Articles

FROM *BAKKE* TO *GRUTTER* AND BEYOND: ASIAN AMERICANS AND DIVERSITY IN AMERICA

By: Harvey Gee*

I. INTRODUCTION

At a recent speech to a group of Chicago lawyers delivered at a luncheon held in his honor, United States Supreme Court Justice John Paul Stevens spoke about his thoughts on the recent Court decisions concerning the University of Michigan law school's race-conscious admissions policies.[1] In a rare moment, Justice Stevens spoke about the internal deliberations that took place during a conference prior to the scheduled oral arguments in the most recent case, *Grutter v. Bollinger*.[2] In particular, Justice Stevens revealed that he had delivered a lengthy defense of the law school's admission program during that meeting. He stated that he was influenced by the briefs filed by former military officers, including retired Army General H. Norman Schwarzkopf and retired Army General Wesley K. Clark, who argued that an affirmative action policy was necessary to guarantee a diverse military, which in turn would produce minority officers.[3] Stevens shared my viewpoint that the ultimate decision concerning affirmative action should not be an issue for jurists alone to decide. Instead, he thought that great deference should be given to the country's corporate, educational, and military leaders. Affirmative action in the military, where minorities are actively hired, trained, and retained, was just one example which showed that affirmative action works in the public's best interest.

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1. Charles Lane, *Stevens Gives Rare View of Court's Conference*, WASH. POST, Oct. 19, 2003, at A1.

2. Grutter v. Bollinger, 539 U.S. 306 (2003).

3. Lane, *supra* note 1.

So it was no surprise that Justice Stevens felt there was no conflict between his position in the 1978 *Regents of the University of California v. Bakke* case,[4] wherein he voted to strike down the University of California medical school's special admissions program, and his subsequent vote upholding the admissions program in *Grutter*. Justice Stevens urged the other Justices to treat *Bakke* as controlling authority, given the fact that many major institutions have already relied heavily on its holding for the past quarter-century.[5]

In *Bakke*, the Court applied the Equal Protection Clause to affirmative action for the first time.[6] In *Bakke*, the University of California at Davis rejected the medical school application of Allan Bakke, a white male. Bakke filed suit against the university, claiming that the school's admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act. The Court affirmed the unconstitutionality of the "special admissions" program, but reversed the lower court's prohibition of using race as an admission criterion.[7] Four of the justices, led by Justices William Brennan and Thurgood Marshall, found affirmative action programs to be constitutional.[8] The other four justices voted with Justice Lewis F. Powell, Jr. to strike down the affirmative action plan as unconstitutional.[9] Justice Powell concluded in his opinion that the University of California at Davis medical school's special admissions program unconstitutionally denied Bakke equal protection.[10] Despite the Court's intentions, the law after the *Bakke* decision remained unclear because there were six separate opinions with no clear victory for either Bakke or the University of California. The murkiness of the decision itself remains even today, over a quarter of century after it was decided. Despite the deep division among the Justices in *Bakke*, Justice Powell's opinion continues to be the law that governs affirmative action.

In his speech Justice Stevens echoed Justice Sandra Day O'Connor's statement in *Grutter* that affirmative action may be a temporary remedy that would no longer be needed twenty-five years from now[11] by suggesting that although affirmative action for African Americans is still necessary today, the situation will "work itself out" in the years to come. He made this bold conclusion after comparing current affirmative action for African Americans to past affirmative action for Asian Americans. Justice Stevens opined that Asian

4. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
5. Lane, *supra* note 1.
6. *Bakke*, 438 U.S. at 270.
7. *Id.* at 319.
8. *Id.* at 324.
9. *Id.* at 407.
10. *Id.* at 311-20.
11. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

Americans no longer need to be considered as beneficiaries of any racial preferences.[12]

Justice Stevens's recent remarks about Asian Americans reinforce the fact that the place of Asian Americans in American jurisprudence and, moreover, in this nation's racial terrain, remains fluid and even ambiguous. As Professor Frank Wu explains,

> In the later nineteenth and early twentieth century, Asian Americans were a distinct class only when considered as foreigners . . . The late twentieth century marked a shift for Asian Americans away from being functionally black and toward being seen as functionally white . . . Asian Americans become white predominantly for the purpose of attacking affirmative action programs.[13]

