

Friends of the Court? Advocacy Groups as Amici in *Students for Fair Admissions*

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Executive Summary

In June, the U.S. Supreme Court brought to a close the country's decades-long experiment in affirmative action in a pair of closely watched cases—*Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*—and overturned the use of racial preferences in higher-education admissions. The [ruling](#) found that both Harvard's and UNC's programs violate the Equal Protection Clause because they “unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.” Ultimately, the Court struck down affirmative action because “eliminating racial discrimination means eliminating all of it.”

In previous cases concerning race-conscious admissions, the Court relied on amicus briefs to inform its decision. Therefore, it is important to analyze the authors of amicus briefs and how they had hoped to influence the Court this time.

About Us

The Manhattan Institute is a think tank whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

While almost two-thirds of Americans oppose the use of an applicant's race or ethnicity as a factor in the college admissions process, it is notable that 83.5% of the advocacy groups that were amici in *Students for Fair Admissions* lobbied in support of racial preferences. This is likely because many of these advocacy groups receive some form of support from foundations and corporations and are operated by staff that tend to be left-wing. A wide gap exists, then, between public opinion on racial preferences and the opinion of most advocacy groups and elites. With its overturning of racial preferences, the Supreme Court affirmed conventional public opinion. Most of the amicus briefs submitted in these landmark cases did not reflect ordinary Americans' views, which begs the question: Is the Court being misled about public opinion by advocacy groups in other policy areas, too?



Introduction

On October 31, 2022, the Supreme Court heard oral arguments in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, companion cases that question the legality of race-conscious admissions.¹ The justices released their decision in these cases in late June 2023, overturning the use of racial preferences in university admissions.

Opponents of this decision, including those who support this policy or who assume that affirmative action is an unalloyed good, are likely to argue that *Students for Fair Admissions* runs counter to Americans' interests. Such was the line of argument used in response to the Court's decision in *Dobbs v. Jackson Women's Health Organization*, another high-profile case, in which the justices overturned *Roe v. Wade*.

The difference between *Dobbs* and *Students for Fair Admissions* is that while public opinion on abortion varies considerably, the same cannot be said of public opinion on racial preferences. Polling from the last several decades shows that Americans unequivocally oppose race-conscious admissions. A Supreme Court strike-down of Harvard's and UNC's race-conscious admissions programs is in line with the American public's view on this issue.

Yet most of the advocacy groups that are amici in *Students for Fair Admissions* filed briefs in support of racial preferences. Advocacy groups arose in the late twentieth century to more directly incorporate the views of ordinary Americans into politics and the policymaking process.² One of the main ways in which these groups have done so has been through the submission of amicus briefs, which have been shown to influence the Court's decisions.³ But in the instance of race-conscious admissions, advocacy groups appear to undermine the political and policy preferences of most Americans.

An analysis of the amicus briefs filed in *Students for Fair Admissions* reveals that a substantial gap exists between public opinion on racial preferences and the opinion of most advocacy groups. While only 31% of Americans believe that an applicant's race or ethnicity should be an "extremely/very" or "somewhat important" factor in college admissions,⁴ 83.5% of the advocacy groups that filed an amicus brief did so in defense of Harvard's and UNC's race-conscious admissions programs. This gap is even more pronounced for those amici who claim to represent the interests of Asian Americans specifically, the racial group at the center of *Students for Fair Admissions* and the larger debate over race-conscious admissions today. Recent polls show that 63%–76% of Asian Americans oppose the use of racial preferences in higher-education admissions—a policy that penalizes them⁵—but 91.7% of the Asian advocacy groups that filed an amicus brief in *Students for Fair Admissions* did so in support of this policy.

Judges and policymakers who are involved in the debate over racial preferences in higher education and beyond should be made aware that the interests of most advocacy groups active in this policy area are opposed to the interests of ordinary Americans. Notably, many advocacy groups that submitted briefs in support of Harvard and UNC are professional advocacy organizations; those that did so in support of the petitioner, Students for Fair Admissions, include several grassroots coalitions made up of parents and immigrants. These latter groups better represent the view of the American public on this issue.



The Amicus Curiae Brief

An amicus curiae or “friend of the court” brief is a legal brief filed by an individual or a group that is not a party in a case but has a strong interest in the outcome. Amici (“friends”) use their briefs to offer expertise, insight, and additional information to the court with the hope of influencing its decision.

In the five cases in which the Supreme Court has already ruled on the legality of race-conscious admissions, more than 350 amicus briefs were filed.⁶ In *Students for Fair Admissions* alone, amici filed 93 briefs.⁷ This is in stark contrast to earlier decades, when the practice was nowhere near as common. Amici, for example, averaged only one brief per case in the 1950s and only five briefs per case in the 1990s.⁸

So what changed? Advocacy groups, which are behind a high percentage of amicus briefs, became key players in American politics, particularly in the context of controversial social policies like race-conscious admissions. As law professors Allison Orr Larsen and Neil Devins have noted: “The ‘friends’ responsible for amicus briefs are motivated interest groups that want to urge their policy positions on the justices much like [the way] they lobby Congress.” Accordingly, “Now everyone sees the amicus brief as the arm of an activist: ‘No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and, most recently, the vindicator of the politically powerless.’”⁹

The Supreme Court’s decisions in 1978’s *Regents of the University of California v. Bakke* and 2003’s *Grutter v. Bollinger*—two landmark cases concerning race-conscious admissions—are illustrative of the impact that amicus briefs can have.

