Asian Pacific American Bar 2022 Unity Night

Gutter v. Bollinger,
Students for Fair Admissions Inc. v. President & Fellows of Harvard College, and
the Future of Affirmative Action

Written Materials

Asian Pacific American Bar Association of Los Angeles

Virtual MCLE-Qualified Program

Thursday, June 16, 2022

5:30 – 7 p.m. PT

This event is certified for 1.0 elimination of bias MCLE credit.
APABA is a California State Bar approved MCLE provider.

Materials

Students for Fair Admissions Inc. v. President & Fellows of Harvard College
Students for Fair Admissions Inc. v. University of North Carolina, et al.
SCOTUSBLOG.com – Case Files

- Issues: (1) Whether the Supreme Court should overrule Grutter v. Bollinger and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.
- Petitioner Students for Fair Admissions Inc.'s Brief (Submitted May 2, 2022)
    - Key Arguments
        - Grutter should be overruled.
        - Harvard's admissions process fails strict scrutiny.
        - UNC's admissions process fails strict scrutiny.

Obscuring Asian Penalty with Illusions of Black Bonus
Kimberly West-Faulcon

- Do white students enjoy an unfair advantage as compared to Asian Americans in admissions to certain universities? This Article explains the proper legal comparison under settled civil rights law for making this determination based on the number of white and Asian American applicants and admits for a given admissions cycle. This Article also raises questions regarding the accuracy of blaming affirmative action favoring African Americans—a Black bonus—for racial discrimination against Asian Americans—an Asian penalty. It does so by examining charges of Asian penalty made by amici in Fisher v. University of Texas at Austin and the similar charges made in the complaints in lawsuits challenging racial affirmative action by Harvard University and the University of North Carolina at Chapel Hill. The Article exposes two mathematical fallacies as well as the limitations of an oft-cited 2009 book that have been relied upon regularly to bolster the notion that admissions bonuses for African Americans and Latinos cause universities to operate racially discriminatory anti-Asian American admissions ceilings. The Article illuminates how efforts to link affirmative action and Asian penalty omit a key inquiry for identifying anti-Asian American discrimination—disparate impact analysis comparing Asian American selection rates to white selection rates.

Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in *Fisher v. Texas*
Kimberly West-Faulcon

- This article asserts that the Fisher v. University of Texas case sidelines the issue of equal racial opportunity to put forth the novel contention that the Equal Protection Clause affords a "race-blindness entitlement." It distinguishes the Fisher lawsuit from earlier "reverse discrimination" cases by explaining how Abigail Fisher forsakes the type of test score-focused meritocracy claims that have been central in other discrimination lawsuits filed by rejected white applicants. The article suggests that the Fisher case is a harbinger

of future efforts to convince the Supreme Court that the constitutional rights of white applicants are violated unless the government is somehow completely "race-blind."

SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus

Jonathan P. Feingold

- In the ongoing litigation of Students for Fair Admissions v. Harvard College, Harvard faces allegations that its once-heralded admissions process discriminates against Asian Americans. Public discourse has revealed a dominant narrative: affirmative action is viewed as the presumptive cause of Harvard's alleged "Asian penalty." Yet this narrative misrepresents the plaintiff's own theory of discrimination. Rather than implicating affirmative action, the underlying allegations portray the phenomenon of "negative action" — that is, an admissions regime in which White applicants take the seats of their more qualified Asian-American counterparts. Nonetheless, we are witnessing a broad failure to see this case for what it is. This misperception invites an unnecessary and misplaced referendum on race-conscious admissions at Harvard and beyond.

Colorblind Capture

Jonathan P. Feingold

- We are facing two converging waves of racial retrenchment. The first, which arose following the Civil Rights Movement, is nearing a legal milestone. This term or the next, the Supreme Court will prohibit affirmative action in higher education. When it does, the Court will cement decades of conservative jurisprudence that has systematically eroded the right to remedy racial inequality. The second wave is more recent but no less significant. Following 2020's global uprising for racial justice, rightwing forces launched a coordinated assault on antiracism itself. The campaign has enjoyed early success. As one measure, GOP officials have passed, proposed or pre-filed hundreds of bills designed to stymie antiracist discourse, activism, and organizing. To process this moment, scholars have surfaced continuities that bind racial retrenchment past and present. This includes decades of rightwing efforts to deny the relevance of race and racism in post-Jim Crow America. These accounts are not wrong. But they obscure a key variable that has long enabled racial backlash: the Left. Specifically, privileged voices on the Left continue to rehearse colorblind conceptions of race and racism—even when defending race-conscious reform. I term this phenomenon "colorblind capture." To capture its ubiquity and impact, I explore decades of affirmative action litigation. This analysis reveals an underappreciated trend. Even as the Left champions affirmative action, the Right sets the terms of debate. This includes the pervasive reflex, on the Left, to defend affirmative action as a "racial preference." This framing is neither inevitable nor strategic. The Left could, for example, defend race-consciousness as essential antidiscrimination—that is, a modest tool to mitigate existing racial (dis)advantage and, thereby, yield a more individualized, objective, and race-neutral process. But as litigation headed for the Supreme Court reveals, Harvard and UNC continue to rehearse rightwing talking points—even as they defend their own admissions policies. This dynamic does more than compromise the legal case for race-conscious admissions. It also naturalizes within public discourse the notion that seeing race and attending to

racism is wrong—the same logic that anchors resurgent efforts to brand antiracism as the new racism. Colorblindness, albeit a creature of the Right, has captured the Left. If left unaddressed, this phenomenon will continue to impede, and could imperil, the long and winding quest for racial justice in America.