The Asian American experience demonstrates that race makes a difference for Asian American individuals for different reasons, depending on the historical and sociopolitical context of the times. I have discussed this phenomenon in various other fora. For instance, I have written about the efforts of several Connecticut senators who opposed the Nineteenth Century Chinese Exclusion Laws;[14] the effect the Refugee Act of 1980 had in limiting the number of Vietnamese refugees coming to America;[15] the issue of race in America being neither black nor white;[16] the need for Asian Americans to be included in the affirmative action debate;[17] the reasons why Asian Americans voted against the California Civil Rights Initiative;[18] the effects on admissions after affirmative action was eliminated at the University of California and after the passage of the California Civil Rights Initiative;[19] the tremendous growth of Asian American studies programs;[20] the place of Asian Americans in the Critical Race Theory genre;[21] the relationship

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12. Lane, *supra* note 1.

13. Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 207-08 (1996) (book review).

14. Henry S. Cohn & Harvey Gee, *No, No, No, No!: Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1 (2003).

15. Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT'L. L. & COM. REG. 559 (2001) (book review).

16. Harvey Gee, *Race, Rights, and the Asian American Experience: A Review Essay*, 13 GEO. IMMIG. L.J. 635 (1999) (book review).

17. Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621 (1997).

18. Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. J. PUB. INT. L. 1 (2001).

19. Harvey Gee, *Asian Americans and the Dismantling of Affirmative Action in California*, 10 ASIAN L.J. 311 (2003) (book review).

20. Harvey Gee, *The Racial and Cultural Profiling of Asian Americans*, 11 SETON HALL CONST. L.J. 775 (2001) (book review).

21. Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999).

between assimilation and multiculturalism;[22] and the possibility of building coalitions amongst communities of color.[23] All of these discussions bring to light a serious need to recognize the arbitrary utilization of Asian Americans, as a group, by and at the whim of higher social and political powers ruling this country. Only recently has there been legal scholarship addressing these unique social, political, and legal issues that Asian Americans currently face. Fortunately, Asian American civil rights groups continue to advocate for affirmative action on behalf of Asian Americans in the business and higher education arenas, building a much needed momentum to propel these important issues into the public forum.

By tracking and studying the role of Asian Americans[24] in the social history of this country more closely, we can learn a great deal about historic and contemporary race relations—which have never been just black and white—with the aim towards improving them. With this in mind, this essay makes some casual observations of the Asian American experience and offers some thoughts and comments on the influence that Asian Americans have had on the jurisprudence of race, as well as the influence of such jurisprudence on Asian Americans. I do this by building on two theories advanced by legal scholar Angelo Ancheta about Asian Americans and the law.

First, Ancheta points out that mainstream America often equates Asian Americans with foreigners or immigrants, creating a "foreignness" which serves to reinforce a stratified racial hierarchy in the United States.[25] Consequently, the foreignness component creates a precarious duality for Asian Americans, which allows society to presume that Asian Americans are foreign and thus entitled to lesser standards of protection than "true Americans."[26] Second, Ancheta theorizes that the racialization of Asian Americans as a "model minority" marks the social position of Asian Americans along a racially stratified hierarchy between black and white.[27] He argues that the "model minority" myth is actually a disingenuous stereotype.[28] By combining Asian American success with traditional conservative American values, the "model minority" myth plays a key role in establishing and sustaining a racial

22. Harvey Gee, *Claiming America: Towards a New Understanding of Assimilation, Pluralism, and Multiculturalism*, 7 ASIAN L.J. 161 (2000) (book review).

23. Harvey Gee, *Asian Americans, the Law, and Illegal Immigration in Post-Civil Rights America: A Review of Three Books*, 77 U. DET. MERCY L. REV. 71 (1999) (book review).

24. For the sake of consistency and brevity, I will use the term "Asian Americans" to refer to both American-born Asians and foreign-born Asians. It is also important to note that Asian Americans as a group are not monolithic; the different nationalities within the category and the differences within each of those nationalities only complicate the effect that affirmative action policies have on each subgroup.

25. *See* ANGELO ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 12-13 (1998).

26. *Id.* at 15.

27. *Id.* at 155.