Bakke was the first case in which the Court considered whether the use of race as a factor in higher-education admissions violates the Constitution and federal civil rights law. The institution at issue in this case, the University of California–Davis medical school, had created a special admissions program designed to guarantee the admission of at least 16 black, “Chicano,” Asian, and “American Indian” students. While applicants from these four minority groups could compete for any of the 100 available seats in the medical school’s entering class, applicants who were of an unpreferred race—such as plaintiff Allan Bakke, a white male—could compete for only one of 84 seats, as 16 seats were reserved for applicants who were of one of the preferred races.¹⁰

A majority of the justices voted to strike down this special admissions program, contending that it constituted a racial quota violative of the Fourteenth Amendment’s Equal Protection Clause. Yet in doing so, the Court did not proscribe institutions of higher education from considering an applicant’s race in the admissions process entirely. Justice Lewis Powell, in a plurality opinion, held that while race-based, “set aside” programs like that of the University of California–Davis medical school are illegal, admissions officials’ use of race as “one factor among many” in determining which applicants to admit is permissible. Powell attempted to rationalize this holding by arguing that institutions of higher education have a “compelling interest” in “the educational benefits that flow from an ethnically diverse student body.”¹¹

The late justice was successful. Not only have most universities in the U.S. embraced racial and ethnic diversity as the preeminent rationale for race-conscious admissions, but the concept also gave rise to the broader Diversity, Equity, and Inclusion movement that today dominates higher education and much of corporate America. Powell appeared to have anticipated the influence that his *Bakke* opinion would have: when asked, after stepping down from the Court in 1987, which was his most important opinion, he said, “*Bakke*.”¹²



But Powell did not come up with the “diversity rationale” for race-conscious admissions himself. Rather, as a 2018 paper by University of California–Berkeley law professor David Oppenheimer revealed, Powell got the idea from an amicus brief filed in a race-conscious admissions case four years before *Bakke*. (That case, *DeFunis v. Odegaard*, was deemed moot.) The brief, penned by former U.S. Solicitor General and Watergate Special Prosecutor Archibald Cox on behalf of Harvard College, included the following lines:

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions....

In recent years, Harvard has expanded the concept of diversity to include students from disadvantaged economic and racial and ethnic backgrounds....

In practice, this new definition of diversity has meant that race has been a factor in some admissions decisions.¹³

The justification for racial preferences in higher education can arguably, therefore, be attributed to a single amicus brief.

That justification was sustained 25 years later in *Grutter*, a case in which the Court upheld the University of Michigan Law School’s race-conscious admissions program.¹⁴ This particular outcome can be attributed also to the amicus briefs filed by military leaders, corporations, and advocacy groups in defense of racial preferences. “Justice O’Connor,” Larsen and Devins write, “cited these briefs in her opinion for the Court, referenced them in her oral bench statement when the decision was announced, and mentioned one of them repeatedly in oral argument as the ‘Carter Phillips brief,’ apparently referring to the lawyer who drafted it.”¹⁵

As the outcomes of *Bakke* and *Grutter* show, amicus briefs—and the people and organizations who file them—have the power to shape our nation’s jurisprudence.

Advocacy Groups as Amici in *Students for Fair Admissions*

Advocacy groups were responsible for 23 of the 93 amicus briefs filed in *Students for Fair Admissions*, or roughly 24.7% of all amicus briefs.¹⁶ The remaining amicus briefs were submitted by professional associations, military leaders, elected officials, institutions of higher education, state governments, the federal government, corporations, university administrators and faculty, academics, think tanks, and student and alumni organizations at various universities.¹⁷ **Table 1** lists every advocacy group that filed an amicus brief in the case, as well as whether the group did so in support of, or in opposition to, race-conscious admissions.¹⁸ (Advocacy groups that filed amicus briefs in support of neither *Students for Fair Admissions* nor Harvard and UNC are excluded.)



Table 1

Advocacy Groups in *Students for Fair Admissions*

In Support of Race-Conscious Admissions (Harvard and UNC)	In Opposition to Race-Conscious Admissions (Students for Fair Admissions)
<p>Human Rights Advocates Human Rights First The Anti-Defamation League ACCEPT, Inc. Equal Justice Society Equal Rights Advocates Hmong Innovating Politics National Center for Fair and Open Testing National Women’s Law Center Athlete Ally Center for Reproductive Rights Family Equality GLBTQ Legal Advocates and Defenders Human Rights Campaign If/When/How: Lawyering for Reproductive Justice KWH Law Center for Social Justice and Change LAMBDA Legal Defense and Education Fund, Inc. League of Women Voters Legal Aid at Work Legal Momentum, the Women’s Legal Defense and Education Fund Minority Veterans of America NARAL Pro-Choice America National Center for Lesbian Rights The National Coalition on Black Civic Participation National LGBTQ Task Force National Organization for Women People for the American Way Reproaction Shriver Center for Poverty and Law Southern Poverty Law Center Southwest Women’s Law Center Tom Homann LGBTQ+ Law Center The Center for Constitutional Rights The Leadership Conference on Civil and Human Rights The Women’s Law Center of Maryland Women Employed Women Lawyers on Guard, Inc. Women’s Law Project Hispanic Federation, Inc. Latino Justice PRLDEF League of United Latin American Citizens MANA, A National Latina Organization Massachusetts Advocates for Children Massachusetts Law Reform Institute New York Communities for Change Parents Leading for Educational Equity</p>	<p>The Liberty Justice Center Southeastern Legal Foundation Louis D. Brandeis Center for Human Rights Pacific Legal Foundation Speech First Judicial Watch Hamilton Lincoln Law Institute Veterans for Fairness and Merit The American Center for Law and Justice Foundation Against Intolerance and Racism Freedom X Silicon Valley Chinese Association Asian American Coalition for Education Asian American Legal Foundation Chinese American Citizens Alliance of Greater New York Committee for Justice Coalition for TJ The Californians for Equal Rights Foundation Parents Defending Education</p>



<p>American Civil Liberties Union of Massachusetts American Civil Liberties Union of North Carolina Legal Foundation Multicultural Media, Telecom, and Internet Council, Inc. New Jersey Alliance for Immigrant Justice Asian Americans Advancing Justice Asian American Federation of Florida—South Region Asian Americans United Baltimore Asian Resistance in Solidarity Center for the Pacific Asian Family Colorado Asian Pacific United HANA Center Japanese American Citizens League MinKwon Center for Community Action National Tongan American Association North Carolina Asian Americans Together OCA—Asian American Pacific Advocates OCA—South Florida Chapter Rising Voices South Asian Network Thomas Jefferson Alliance for Racial Justice VAYLA New Orleans Asian American Legal Defense and Education Fund 18 Million Rising Asian American Federation Asian American Resource Workshop Chinese for Affirmative Action Chinese Progressive Association—Boston Desis Rising Up and Moving GAPIMNY—Empowering Queer and Trans Asian Pacific Islanders Greater Malden Asian American Community Coalition Leadership Education for Asian Pacifics Mekong NYC National Coalition for Asian Pacific American Community Development National Korean American Service and Education Consortium National Queer Asian Pacific Islander Alliance OCA Asian Pacific American Advocates of Greater Seattle OCA Asian Pacific Islander American Advocates Utah Chapter OCA Greater Chicago OCA Greater Houston Providence Youth Student Movement South Asian Americans Leading Together Southeast Asian Resource Action Center Southeast Asian Defense Project Southeast Asian Freedom Network VietLead Vietnam Agent Orange Relief and Responsibility Campaign Coalition for Asian American Children and Families</p>	
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Friends of the Court? Advocacy Groups as Amici in *Students for Fair Admissions*

In *Students for Fair Admissions*, 115 advocacy groups either filed themselves or joined onto an amicus brief. Of these 115 groups, 96 lobbied in favor of race-conscious admissions, meaning in support of defendants Harvard and UNC, while 19 lobbied on the winning side, against race-conscious admissions, or in support of the plaintiff Students for Fair Admissions.

