT score 164-66 and a GPA of 3.25-3.49, the chances of admission for a White or Asian applicant are around 22 percent. For an under-represented minority applicant, the chances of admission (100%) would be better called a guarantee of admission.”). We can, for the intents and purposes of this paper, ignore the clear exaggeration in Judge Bogg’s speech here.
admitted in substantial numbers—like those of White students—in preceding years.156 All of these opinions demonstrate that Asian Americans and White students have been “lumped” together to create a coalition against other minorities in the affirmative action context.

This rhetoric of division has evolved, visible at the local level as well. In early 2019, Mayor Bill de Blasio of New York City introduced a plan to end the Specialized High School Admissions Test (SHSAT), an examination which controlled admission into all eight of New York City’s “elite” high schools.157 The introduced justification for the legislation, which never was delivered to the Governor, despite passing the Senate Assembly, reads:

[U]sing this test as the sole basis for admission further exacerbates the racial gap persistent in the enrollment of these schools. Combined white and Asian students account for 70 percent of the students admitted to these schools, conversely Black and Hispanic children make up 72 percent of citywide enrollment at these institutions but only account for 11 percent of the student enrollment at these institutions. Research has consistently shown that minorities perform worse on standardized test [sic] than their white counterparts.158

The bill showcases another instance in which Whites and Asian Americans are pitted together against other minorities. The tests benefit one alliance, but not the other. More menacingly, the test seemingly excludes Asian Americans in its definition of minority when it states that minorities perform worse on the test, except for Asian Americans who populate these schools in high percentages. This is, of course, to the great detriment to Asian Americans, not only because it erases the discrimination that we have faced in the past—as the amici organizations argue in the various briefs filed in affirmative action cases—but also because it elevates Asian Americans as different from and better than other minorities.

The coalition between Whites and Asians is thus perpetuated by legislatures and the Supreme Court, utilizing the idea of the “model” Asian American to destroy solidarity movements and sow division between minorities. Based on political dialogue, Asian American organizations in affirmative action cases might assume that their alignment with Whiteness

158 N.Y. S.B. 1415, supra note 157.
would be successful in obtaining equality and greater protections under the law. But as we have seen from the instances of Asian exclusion that pervade society to this very day, Asian Americans do not have the benefit of Whiteness, and aligning with them only reinforces the White supremacist state that thrives when minorities splinter. A way to reverse this is for Asian Americans to make coalitions with other minorities in the way they have with Whites—solidarity movements that seek to create bonds between minority groups—because such alignments will not result in deeper divisions between them. We do see some Asian American organizations making this legal move, such as in *Students for Fair Admissions v. President & Fellows of Harvard College*.

VI. A WAY FORWARD: USING THE STUDENTS FOR FAIR ADMISSIONS BRIEFS FILED IN FAVOR OF AFFIRMATIVE ACTION AS A GUIDE FOR FUTURE CHANGE

The briefs filed in the *Students for Fair Admissions* litigation in favor of affirmative action can provide a basis for future legal arguments because they advocate Asian American equality without aligning Asian Americans with Whiteness. Instead, they form racial solidarity movements between minorities.

The two relevant briefs in favor of affirmative action begin similarly to those filed against it by first arguing that Asian Americans have a unique place in the litigation.159 Unlike briefs by AACE or AALF, however, amici maintain this message throughout, acknowledging that the Asian American community is far more nuanced than society accepts, which inevitably means that affirmative action would harm some while helping others.160 In this way, the briefs carve places for all Asian Americans, instead of lumping them under one big tent as the other organizations did.

Most importantly, however, the amicus briefs by the Asian American Legal Defense and Education Foundation and other groups explicitly distance their position from any alignments with Whiteness, while


160 See AALDEF Amici Brief in *Students for Fair Admissions*, supra note 159, at 6 (explaining how the diversity of people within the term “Asian American” means that some will greatly benefit from affirmative action policies while others may not); AALDEF Amici Brief in *Fisher II*, supra note 159, at 4 (“Asian Americans and Pacific Islanders—a unique cross-section of identities and experiences that spans a range of comparative privilege and disadvantage—benefit from this individualized approach, as do African Americans, Latinos, and whites.”).
highlighting that affirmative action can be advantageous for Asian Americans and other minorities. The organization notes that defeating affirmative action will entrench White privilege and that “SFFA’s arguments continue the longstanding tradition of using the Asian community as a wedge to punish other marginalized groups and undermine legitimate race-conscious admissions policies.”

The organization thus turns its reasoning away from Whiteness. But it also seeks to create broader similarities between minority groups, stating that there has been a history of elite universities discriminating against not just Jewish students—as the briefs against affirmative action highlight—but also “black applicants, Asian Americans, women, and others.”

The Asian American Legal Defense and Education Fund, and the other youth-serving organizations they represent, therefore seek to prove that affirmative action is not harmful. The brief both acknowledges that there have been dangerous discriminatory practices against many groups in the past and distinguishes affirmative action in its modern conception as helping not just Asian Americans, but also other minorities, and even, to an extent, White applicants.

We can also look to these briefs as strong examples of explicit solidarity movements. Student groups at Harvard—including Asian American, Black, Hispanic, Native American and Jewish students and alumni—filed a brief in the appellate court advocating for affirmative action.