28. *Id.* at 12-13.

hierarchy. Other racial groups are encouraged to be more like Asian Americans, who in turn are encouraged to be more like upwardly mobile whites. This hierarchy denies the reality of Asian American oppression, while legitimizing the oppression of other racial minorities and poor whites.[29]

This essay makes two interrelated and focused points: (1) Traditional equal protection analysis does not apply well to Asian Americans since they have historically been and continue to be perceived as "foreign," not American and (2) most mainstream Americans, even after the recent litigation over the University of Michigan affirmative action programs, remain largely unaware of the tremendous work by Asian American civil rights groups who have advocated for the preservation of affirmative action. Coupled together, these two ideas suggest that Asian Americans can be easily mischaracterized with racial and cultural stereotypes, which if left unchallenged, can be used to reinforce a stratified racial hierarchy in the United States where whites are at the top, African Americans and Latinos are at the bottom, and Asian Americans are somewhere in between.[30]

II.

During a recent car drive from San Diego into Mexico, I reflected upon the ease by which I could cross the border between the two countries without any concern. If I were questioned at the border about my citizenship, I would merely respond with the obligatory "U.S.C." or "U.S. Citizen," and be done with it. By virtue of having been born in 1968 at Kaiser Permanente Hospital in San Francisco, I was a citizen of this country since birth. My parents had emigrated from Canton, China, only a decade before my birth. In some respects, I am grateful, if not indebted, to Wong Kim Ark, another native San Franciscan who in 1898 challenged the constitutionality of denying birthright citizenship before the U.S. Supreme Court.[31] His case formally dealt with the right of Chinese Americans to U.S. citizenship. The facts were straightforward: Wong Kim Ark was refused admission to the United States upon his return from an overseas visit on the grounds that he was not a citizen and could not be admitted as an immigrant because of the Chinese Exclusion Act.[32]

Wong Kim Ark established the legal precedent of birthright citizenship under the Fourteenth Amendment. At the time of the case,

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29. *Id.* at 162.

30. Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners" and Social Change: Is the Law the Way to Go?*, 76 OR. L. REV. 347, 358 (1997).

31. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

32. *Id.* at 652.

under the terms of the naturalization statutes Asian Americans were generally not eligible for naturalization.[33] While the decision clearly established a uniform rule on national citizenship and settled a longstanding controversy regarding the definition of national citizenship,[34] the Fourteenth Amendment still preserved the distinction between national and state citizenship.[35] The Court in *Wong Kim Ark* interpreted Section 1 of the Fourteenth Amendment in accordance with congressional intent, and held that a child born in the United States to Chinese parents is nevertheless a citizen of the United States and entitled to all the rights and privileges of citizenship.[36] Interestingly, the element of "foreignness" was applied to the racial identity of the Chinese. In fact, Neil Gotanda argues that,

> In the majority and dissent in . . . *Wong Kim Ark* can be found the paradoxical aspects of the emergent Chinese-American racial identity. Chinese-Americans are American citizens, yet as [Justices] Fuller and Harlan emphasize, they retain a dimension of 'foreignness'—they are unassimilable strangers. This inclusion of foreignness into racial identity, begun with the Chinese, became a part of the American understanding of Japanese immigrants as well, and also part of the explicitly racial classification "Oriental."[37]

Before and even after *Wong Kim Ark*, there was a racialized identification of Asian Americans as foreign and "un-American" that emerged through a process involving the social construction of an Asian "race." The Court's treatment of the Chinese as foreign reverberated the controversy over the racial positioning of Asians at the time. Lisa Lowe explains that "oriental racializations," especially during periods of economic downturn, portrayed Asians as physically and intellectually different from whites.[38] When coupled with the nativist anti-Asian backlash at the time, these perceptions promoted the immigration

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33. *Id.* at 699.

34. *Id.* at 702-03.

35. *Id.* at 676 (citing *The Slaughter-House Cases*, 83 U.S. 36, 74 (1873)).

36. *Wong Kim Ark*, 169 U.S. at 688. (Congress's intent in including the qualifying phrase "and subject to the jurisdiction thereof" was apparently to exclude from the reach of the language all children born of alien enemies in hostile occupation, recognizing both exceptions to the common-law rule of acquired citizenship by birth, as well as children of members of Indian tribes subject to tribal laws. Elk v. Wilkins, 112 U.S. 94, 99 (1884). The lower courts have generally held that the citizenship of the parents determines the citizenship of children born on vessels in the United States territorial waters or on the high seas. *See* United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861); *In re* Look Tin Sing, 21 F. 905 (C.C. Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928)).

37. Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1190 (1985).

38. LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 4-5 (1996).

exclusion acts.[39] The most notorious was the first Chinese Exclusion Act of 1882, with which the United States committed an overt act of discrimination against its resident Chinese population. According to historian Andrew Gyory, the creation of Chinese immigration as a national issue and the passage of the first Chinese Exclusion Act on May 6, 1882, marked a turning point in American history.[40] It was the first immigration law passed by the United States barring one specific group of people because of their race or nationality.[41] By changing America's traditional policy of open immigration, this landmark legislation set a precedent for future restrictions that all but ended Asian immigration in the late Nineteenth and early Twentieth Centuries.[42] If nothing else, these historical events demonstrate that race has never been literally or conceptually a black and white matter.

III.

Even today, Asian Americans are often cast in a "citizen-foreigner" paradigm, rather than in the black-white paradigm, that facilitates discrimination against Asian Americans.[43] The prosecution of nuclear scientist Wen Ho Lee is a recent example. According to one

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39. *Id.*

40. *See id.* at 6. Professor Kevin R. Johnson suggests that

> The horrible mistreatment of Chinese immigrants by federal, state, and local governments, as well as by the public at large, in the 1800s represents a bitter underside to U.S. history . . . . The timing of the backlash in U.S. history against the Chinese is critically important. Congress passed the first wave of anti-Chinese immigration laws not long after the Fourteenth Amendment . . . . A member of Congress justified the less favorable treatment of Chinese people compared with African Americans "because [the Chinese] are foreigners and the Negro is a native."

Id. See KEVIN R. JOHNSON, *Race and the Immigration Laws: The Need for Critical Inquiry, in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 189 (Francisco Valdes et al. eds., 2002).

41. Lowe, *supra* note 31, at 6.

42. *See* Ozawa v. United States, 260 U.S. 178, 198 (1922) (holding that persons of Japanese descent were not eligible for naturalization); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (upholding deportation of aliens unable to naturalize). *See also* KAREN C. WONG, DISCRIMINATION AGAINST THE CHINESE IN THE UNITED STATES IN CHINESE HISTORICAL SOCIETY OF AMERICA, THE LIFE, INFLUENCE, AND THE ROLE OF THE CHINESE IN THE UNITED STATES, 1776-1960 217-18 (1976).

> [The Exclusion Act] accomplished the effective exclusion of Chinese laborers for Chinese immigration dropped to zero. This was the first time that the American government had ever stopped people of a specific origin from coming to the United States. No Chinese citizens could be legally admitted to the United States as an immigrant from 1882 to 1944 when the Chinese Exclusion Act was repealed.

Id.; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C.L. REV. 273, 281 (1996) ("Asians were the only group whose immigration was restricted on the basis of race. A consistent feature of anti-Asian immigration laws was categorization by race and ancestry, rather than by place of birth.").

43. *See generally* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hgung-In Kim ed., 1992); Gotanda, *supra* note 37.

scholar, "The government and media emphasis on Lee's Chinese ethnicity promotes societal perceptions that Asian-Americans possess not only divided loyalties that prevent them from being 'real' Americans, but also a malignant streak of foreignness that inevitably renders them suspect."[44]

Dan Stober and Ian Hoffman offer a vivid account of the infamous failed prosecution of nuclear scientist Wen Ho Lee in their latest book.[45] The book reveals the weakness of the government's strategy and, as a result, one cannot help but become incensed at the moral bankruptcy of the FBI in its chasing down Lee as the only suspect when they had little factual or legal evidence to support their belief that Lee was a spy.[46] The investigation of Lee ended in a national disgrace for all the institutions involved. It was the perfect example of a national security investigation based on racial and ethnic profiling.[47] Lee's life was turned upside down when he was accused of espionage by members of Congress and then the national media. Attorney General Janet Reno gave the approval to proceed with the prosecution of Lee, and soon after, the indictment went to the grand jury.[48] Lee was indicted on fifty-nine counts and held in detention for nine months, allegedly as a national security threat.[49] In aggressive interrogations, Lee was threatened repeatedly with references to Ethel and Julius Rosenberg, who were executed for treason during the nation's Red Scare, and was reminded that the Rosenbergs' refusal to admit guilt eventually resulted in their death.[50] Lee was also threatened with the demise of his career, reputation, and the lives of his family as a result of his arrest.[51]

During the heated investigation into the spying incident, the original list of suspects quickly shrank from all the Los Alamos and Lawrence Livermore research lab employees who had traveled to China to only scientists of Chinese heritage who had worked indirectly on the W-88 design development and had contacts with other Chinese scientists.[52] From there, it quickly boiled down to Wen Ho Lee as the only person who had the opportunity, motivation, and legitimate access

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44. *See* Spencer K. Turnbull, *Comment: Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 ASIAN PAC. AM. L.J. 72, 75 (2001).

