

## Puzzling through *SFFA*: The Roberts Court, Affirmative Action, and the Backstopping of Minority Rule

*Students for Fair Admissions v. Harvard* (2023) is widely and rightly recognized as a landmark Supreme Court decision. This ruling on the future of race-conscious affirmative action in higher education has sparked jubilation and lamentation in equal measure. But it also presents a series of political, legal, and sociological puzzles that have yet to receive the close attention they deserve.

One of the most striking of these puzzles is the convoluted and strained quality of *SFFA*'s legal reasoning. It was conceivable that the Roberts Court could have ruled in a narrow way, striking down the Harvard and the University of North Carolina programs for violating the narrow-tailoring prong of strict scrutiny. It was also conceivable that the Court could have ruled in a broad way, invoking originalism and explicitly overturning its existing precedent, the 2003 *Grutter* case, in a manner reminiscent of *Dobbs* (2022). Tapping himself to author *SFFA*, Chief Justice John Roberts instead formulated a head-scratching, quadripartite set of novel factors that he claimed the schools were constitutionally obliged to satisfy. The factors were tortuously derived from a selective reading of precedent, and it was unclear whether they should supplant or supplement *Grutter*. But these flaws did nothing to deter Roberts from finding both that both Harvard and UNC were wanting on all four factors. Why did Roberts take such a peculiar tack when more straightforward options were readily available?

A second puzzle presented by the *SFFA* cases is the curious way that Asian Americans were involved in the litigation. Much of the rhetoric around the lawsuits focused on the unfair treatment of Asian Americans in elite college admissions. Yet the lawsuit did not bear the name of an individual plaintiff, a real person who had taken to the courts to assert their constitutional rights, as had every other major lawsuit involving affirmative action and university admissions. Instead, it bore the name of the conservative 501(c)(3) legal organization Students for Fair Admissions. To be sure, Asian Americans were involved in the legal campaign against affirmative action at various levels, but they were less leaders than followers, and their presence was more apparent than real. The phantasmagorical quality of Asian American involvement was never more unmistakable than the day the Court announced the *SFFA* decision, when a Berkeley undergraduate named Calvin Yang stepped up to a podium at *SFFA*'s exultant presser to speak on behalf Asian Americans. The only problem was that Yang was not American; he was Canadian. How did Asian Americans come into the legal picture, and why did they play such a paradoxical role?

A third puzzle presented by the *SFFA* decision concerns how it fits into the broader conversation about the travails of American democracy in our time. A legion of commentators and scholars, led in good measure by Steven Levitsky and Daniel Ziblatt, have explained how a variety of defects in our political institutions have contributed decisively to democratic backsliding in the United States and raised the specter of minority rule. But how *SFFA* should be interpreted in light of these trends is not altogether obvious. After all, how much public support there has been for affirmative action has never been easy to discern. Along with other recent decisions since Justice Amy Coney Barrett's

installation and the rise of a conservative supermajority, can *SFFA* be read to suggest that the Court is abandoning its counter-majoritarian role as a protector of unpopular minorities (which is a role of relatively recent vintage) and returning instead a much older role as a backstop of minority rule?

This paper grapples with these three interrelated puzzles, drawing on a close reading of the trial record in district court, appellate rulings, the Supreme Court's *SFFA* opinions, and relevant precedent; political reporting in a range of newspapers and periodicals; and selected secondary sources in political science and the legal academy.

Building on the work of Steve Teles, Amanda Hollis-Brusky, and many others, this paper argues that the throughline that ties together all three puzzles is the multi-faceted, decades-long, top-down activism of the conservative legal movement. That movement has been spectacularly successful in engineering conservative legal change over the years—not only by transforming the ideological composition of the federal judiciary but also by initiating original litigation. The conservative legal movement has sought not only to facilitate the supply of conservative legal change (by encouraging the appointment of conservative judges) but also to stimulate and channel the demand for conservative legal change (by identifying the right litigants, connecting them with the right attorneys, and covering the lion's share of legal costs, including as many appeals as it takes to get a favorable ruling). But it is important to note that the movement has not achieved a total victory at every level, and there are limits to its influence. While movement conservatives now form a supermajority on the Supreme Court, lower levels of the federal judiciary are far more ideologically divided—and not without consequence for many aspects of our political and constitutional development.

This paper argues that the key to understanding *SFFA*'s trio of puzzles lies in recognizing that it is fully and completely a creature of the conservative legal movement and the legal and judicial landscape that it has shaped over the years.

*SFFA* was nothing if not a project of the conservative legal movement, but the opinion was so bafflingly reasoned because the movement had not succeeded in completely capturing the lower courts, whose decisions gave Roberts very little work with. Bench trials were held in both cases, and the presiding judges were both Obama appointees. The judge in the Harvard case did not find evidence of any kind that Asian Americans had been discriminated against. Nor did she find evidence that Harvard had failed to consider race as a non-mechanical "plus factor" or that it had overlooked serviceable, race-neutral alternatives. The judge in the UNC case made findings that were similarly adverse to *SFFA*. In the wake of the *Dobbs* debacle, Roberts wanted to show the conservative supermajority that it was possible to overrule precedent without tearing it "down to the studs" (as he noted). But the lower courts left him very little to finesse, and so he was forced to come up with a list of four factors that had only the most meager warrant in precedent or the trial record. Roberts had hoped to show restraint, but he had been given little choice but to overreach.