These multi-ethnic and cultural organizations formed a strong coalition, its power made even more potent by virtue of the sheer number of groups that signed on to the work. The brief draws multiple parallels between the experiences of all the minority groups mentioned. One section highlights how Black, Latinx, Native American, and Pacific Islander students attend high-poverty schools at much higher rates than their White peers. Moreover, the brief highlights that implicit biases in education negatively impact all students of color regardless of socioeconomic status.

And it underscores that if affirmative action policies are eliminated, not only would admission of Black and Latinx

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161 AALDEF Amici Brief in Students for Fair Admissions, supra note 159, at 2, 9. The Fisher II brief in favor of affirmative action filed in the Supreme Court makes similar solidarity strides that I seek to highlight in this section. See Brief of the Asian American Legal Defense & Education Fund et al. as Amici Curiae in Support of Respondents at 4, Fisher II, 136 S. Ct. 2198 (2016) (No. 14-981) (“Students belonging to these subgroups [Asian Americans,] in Texas and elsewhere have faced pervasive social and economic disadvantages akin to those experienced by many African Americans and Latinos, educational attainment levels that are among the lowest of all ethnic and racial groups, and even racial intimidation and harassment.”).

162 Id. at 29.


164 Id. at 12-13.

165 Id. at 13.
students drop but so too would that of Asian Americans. Amici ultimately craft threads of solidarity between the races, highlighting that affirmative action is beneficial for the classes of people that the briefs against affirmative action underscore—Black and Hispanic students—and for Asian American, Pacific Islander, and Native American students. In doing so, the organizations elevate all minorities, making arguments that will seek to benefit each and every group.

This kind of solidarity-building showcases how some organizations have escaped the pattern of aligning with Whiteness at the expense of other minorities. Perhaps we can argue that the claim is easier when the argument must be that affirmative action policies do not harm Asian Americans. While this may be true, the legal documents highlighted in this section did not have to go as far as to argue that the policies actually benefit other minorities in very significant ways. To make a convincing rebuttal, all the organizations needed to do was prove that affirmative action is helpful to Asian Americans, which they could have done purely by focusing on the nuances in the Asian American community. Instead, these amici seek to create bridges between Asian Americans and other minorities, emphasizing that affirmative action would not only be helpful to Asian Americans, but also to others who have also been negatively impacted by social policies in the United States.

Although Asian American organizations are no longer required to align with Whiteness to make their arguments, some still do. This creates deeper divisions between Asian American communities and other minorities, especially as American society has continually closed the door to Asian Americans ever truly being considered White. Combining these two ideas—that Asian Americans can never be White and that aligning with Whiteness creates deeper division between minorities—means that Asian Americans who seek equality should do so by forming solidarity movements with other minorities, as those are what will topple the White supremacist structure in place.

VII. CONCLUSION

We have seen how Asian Americans have often aspired for Whiteness in many contexts and over many eras. In the early years of Asian immigration, this aspiration was forced. American politics had created a Black–White binary into which the government then shoehorned Asians, instead of creating separate spaces for them. And aligning with Blackness was not a viable legal argument, if only because the laws that dealt with rights of Black citizens were clearly meant for those who were descended from slaves or had been slaves themselves. So, while there might have been some semblance of

166 Id. at 18.
a choice between White and Black, this choice was often a fictitious one, leaving Asian Americans no option but to align with Whiteness in the late nineteenth and early twentieth centuries.

However, while Asian Americans during this era were certainly constrained in who they could align with, they had leeway in the kinds of arguments they could make within those constraints. In both separate-but-equal and citizenship cases, some Asian American plaintiffs and their attorneys chose to use this leeway to force a wider division between themselves and other minorities, aligning themselves with Whiteness by explicitly differentiating themselves from other minority groups instead of only pointing out the ways that they were similar to Whites.

This phenomenon is salient even in the modern era, as demonstrated in affirmative action cases like *Fisher I*, *Fisher II*, and *Students for Fair Admissions*. Even though Asian Americans are no longer relegated to aligning with Whiteness—the statutes that made aligning with Blackness an impossibility have now been eliminated—some still sought to do so when they argued that affirmative action policies harmed Asian American communities. These alignments followed the same patterns as the ones in the late nineteenth and early twentieth centuries: Litigants aligned themselves with Whiteness by explicitly distancing themselves from other minorities.

These alignments continue to be harmful because the White supremacist structure has never allowed Asian Americans to be considered White, except when it benefits them. When Asian Americans and Whites are lumped together, it only serves to foster divisions between minorities that have led to the continuance of the White supremacist structure. This is why it is so important to create solidarity movements between minorities. The White supremacist structure is dominant because of its manipulation of race. It has succeeded in convincing some Asian American groups that one needs to be White to be equal. If we can topple this system by creating solidarity movements, then the system that holds Whiteness up as the paradigm of perfectness also falls.

The solidarity movements I encourage the legal world to pursue do exist. The examples that we have of such coalitions and relationships—like the ones in the *Students for Fair Admissions* litigation—should be the beacon that Asian Americans and other minorities look to when they discuss the ways in which they can seek equality. Doing so will create bonds between people that would elevate them all, instead of chains that would raise one race at the expense of another.