45. DAN STOBER & IAN HOFFMAN, A CONVENIENT SPY: WEN HO LEE AND THE POLITICS OF NUCLEAR ESPIONAGE (2001).

46. *Id.*

47. Recent events have caused individuals to become targets of suspicion and prosecution solely because of their racial identity. In the context of criminal procedure, racial profiling is a practice condemned by many public officials, including state governors and presidential candidates. The roots of racial profiling are grounded in incidents where African Americans have frequently been found to be the subject of traffic stops that are far out of proportion to their presence on the road. *See* David Harris, *Law Enforcement's Stake in Coming to Grips with Racial Profiling*, 3 RUTGER'S RACE & L. REV. 9, 9 (2001).

48. STOBER & HOFFMAN, *supra* note 45, at 247.

49. *Id.* at 316, 328

50. *Id.* at 15.

51. *Id.*

52. *Id.*

to the specific nuclear weapons information believed to have been leaked to the Chinese government.[53] The reasons Secretary of Energy Bill Richardson gave for firing Lee included "failure to properly notify Energy Department and laboratory officials about contacts with people from a sensitive country, specific instances of failing to properly safeguard classified material, and attempting to deceive lab officials about security matters."[54]

Lee's own unwillingness to explain his actions fed into the political furor that made him an all too convenient target.[55] Because the prosecution's claim that Lee had stolen America's "crown jewels" of nuclear security did not stand up to scrutiny, their case evaporated without a satisfactory explanation of Lee's motives.[56] The FBI first tried to intimidate Wen Ho Lee into confessing that he had passed nuclear secrets to China.[57] Despite the thin evidence against Lee and his consistent denial of having passed along any secrets,[58] the FBI placed wiretaps in Lee's home.[59] When that failed to produce any useful evidence, Lee was put in jail, even though the government had no evidence to convict him as a spy.[60] Meanwhile, Lee continued to cooperate with investigators by submitting to polygraph tests and repeated FBI questioning without the presence of a lawyer.[61]

Against this racially tinged background of events, five years of relentless hounding by FBI agents—at times more than one thousand of them—produced nothing. In the end, Lee was only charged with mishandling classified information.[62] Notably, in this FBI manhunt, there seemed to be a racial double standard between Chinese and non-Chinese suspects. Similar security infractions by non-Chinese suspects were often ignored and rarely resulted in disciplinary measures. In one error of potentially much graver consequences for our nation's security, the former Director of the Central Intelligence Agency, John Deutch, downloaded top-secret files onto his unsecured home computer.[63] Deutch was disciplined but did not lose his job, much less end up incarcerated.[64]

The U.S. government spent four years and millions of dollars in an attempt to convict Wen Ho Lee, only to find him ultimately innocent of

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53. STOBER & HOFFMAN, *supra* note 45, at 235-36.
54. *Id.* at 204.
55. *Id.* at 79-85.
56. *Id.* at 64.
57. *Id.* at 15.
58. STOBER & HOFFMAN, *supra* note 45, at 13, 182.
59. *Id.* at 150-56.
60. *Id.* at 235-36, 248-49.
61. *Id.* at 172-80, 185-90.
62. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 179 (2002).
63. ERIC K. YAMAMOTO, et al., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 465 (2001).
64. *Id.*

spying. The government's pursuit of Wen Ho Lee at almost any cost—to civil rights, personal freedoms, civil liberties, and scientific vitality—exacted a high price in long-term national security.[65] In the end, District Judge Frank Parker reviewed the terms of Lee's release under a plea bargain agreement.[66] After nine months in solitary confinement, Lee pled guilty to one felony count, and went home with an unusual and emotional apology from Judge Parker, who concluded that he was misled by the government.[67]