Table 2 lists which of these 115 advocacy groups represent Asian Americans specifically, as Asian American students and their families are responsible for the lawsuits against Harvard and UNC. There are 48 such groups.



Table 2

Asian American Advocacy Groups in *Students for Fair Admissions*

In Support of Race-Conscious Admissions (Harvard and UNC)	In Opposition to Race-Conscious Admissions (Students for Fair Admissions)
<p>Hmong Innovating Politics Asian Americans Advancing Justice Asian American Federation of Florida—South Region Asian Americans United Asian Pacific Community in Action Baltimore Asian Resistance in Solidarity Center for the Pacific Asian Family Colorado Asian Pacific United HANA Center Japanese American Citizens League MinKwon Center for Community Action National Tongan American Association North Carolina Asian Americans Together OCA—Asian American Pacific Advocates OCA—South Florida Chapter Rising Voices South Asian Network VAYLA New Orleans Asian American Legal Defense and Education Fund 18 Million Rising Asian American Federation Asian American Resource Workshop Chinese for Affirmative Action Chinese Progressive Association—Boston Desis Rising Up and Moving GAPIMNY—Empowering Queer and Trans Asian Pacific Islanders Greater Malden Asian American Community Coalition Japanese American Citizens League Philadelphia Chapter Leadership Education for Asian Pacifics Mekong NYC National Coalition for Asian Pacific American Community Development National Korean American Service and Education Consortium National Queer Asian Pacific Islander Alliance OCA Asian Pacific American Advocates of Greater Seattle OCA Asian Pacific Islander American Advocates Utah Chapter OCA Greater Chicago OCA Greater Houston South Asian Americans Leading Together Southeast Asian Resource Action Center Southeast Asian Defense Project Southeast Asian Freedom Network VietLead Vietnam Agent Orange Relief and Responsibility Campaign Coalition for Asian American Children and Families</p>	<p>Silicon Valley Chinese Association Asian American Coalition for Education Asian American Legal Foundation Chinese American Citizens Alliance of Greater New York</p>



Of the 48 Asian advocacy groups that filed an amicus brief in *Students for Fair Admissions*, 44 did so in support of race-conscious admissions, while only four did so in opposition to this policy. An analysis of these findings and their implications for American politics and the policymaking process will be provided in the next two sections.

Public Opinion vs. Advocacy Group Opinion

In a *New York Times* op-ed published shortly after the Court decided *Grutter*, journalist Linda Greenhouse argued that the outcome of the case was in line with the “broad societal consensus in favor of affirmative action in higher education, as reflected in an outpouring of briefs on Michigan’s behalf from many of the country’s most prominent institutions.”

“Justice O’Connor observed in her opinion,” Greenhouse wrote, “that ‘context matters when reviewing race-based governmental action under the Equal Protection Clause.’ The context provided in the briefs by Fortune 500 companies, senior military officers, and colleges and universities big and small, public and private, quite clearly won the day for Michigan.”¹⁹

The “context” of which Greenhouse writes, however, is misleading. Public-opinion polling on race-conscious admissions reveals that while there might be a consensus in favor of this policy among Fortune 500 companies, senior military officers, and colleges and universities—in short, American elites—the opposite is true for the general public. Ordinary Americans have opposed the use of racial preferences in higher-education admissions since the policy’s inception, as shown in **Table 3**.

Table 3

Public Opinion on Racial Preferences in College Admissions, 1969–2020

Poll Sponsor	Poll Date	Poll Question	Poll Results
<i>Newsweek</i>	May 1969	Some people feel that what Negroes should be asking for is the same chance as whites when it comes to such things as getting jobs and being admitted to college. Others say that to make up for past treatment, Negroes should get preference over whites in such things. What is your opinion?	85% Same chance as whites 10% Preference over whites
Gallup	March 1977	Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel on this matter?	83% Ability should be the only consideration 10% Women, minorities should be given preference
Gallup	October 1977	Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel on this matter?	81% Ability should be the only consideration 11% Women, minorities should be given preference



Friends of the Court? Advocacy Groups as Amici in *Students for Fair Admissions*

Poll Sponsor	Poll Date	Poll Question	Poll Results
Gallup	December 1980	Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel on this matter?	84% Ability should be the only consideration 10% Women, minorities should be given preference
Media General; Associated Press	June 1988	Do you think blacks and other minorities should receive preference in college admissions to make up for past inequalities, or not?	76% No 18% Yes
ABC News; Washington Post	May–June 1991	Do you think blacks and other minorities should receive preferences in college admissions to make up for past inequalities?	76% No 22% Yes
Gallup	November 1991	As I read each proposal, please tell me whether you would favor or oppose it. Giving blacks preferences over equally qualified whites in such matters as getting into college or getting jobs because of past discrimination against blacks.	76% Oppose 20% Favor
Family Circle	May 1992	In order to help disadvantaged students get a college education, many colleges give preference to minority students in admissions. Some white students feel this is unfair to them. Do you think it is right or wrong for colleges to have admission policies that favor minorities?	68% Wrong; unfair 24% Right; fair
Newsweek	March 1993	Do you believe that, because of past discrimination against black people, qualified blacks should receive preference over equally qualified whites in such matters as getting into college or getting jobs, or not?	77% No, should not 20% Yes, should
Los Angeles Times	June 1993	Because of past discrimination, should qualified blacks receive preference over equally qualified whites in such matters as getting into college or getting jobs?	78% No preference 17% Preference
Los Angeles Times	March 1995	Because of past discrimination, should qualified blacks receive preference over equally qualified whites in such matters as getting into college or getting jobs?	72% No preference 22% Preference
ABC News; Washington Post	March 1995	Do you think blacks and other minorities should receive preference in things like hiring, promotions, and college admissions to make up for past discrimination, or not?	75% No 24% Yes
Newsweek	March 1995	Do you believe that, because of past discrimination against black people, qualified blacks should receive preference over equally qualified whites in such matters as getting into college or getting jobs, or not?	75% Should not 19% Should