When it came to the involvement of Asian Americans, there was less of it in *SFFA* than met the eye because the lawsuits against Harvard and UC were not initially driven by a bottom-up groundswell of outrage in the Asian American community. The lawsuits instead followed a top-down process led by a legal activist named Edward Blum, one of the most dogged and skilled exponents of the conservative legal movement. It was Blum who had organized SFFA in the wake of earlier Supreme Court rulings on affirmative action's constitutionality at the University of Texas; *Fisher I* (2013) and *Fisher II* (2016) did not go the way he had hoped. It was Blum who realized that he "needed Asian plaintiffs" to generate a different result. It was Blum who found conservative attorneys to take on the case. It was Blum who raised the financing that enabled SFFA to repeatedly appeal one adverse decision after another. And it was Blum who introduced Calvin Yang at SFFA's celebratory press conference in 2023. Asian Americans did not appear at the forefront of the legal assault on affirmative action because dozens of Asian Americans were chomping at the bit to take their individual cases to court. They took on a leading role because they were the most ideologically appealing plaintiffs in the estimation of the conservative legal movement. Asian Americans were the model minority *par excellence*, and they were the perfect vehicle for the delegitimizing message that the movement wanted to craft and broadcast: If applicants of their unquestioned caliber were getting treated unfairly by the system, something must be wrong with the system.

Lastly, considering *SFFA* in the developmental arc of the conservative legal movement and the context of the Court's recent rulings it seems clear that the Court is continuing to leave behind the ideas about majoritarianism and counter-majoritarianism that it had embraced since the mid-twentieth century. It was not too long ago that the Court saw itself in certain contexts as the constitutional guarantor of minority rights against the tyranny of the majority. Consider cases involving rights to free speech, religion, privacy, and equal protection such as *Barnette* (1943), *Roe* (1973) and *Casey* (1992), and more recently *Obergefell* (2015). A key thread running through these and other cases was the Court's conviction that it was playing its rightful constitutional role in the American democratic system when it placed "some issues off limits to majority rule," in the crisp phrasing of the liberal trio dissenting in *Dobbs*. That vision was already beginning to fade during the initial decade of the Roberts Court, but it did so with increasing speed after Coney Barrett's arrival and the rise of a conservative supermajority.

We argue that *SFFA* exemplifies a crucial aspect of the Roberts Court's impulses around legal and constitutional interpretation.

The Court's fair-weather majoritarianism is perhaps its most readily observable interpretative tendency. When there are majoritarian policies that embody policy preferences the Court shares, it seems only too glad to legitimate them, as it did in *Dobbs* (2022). But when the Court encounters majoritarian policies that do not accord with its own policy preferences, it seems inclined to find ways to arrive at the policy results it prefers, no matter how distorted or unavailing its interpretations might be. This could involve momentarily setting aside its professed fidelity to textualism, as in *West Virginia v. EPA* (2022); or it could involve a clearly overbroad application of originalism, as in *Bruen* (2022); or it could involve the obvious attempt to shield discriminatory behavior behind

the imputed protections of the Free Speech Clause of the First Amendment, as in *303 Creative* (2023).

What a case like *SFFA* illustrates in our view is another way the Court tends to operate as a backstop; namely, how it operates in cases where there are no clear majorities for the Court to legitimate or circumvent. Here too the Court is content to advance problematic interpretations that strip away previously established protections from disfavored minorities, insofar as the results fit with the preferences of the conservative supermajority. In two earlier cases, first in *Bakke* (1978) and then again in *Grutter* (2003), two ideologically distinct incarnations of the Court saw fit to defend the freedom of academic institutions to achieve goals that they saw as paramount to fulfilling their mission, whatever the vicissitudes of public sentiment. On this rationale, it twice defended the discretion of colleges and universities to decide for themselves who should be admitted and under what criteria. *SFFA* jettisoned these constitutional protections in a less than satisfactory manner. As Justice Sonia Sotomayor perceptively observed in her dissent, *SFFA* simply “moves the goalposts” to achieve a *de facto* invalidation of *Grutter* without making the “extraordinary showing required by *stare decisis*.” No wonder Justice Thomas asserted in his concurrence that “*Grutter* is, for all intents and purposes, overruled.” In realizing this result in this manner, *SFFA* symbolizes a distinctive way—beyond fair-weather majoritarianism—in which the conservative supermajority on the Roberts Court is operating at this moment in American democracy.

If there once was a period when the Supreme Court saw itself as protecting marginalized and unpopular minorities against maltreatment by the majority, *SFFA* and other recent cases clearly suggest that it is now functioning as a backstop to rule by an ideologically extreme and politically powerful conservative minority—one that privileges deeply conservative ideas about gender, sexuality, family, religion, race, capital, and gun ownership.

[NOTE: This abstract is based on the final chapter and epilogue of our book manuscript on the origins and political development of race-conscious affirmative action in higher education]