There are more recent examples of the U.S. government racially profiling Asian Americans. Specifically, the events of September 11, 2001 and the present war on terrorism have brought about the latest round of laws directed at immigrants and suspected terrorists.[68] The government's recent investigations have focused primarily on people of Arab descent or Muslims, such as in the failed prosecution of suspected Guantanamo Bay spy Captain James "Youseff" Yee, a Chinese American army officer, and Muslim convert.[69] Yee was raised a Christian in New Jersey, graduated from WestPoint in 1990,[70] and the following year converted to Islam. In August 1991 he was deployed to Saudi Arabia where he married a Syrian woman.[71] When he returned to the United States, he re-enlisted when the Pentagon asked him to serve as a chaplain for the army.[72] After September 11, Yee was allegedly charged with various claims, and continues to face a group of miscellaneous charges lodged against him in what appears to many to be an effort to drum him out of the military in disgrace.[73]

Initially, the U.S. government alleged that Yee, as part of an Islamic Fifth Column of extremists,[74] breached security with two Arab language translators at Guantanamo Bay.[75] The U.S. government detained Yee for a month before formally charging him with five offenses: sedition, aiding the enemy, spying, espionage, and failure to

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65. *See id.* at 349.

66. *See* WU, *supra* note 62, at 184.

67. *Id.*

68. *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 72 (2002).

69. John Mintz, *Guantanamo Spy Cases Fading: Pentagon to Proceed on Lesser Charges*, SAN JOSE MERCURY NEWS, Jan. 25, 2004, at 10.

70. Mark Miller, *A Very Curious Case*, NEWSWEEK, Dec. 22, 2003, at 41.

71. *Id.*

72. Andrew Law, *Wen Ho Lee II?*, *at* http://www.alternet.org/story/html?StoryID=16861 (last visited Sept. 29, 2003).

73. Mintz, *supra* note 69.

74. Fifth Column Islamic extremists in the United States conspired to replace the U.S. Constitution with the Koran. *See* David B. Caruso, *Muslim Groups Criticize Nominee: Bush's Choice for Peace Think Tank Say a Militant Islam Threatens National Fabric*, ASSOCIATED PRESS, Apr. 11, 2003, at B9.

75. Sam Skolnik, *Wife of Guantanamo Chaplain Speaks Out Against Charges, at* http://seattlepi.newsource.com/local/149300_yee2l.html (last visited Dec. 20, 2003); L.A. Chung, *Embattled Captain Receiving Support of Bay Area Groups in Fight with Army*, MERCURY NEWS, Dec. 5, 2003, *available at* http://www.bayarea.com/mid/mercurynews.news.columnists/la_chung/7420219.htm.

obey a general order.[76] Officials reported that they found "suspicious documents" and notebooks containing information and diagrams about detainees in Yee's backpack.[77] However, it was later determined that these documents were never labeled as classified, and the diagrams were Yee's anecdotal notes written for himself concerning counseling sessions with some of the prisoners.[78] Nevertheless, "[p]rosecutors seemed so certain of Yee's guilt that they hauled him to the military's maximum-security brig in South Carolina and warned his lawyers to start preparing a death-penalty defense."[79]

After spending three months in a military prison, the government quietly, and seemingly reluctantly, dropped the espionage charges due to lack of proof.[80] Yee was allowed to return to active duty but only in the capacity of a desk clerk.[81] However, a month after his release, authorities brought new charges of adultery and having illegally downloaded pornography.[82] Some believe that these new allegations are wrought with vindictiveness and bitterness.[83]

The Yee and Lee cases are both likely examples of racial profiling against Asian Americans. Interestingly, the distinction between the two individuals did not make a difference in the government's pursuit of prosecutions. For example, Lee was born in Taiwan and a naturalized American for twenty-five years, while Yee is an American-born son of Chinese immigrants, raised in a New Jersey suburb. Yee, unlike Lee, was a Muslim convert.[84] Also, during its prosecution of Yee, the government portrayed him as both Chinese and Muslim, with possible ties to terrorists. The combination of these two attributes highlighted Yee's "foreignness." As Professor Saito remarked,

> Just as Asian-Americans have been 'raced' as foreign, and from there as presumptively disloyal, Arab Americans and

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76. *Id.*

77. Mark Miller, *A Very Curious Case*, NEWSWEEK, Dec. 22, 2003, at 41.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See James Yee's Supporters: We're Relieved, Outraged*, PACIFIC NEWS SERVICE, Nov. 26, 2003, *at* http://www.pacific news.org/news/views_article.html?article. Although it is beyond the scope of this essay, a worthwhile research project would be an analysis of the lessons of the Japanese internment, and the Wen Ho Lee and James Yee cases. What do they tell us about the future of race jurisprudence as it applies to Asians and Asian Americans? Are current standards of judicial review adequate to protect Asian Americans? Does the "perpetual foreigner" stereotype justify a more heightened standard than strict scrutiny? *See also* Cohn & Gee, *supra* note 14.