Friends of the Court? Advocacy Groups as Amici in *Students for Fair Admissions*

Poll Sponsor	Poll Date	Poll Question	Poll Results
ABC News; <i>Washington Post</i>	June 1997	Do you think blacks and other minorities should receive preference in college admissions to make up for past inequalities, or not?	73% No 24% Yes
ABC News; <i>Washington Post</i>	January 2001	Do you support or oppose government and private programs that give women, blacks, and other minorities preference over white men getting into college, getting a job, or getting a promotion?	69% Oppose 28% Support
<i>Time Magazine</i> ; CNN	January 2003	Do you approve or disapprove of affirmative action admissions programs at colleges and law schools that give racial preferences to minority applicants?	54% Disapprove 39% Approve
ABC News; <i>Washington Post</i>	January 2003	Do you support or oppose government and private programs that give women, blacks, and other minorities preference over white men getting into college, getting a job, or getting a promotion?	66% Oppose 30% Support
<i>Time Magazine</i> ; CNN	February 2003	Do you approve or disapprove of affirmative action admissions programs at colleges and law schools that give racial preferences to minority applicants?	49% Disapprove 39% Approve
Associated Press	February– March 2003	Do you think affirmative action programs that provide advantages or preferences for blacks, Hispanics, and other minorities in hiring, promoting, and college admissions should be continued, or do you think these affirmative action programs should be abolished?	35% Should be abolished 53% Should be continued
Quinnipiac	May–June 2009	Do you think affirmative action programs that give preferences to blacks and other minorities in hiring, promotions, college admissions should be continued, or do you think these affirmative action programs should be abolished?	55% Abolished 36% Continued
Georgetown University, Berkley Center for Religion, Peace, and World Affairs	August– September 2012	Do you think blacks and other minorities should receive preference in college admissions to make up for past inequalities, or not?	69% Oppose 19% Favor
Public Religion Research Institute	May 2013	Do you think blacks and other minorities should receive preference in college admissions to make up for past inequalities, or not?	64% No, should not 29% Yes, should
CNN	June 2013	Do you approve or disapprove of affirmative action admissions programs at colleges and law schools that give racial preferences to minority applicants?	68% Disapprove 29% Approve
Survey Center on American Life	July–August 2020	How much do you favor or oppose the following? Giving blacks and other minorities preference in college admissions to make up for past inequalities.	61% Oppose 38% Favor

Source: Author's analysis of Roper Center for Public Opinion Research polls

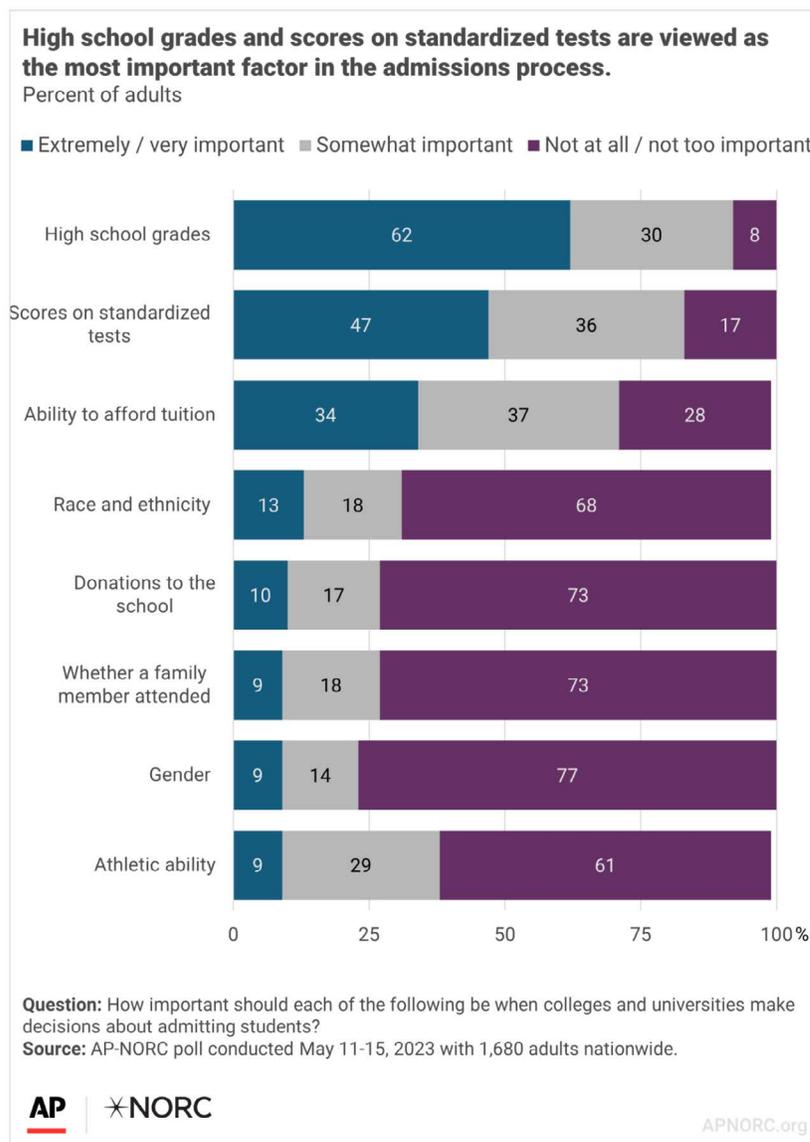


With the exceptions of a February 2003 *Time* magazine and CNN poll (in which a plurality, 49%, of Americans said that they disapproved of racial preferences in college admissions) and a February–March 2003 Associated Press poll (in which 53% of Americans said that racial preferences in college admissions should be continued), polls from the last several decades show that Americans have long opposed this policy.²⁰

And the results of a May 2023 poll from the Associated Press and NORC at the University of Chicago (**Figure 1** screenshot) suggest that the American public continues to oppose race-conscious admissions today.²¹

Figure 1

AP-NORC Poll: “How Important Should Each of the Following Be When Colleges and Universities Make Decisions About Admitting Students?”