83. *Id.*

84. *See* Deborah Kong, *Asian Activists Wary of Prejudice in Army Inquiry*, PHILADELPHIA INQUIRER, Oct. 20, 2003, at A4. One might also question whether the traditional equal protection analysis even applies to Asian Americans, as witnessed during the Japanese American internment and, more recently, the Wen Ho Lee controversy. Asian Americans occupy a unique position in race matters, and this fact was clearly illustrated during the prosecution of nuclear scientist Wen Ho Lee. This demonstrates the need for a more refined and inclusive analysis of race which guarantees Asian Americans equal protection of the laws.

> Muslims have been 'raced' as 'terrorists': foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.[85]

Despite key distinctions in the form and structure of prosecution, the Yee and Lee cases are essentially identical in other respects. Both men are Asian Americans who worked for the government in classified, highly sensitive settings. Both were accused and arrested for possessing or mishandling classified information, actions that immediately translated into accusations of espionage and even treason.[86]

While much of the recent legal and popular literature has discussed the "model minority myth" and the "perpetual foreigner" stereotype in great detail, [87] none have offered the supposition that these generalizations may be exclusive of one another. These two stereotypes, though they compliment one another, are actually mutually exclusive in the affirmative action discussions and in the news accounts of recent spy allegations against Asian Americans Wen Ho Lee and James Yee. Both highly educated men sought and achieved the American dream through hard work and perseverance. But, notably, these characterizations were ignored in the government and media's portrayal of these men.

IV.

In the affirmative action debate, past usage of extremely race-conscious laws invoked against Asian Americans for their perceived

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85. Natsu Taylor Saito, *Symbolism Under Siege: Japanese Americans Redress and the "Racing" of Arab Americans as 'Terrorists,'* 8 ASIAN L.J. 12 (2001); *cf.* Frank H. Wu, *Profiling in the Wake of September 11: The Percent of the Japanese American Internment*, 17 CRIM. JUST. 52, 53-54 (2002) (providing that "[t]he internment of Japanese Americans during World War II is the obvious precedent for the treatment of Arab Americans and Muslim Americans in the aftermath of the September 11, 2001, terrorist attacks").

86. During the prosecution of Wen Ho Lee, Asian American civil rights organizations protested the government's prosecution and called for his release, even though they were at first hesitant because of the uncertainty of Lee's guilt or innocence.

> "There is a certain maturity that has evolved in the Asian-American civil rights community since Wen Ho Lee," said Ted Wang, policy director for Chinese Affirmative Action. "We wanted to let the government know that when you single out someone in our community, we're going to step forward and let them know we're monitoring it."

L.A. Chung, *Embattled Captain Receiving Support of Bay Area Groups in Fight with Army*, SAN JOSE MERCURY NEWS, Dec. 5, 2003, at C1. Likewise, a coalition of Chinese Americans, American Muslims, and civil rights activists gathered to condemn the charges against James Yee. *See* Matthai Chakko Kuruvila, *Voices of African-American Muslims Often Left Out of Islam Debate*, SAN JOSE MERCURY NEWS, Dec. 4, 2003, *available at* 2003 WL 69054634.

87. YAMAMOTO, *supra* note 63.

"foreignness," along with contemporary use of the same misconception to target Asian Americans as potential spies, is, unfortunately, often supplanted by the race-conscious rhetoric offered by supporters and opponents of affirmative action. Both sides of the current debate have forgotten the contributions made by Asians to race jurisprudence, especially in affirmative action and immigration debates. The consideration and inclusion of Asian Americans is necessary to prove that civil rights involves everyone, and such inclusive involvement is crucial to a meaningful exploration of the contemporary relationship between race and law. Historically, we have been constrained in our race relations discourse by the dominant black/white paradigm. This has left us with questions as to where Asian Americans fit in. The racialization of Asian Americans as immigrants, foreigners, or as model minorities existing among black, white, and brown, demonstrates that a failure to recognize racial differences almost always results in racial injustice. Also revealing is the premise that civil rights protections available to Asian Americans are most often contingent upon the rights granted to African Americans. The crucial role of Asian Americans in race jurisprudence, as with affirmative action, indicates that the present race-relations discourse needs to be broadened so that those situated among these three dominant "colors" may articulate their experiences independent of a black/white/brown framework. A review of affirmative action litigation in the context of higher education showcases the involvement of Asian Americans, who have contributed and informed the debates significantly.