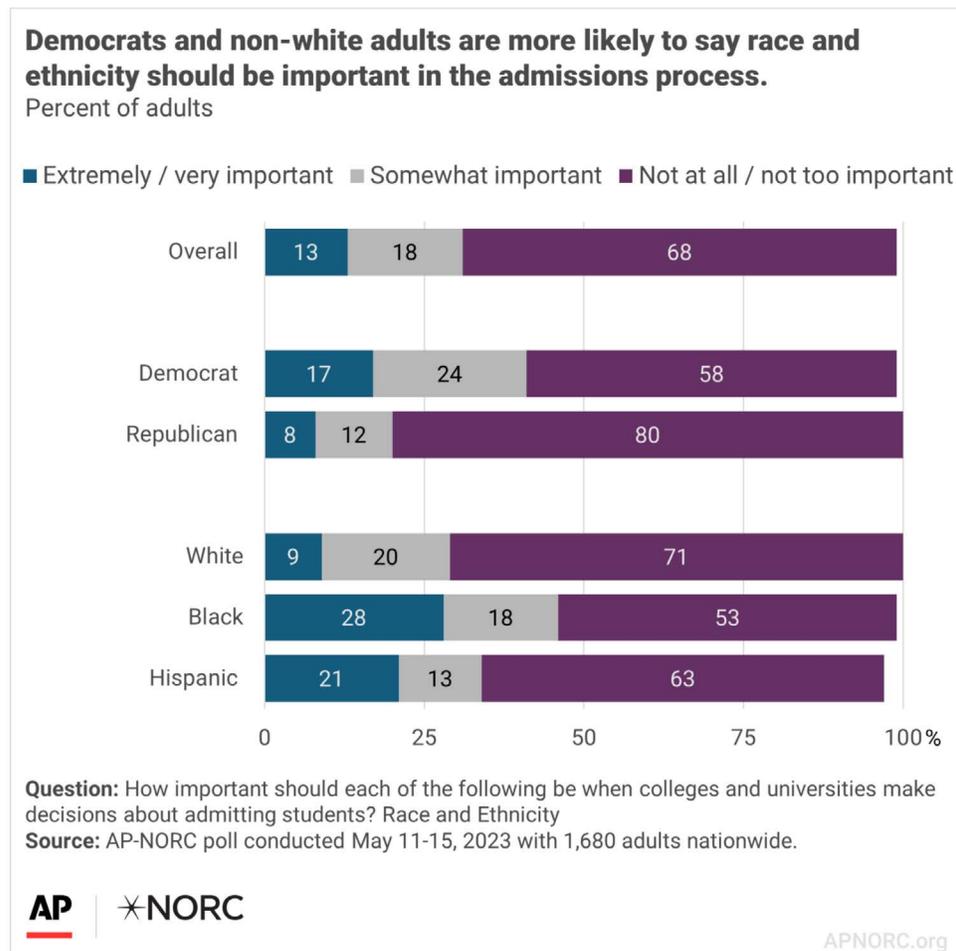


According to the AP-NORC poll, 68% of Americans believe that an applicant’s race or ethnicity should be “not at all” or “not too important” in the college admissions process. This includes a majority of black (53%) and Hispanic (63%) respondents, who are the primary beneficiaries of racial preferences in admissions, and a majority of Democrats (58%), as displayed in the **Figure 2** screenshot.

By contrast, Americans view high school grades and standardized test scores, which are measures of academic merit, as most relevant in deciding whether a student should be admitted to a college or university.²²

Figure 2

AP-NORC Poll: “How Important Should Race and Ethnicity Be When Colleges and Universities Make Decisions About Admitting Students?”



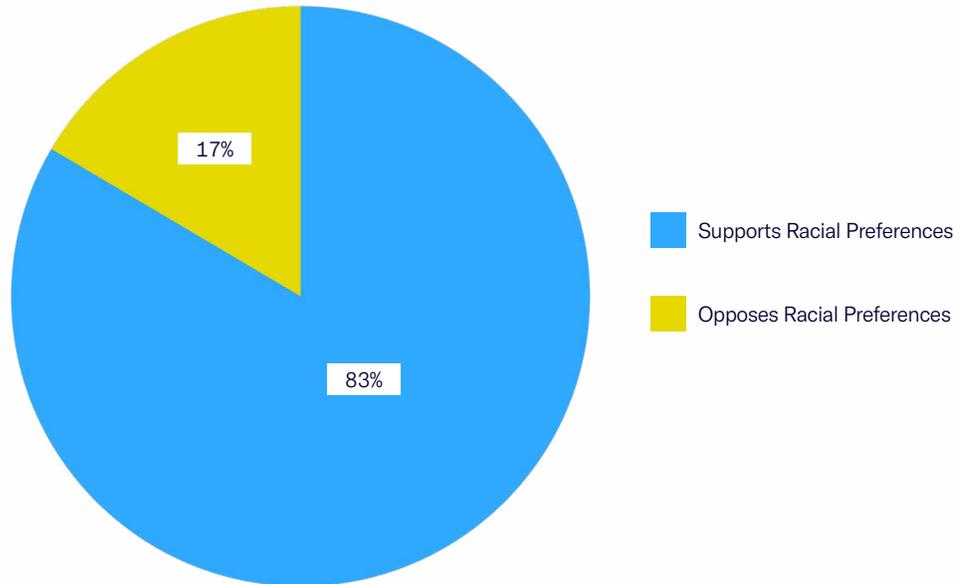


Contrary to what Greenhouse posited in her 2003 *New York Times* op-ed, the submission of more amicus briefs on one side of a case than the other is not necessarily indicative of a “broad societal consensus” on the policy at issue. In fact, when it comes to racial preferences in higher-education admissions, the opposite appears to be true. For example, in the cases against Harvard and UNC, the party that had fewer advocacy groups as amici—plaintiff *Students for Fair Admissions*—was *more* reflective of American public opinion.

A total of 83.5% of the advocacy groups that were amici in this case (96 out of 115) submitted briefs in support of racial preferences, while 16.5% (19 out of 115) did so in opposition to this policy (**Figure 3**). Yet according to AP-NORC’s May 2023 poll, 68% of Americans oppose the use of race or ethnicity—calling it “not at all important” or “not too important”—as a factor in the college admissions process (**Figure 4**). Thus, fewer than one in five advocacy groups that were amici in *Students for Fair Admissions* represented the view of more than three in five Americans to the Court.

Figure 3

Amici Advocacy Groups in *Students for Fair Admissions*

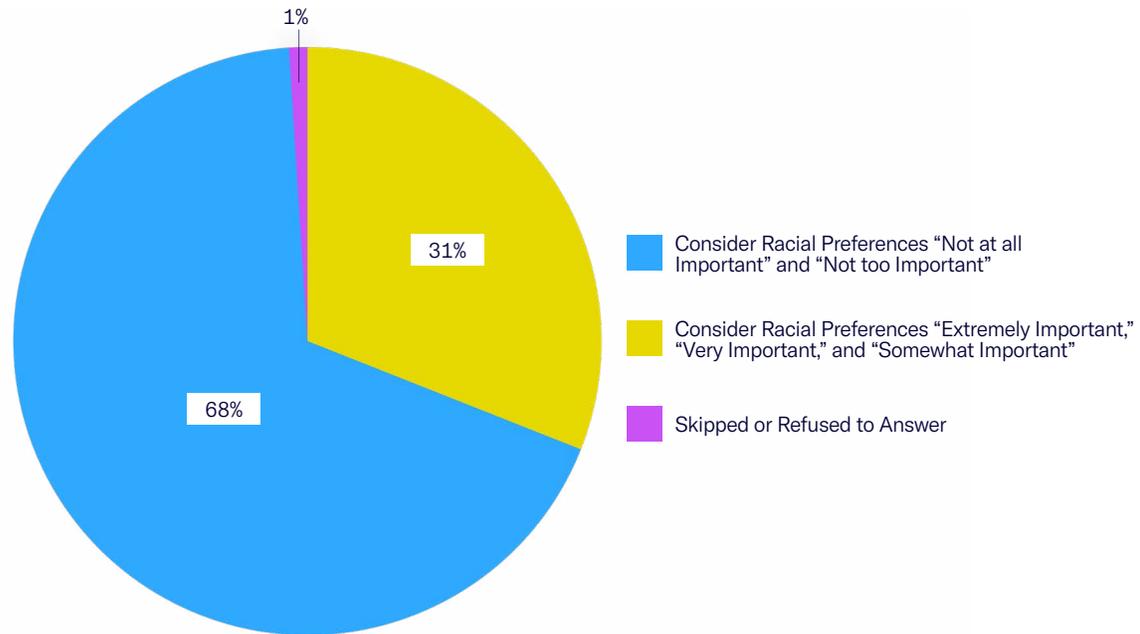


Source: Author’s analysis of amicus briefs



Figure 4

Public Opinion on Race-Conscious Admissions



Source: AP-NORC poll, May 2023

Because the central accusation made against Harvard and UNC is that their race-conscious admissions policies penalize Asian American applicants in violation of Title VI and the Equal Protection Clause, almost half of all the advocacy groups that were amici in this case claimed to represent the interests of Asian Americans specifically. For this reason, one might expect there to have been more amicus briefs submitted by Asian American advocacy groups on behalf of *Students for Fair Admissions* than on behalf of Harvard and UNC; however, this is not the case.

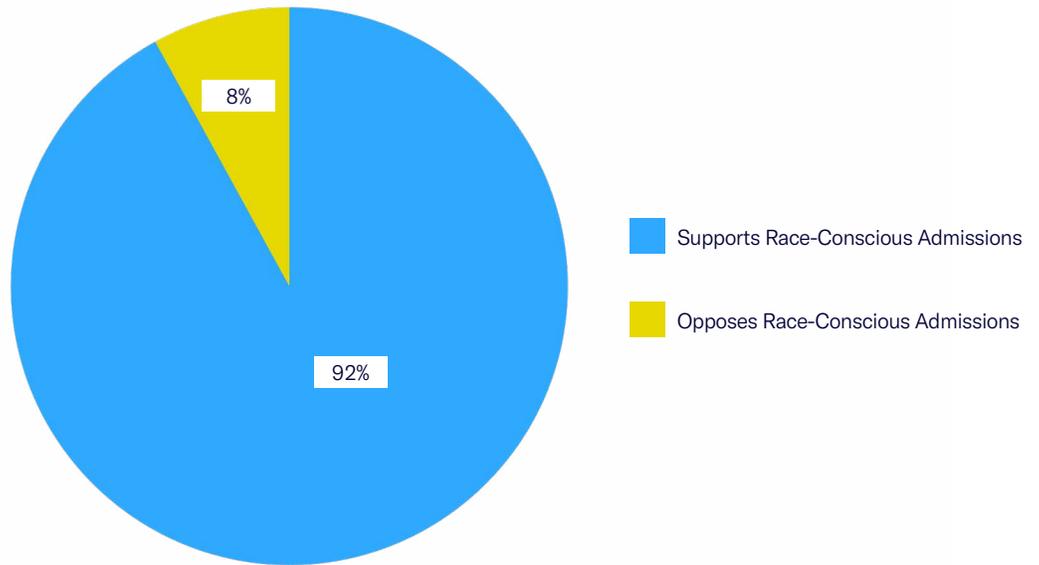
Of Asian American advocacy groups that were amici in *Students for Fair Admissions*, 91.7% filed a brief in support of racial preferences, while 8.3% did so in opposition (**Figure 5**). This is despite the fact that 63% of Asian Americans said that "race or ethnicity" should "not" be a factor in college admissions decisions in a March 2022 poll from Pew Research Center (**Figure 6**).²³ By contrast, 27% said that it should be a minor factor; 10% said that it should be a major factor in college admissions. Notably, this poll was conducted after the October 2018 Harvard trial revealed evidence of the substantial discrimination that Asian American students face in college admissions, as a result of racial preferences.²⁴

In June 2023, days before the Supreme Court issued its opinion in the *Students for Fair Admissions* case, Pew Research Center released another poll on Asian American preferences (conducted July 2022 through January 2023) and the results were even more stark: only 21% of Asian adults polled said that "colleges should consider race or ethnicity when deciding which students to accept to their school." A total of 76% of Asian respondents said that race or ethnicity should not be considered.²⁵



Figure 5

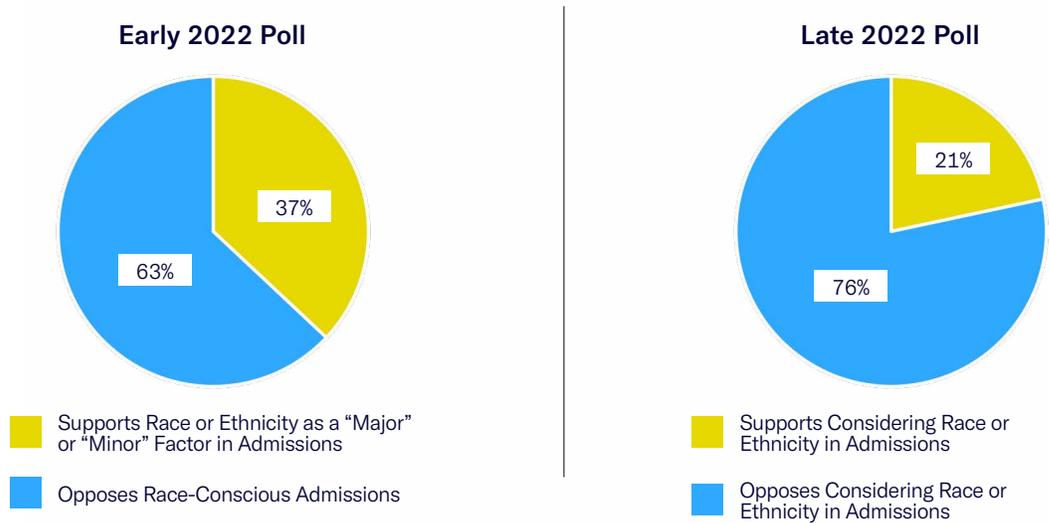
Amici Asian American Advocacy Groups in *Students for Fair Admissions*



Source: Author's analysis of amicus briefs

Figure 6

Asian Americans' Opinion on Race-Conscious Admissions



Source: Pew Research Center

The gap between public opinion, on the one hand, and the opinion of advocacy groups that were amici in *Students for Fair Admissions*, on the other, is therefore even wider for Asian Americans and the groups that claim to represent them.



Elite Advocates vs. Regular Americans

Many advocacy groups that submitted briefs in defense of Harvard's and UNC's race-conscious admissions programs are "professional" advocacy organizations, defined, for the purposes of this report, as organizations that receive funding or support from (or are affiliated with) a foundation or corporation, and/or have a paid staff. Among these groups are the Anti-Defamation League, American Civil Liberties Union, NARAL Pro-Choice America, Athlete Ally, Asian American Legal Defense and Education Fund, Asian Americans Advancing Justice, League of Women Voters, Southern Poverty Law Center, and Japanese American Citizens League.

Professional advocacy organizations claim to represent the interests of the public as a whole (all Americans), or of a particular subset of the public, such as Asian Americans. However, because many advocacy organizations today are run by a board of directors and staff made up of liberal researchers, attorneys, and business professionals, they frequently lobby on behalf of the liberal, or "elite," position on issues like race-conscious admissions. This is evident in the *Students for Fair Admissions* case. Their advocacy work tends to be more reflective of the interests of their board and staff than of the interests of their constituents, who are ordinary Americans.

A smaller proportion of the advocacy groups that filed briefs on behalf of *Students for Fair Admissions* are professional advocacy groups. Several of these pro-plaintiff amici are "grassroots" organizations, meaning that they do not receive support from foundations or corporations and their staffs are made up of volunteers. Among them are Coalition for TJ, the Asian American Coalition for Education, and Silicon Valley Chinese Association. These particular advocacy groups comprise parents and immigrants concerned with the prospect of racial discrimination, and they were formed in response to specific instances of discrimination against Asian American and white students in K-12 and higher education by education and government officials.

The Asian American Coalition for Education (AACE), for example, is an alliance of 368 Asian American small businesses and parent groups from across the United States. The group wrote in its amicus brief:

The leaders of AACE and its supporting organizations are Asian American community leaders, business leaders, and, most importantly, parents. They are not "professional civil rights advocates" and do not get funding from large corporations or multibillion dollar foundations, but were forced to become civil rights advocates to expose, stop, and prevent the discrimination against their children that the "professionals" ignore, downplay, and facilitate.²⁶

AACE's view of race-conscious admissions is aligned with that of the American public, presumably because this group is run on a voluntary basis by everyday Americans. The same arguably cannot be said for the Asian American Legal Defense and Education Fund (AALDEF) in its current form. While AALDEF boasts that it has hundreds of volunteers, it also receives support from foundations and corporations²⁷ and has more than a dozen paid staffers who dedicate much of their time to advocating on behalf of liberal policy priorities like "housing and environmental justice," "economic justice for workers," and "educational equity."²⁸



Moving Forward

Advocacy groups were formed to make U.S. policymaking more democratic. But as the foregoing analysis has shown, the opposite has happened in the case of race-conscious college admissions, arguably one of the most controversial policies in modern U.S. history. Despite 68% of Americans today opposing the use of an applicant's race or ethnicity as a factor in the college admissions process, only 16.5% of advocacy groups that were amici in *Students for Fair Admissions* represented this view to the Court, the view that was ultimately successful. Advocacy groups that filed amicus briefs in support of racial preferences purport to represent the interests of the American public but, in reality, do not.

Judges, legislators, government officials, researchers, and others involved in the policymaking process need to be made aware of the gap between public opinion on race-conscious admissions and the opinion of most advocacy groups and other elites. When it comes to the use of racial preferences in higher-education admissions, a majority of advocacy groups chose to lobby against the view of the American public and, in the case of Asian Americans, against this racial minority group's interests and well-being, especially in the context of educational opportunities.

In the future, judges and policymakers should also pay closer attention to the funding behind the advocacy groups lobbying before them. At least in the case of *Students for Fair Admissions*, several of the advocacy groups that filed briefs against Harvard and UNC are coalitions or alliances run by parents, immigrants, and ordinary citizens (as opposed to political professionals) concerned about the prospect of racial discrimination taking place within the country's educational institutions. In contrast, many of America's largest professional advocacy groups, which are often supported by left-wing foundations and staff, all filed briefs in defense of Harvard, UNC, and the continuation of race-based discrimination in higher-education admissions and beyond. This latter view is at odds with what the public wants—colorblindness.

Conclusion

In striking down Harvard's and UNC's race-conscious admissions programs, the Supreme Court ended 45 years of court-approved race-based discrimination in higher education. Racialists who believe—mistakenly—that such supposedly “benign” discrimination is beneficial for the country because it increases the number of African Americans and Hispanics on college campuses and decreases the number of whites and “white-adjacent”²⁹ Asian Americans will likely decry a strike-down of racial preferences as an assault on democracy and equity by a few Republican-appointed justices.

But a response of this sort would be unjustified. As we have already noted, 68% of Americans—including 53% of African Americans and 63% of Hispanics—say that an applicant's race or ethnicity should not be a factor in college admissions decisions. Americans do not want to judge or give special treatment on the basis of race.

Americans' opposition to racial preferences has been documented on the ground. In 1996, 54.6% of Californians voted in favor of a constitutional amendment that banned the use of racial preferences in public employment, public education, and public contracting in the state.³⁰ When liberal advocacy groups, in the aftermath of the 2020 Black Lives Matter protests, added an initiative on the California ballot to repeal the state's ban on racial preferences, an even greater majority of



Californians (57.2%) voted to uphold colorblindness³¹—and this is a state that Joe Biden won by 29.2 percentage points in the 2020 presidential election.³² Americans, by and large, oppose racial discrimination, even if it is marketed to them as benign.

As already mentioned, despite the American public's real and existing opposition to racial preferences, 83.5% of all advocacy groups that were amici in *Students for Fair Admissions* and 91.7% of Asian American advocacy groups that were amici filed briefs in support of race-conscious admissions. This is troubling not only because the impetus for the contemporary advocacy-group movement was to incorporate more directly the views of ordinary Americans in politics and policymaking, but also because amicus briefs—and the people and groups that submit them—can influence the Court's decision in a case.

In her book *The Majesty of Law* (which was released the week after oral arguments in *Grutter* took place), Justice Sandra Day O'Connor wrote that "rare indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus."³³ The social consensus surrounding race-conscious admissions in the U.S., however, has been misconstrued by left-wing professional advocacy groups. Advocates of colorblindness can only be relieved that today's Court is able to see that.



About the Author

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Endnotes

- ¹ “Argument Session: October 31, 2022–November 09, 2022,” Supreme Court of the United States.
- ² Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* (Washington, DC: Brookings Institution, 1999).
- ³ Anthony J. Franze and R. Reeves Anderson, “Amicus Curiae at the Supreme Court: Last Term and the Decade in Review,” *National Law Journal*, Nov. 18, 2020.
- ⁴ These statistics are elaborated on later in the report. See Associated Press and NORC at the University of Chicago, “Most Oppose Banning the Consideration of Race and Ethnicity in College and University Admissions,” May 30, 2023.
- ⁵ Supreme Court, *Students for Fair Admission v. Harvard* transcript (Oct. 31, 2022).
- ⁶ David Oppenheimer, “Archibald Cox and the Diversity Justification for Affirmative Action,” *Virginia Journal of Social Policy & the Law* 25, no. 2 (2018).
- ⁷ Ellena Erskine, Angie Gou, and Elisabeth Snyder, “A Guide to the Amicus Briefs in the Affirmative-Action Cases,” *SCOTUSblog*, Oct. 29, 2022.
- ⁸ Allison Orr Larsen and Neil Devins, “The Amicus Machine,” *Virginia Law Review* 102 (2016).
- ⁹ *Ibid.*
- ¹⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- ¹¹ *Ibid.*
- ¹² Oppenheimer, “Archibald Cox.”
- ¹³ *Ibid.*
- ¹⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- ¹⁵ Larsen and Devins, “The Amicus Machine.”
- ¹⁶ Erskine, Gou, and Snyder, “A Guide to the Amicus Briefs.”
- ¹⁷ These other organizations engage in advocacy work as well, but because they are not considered to be traditional “public interest” or “citizen” advocacy groups per se, they are excluded from the analysis. For a more in-depth discussion of what constitutes such advocacy groups, see Berry, *The New Liberalism*.
- ¹⁸ See the dockets for *Students for Fair Admissions, Inc., Petitioner v. University of North Carolina*, et al., No. 21-707, and *Students for Fair Admissions, Inc., Petitioner v. President and Fellows of Harvard College*, No. 20-1199.



- ¹⁹ Linda Greenhouse, “The Supreme Court: The Justices; Context and the Court,” *New York Times*, June 25, 2003.
- ²⁰ To track American opinion on race-conscious admissions over the years, I examined survey questions that included the terms “racial preferences” and “college” on the Roper Center for Public Opinion Research—the world’s largest archive specializing in data from public-opinion surveys. For an explanation on why survey questions that ask respondents their opinion on “racial preferences,” as opposed to “affirmative action,” lead to more accurate measures of Americans’ views on race-conscious admissions, see Renu Mukherjee, “Stacking the Deck in Favor of Affirmative Action? How ‘Framing’ Affects Polling on One of America’s Most Controversial Policies,” Manhattan Institute, Feb. 16, 2023.
- ²¹ Associated Press and NORC at the University of Chicago, “Most Oppose Banning the Consideration of Race and Ethnicity in College and University Admissions,” May 30, 2023.
- ²² Ibid.
- ²³ Vianney Gómez, “As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions,” Pew Research Center, Apr. 26, 2022.
- ²⁴ The trial took place in 2018. The opinion was released in 2019. *Students for Fair Admissions v. Harvard Corp.*, 397 F. Supp. 3d 126 (D. Mass. 2019).
- ²⁵ Neil G. Ruiz, Ziyao Tian, and Jens Manuel Krogstad, “Asian Americans Hold Mixed Views Around Affirmative Action,” Pew Research Center, June 8, 2023.
- ²⁶ Lee C. Cheng and Gordon M. Fauth, Jr., “Brief of *Amici Curiae* the Asian American Coalition for Education and Asian American Legal Foundation in Support of Petitioner,” *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199.
- ²⁷ Asian American Legal Defense and Education Fund, “About.”
- ²⁸ Asian American Legal Defense and Education Fund, “Our Programs.”
- ²⁹ See, e.g., Patricia Pan Connor, “Calling Asians ‘White Adjacent’ Is Racist and Insulting” *American Conservative*, Apr. 6, 2021.
- ³⁰ “California Proposition 209, Affirmative Action Initiative (1996),” *Ballotpedia*.
- ³¹ “California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020),” *Ballotpedia*.
- ³² “Presidential Election in California, 2020,” *Ballotpedia*.
- ³³ Sandra Day O’Connor, *The Majesty of the Law* (New York: Penguin Random House, 2003), 166.