Asian Americans played major roles in the litigation over *Bakke* and *Grutter*,[88] two of the most important affirmative action cases in the modern era. Although never mentioned in the mainstream coverage, Asian Americans have supported affirmative action whether they have been included as beneficiaries of the policy or not. In *Bakke*, Asian Americans were included as beneficiaries of the admissions policy, whereas under *Grutter*, they were not. All too often the reasons for their exclusion are shrouded by ambiguity or, at best, are unclear. For example, the Michigan law school has never explained why they did not include Asian Americans in their affirmative action policies, even when Asians are clearly under-represented in their student body.[89] Did the University of Michigan buy into the model minority myth?

The "model minority myth" describes a racially stereotyped image of Asian Americans where they are portrayed as models of achievement

88. *See* Brief of Amicus Curiae Asian American Bar Association of the Greater Bay Area in Support of Petitioners, Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811), *available at* 1977 WL 189498 [hereinafter Amicus Brief of the AABA].

89. A review of the Supreme Court opinion and a survey of the briefs submitted in the case do not reveal any explanation.

and as able to succeed without societal assistance.[90] This myth depicts Asian Americans as a monolithic ethnic group that achieves economic success and social acceptance through education and hard work, and without governmental assistance or racial preferences.[91] All too often, mainstream America does not think of Asian Americans as being beneficiaries of affirmative action because of the model minority myth, perpetuating the fiction that Asian Americans are shielded from racial prejudice.[92]

The problem with this myth is two-fold. First, this myth obfuscates the fact that Asian Americans are an ethnically diverse group whose various subgroups have different histories, face very different issues, and whose members are still in need of affirmative action. Secondly, the myth is often used by opponents of affirmative action to show that affirmative action is not needed to help minorities in general.[93] The model minority stereotype is often used to place Asian Americans in a falsely elevated position relative to African Americans and Latinos.[94] Professor Frank Wu argues,

> As well-meaning as it may be, the model minority myth ought to be rejected for three reasons. First, the myth is a gross simplification that is not accurate enough to be seriously used for understanding 10 million people. Second, it conceals within it an invidious statement about African Americans along the lines of the inflammatory taunt: "They made it; why can't you?" Third, the myth is abused both to deny that Asian Americans experience racial discrimination and to turn Asian Americans into a racial threat.[95]

Alternatively, does the administration of the University of Michigan Law School believe that Asian Americans do not contribute to the important goal of diversity? I would modestly contend that Asian Americans do contribute to diversity in education. Diversity of ethnicity and cultures within the classroom challenges all students to improve their critical thinking skills because it forces students to see a given set of facts from different points of view. Diversity of perspective also

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90. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 40 (2000); *see also* Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 2 (2000) ("Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.").

91. *See* WU, *supra* note 62, at 40.

92. Kidder, *supra* note 90, at 60-61.

93. *Id.*

94. *See* ANCHETA, *supra* note 25, at 158.

95. WU, *supra* note 62, at 49.

prepares students to participate in our multicultural society. Moreover, diversity in an educational setting provides students, including Asian Americans, the opportunity to study, live among, and socialize with students from different backgrounds, thus facilitating enhanced interaction with different peoples in the future. Interestingly, however, Professor Gabriel Chin remarks that this stands in sharp contrast to many institutions that insist Asian Americans do not contribute to diversity in an institution.[96]

As a law student at the University of Michigan Law School, Professor Chin conducted research on this issue. He recalled:

> When I was a student here ten years ago we looked at the documents. And in 1975, when there were little more than a thousand Asian-Pacific-American law students in the entire United States—out of more than 100,000 total—the faculty at Michigan Law School decided that there were enough Asian-American law students at Michigan and that there were enough Asian-American lawyers in the community. Therefore, they specifically decided not to include Asian-Americans in the affirmative action program at Michigan.[97]

The absence of Asian Americans in the law school is intriguing because Asian Americans have benefited greatly from affirmative action. There have been notable gains not only in the education context but also in the employment sector. Historically, Asian Americans have embraced the ideals behind affirmative action. In the late 1970s and 1980s, affirmative action helped Asian Americans pursue careers in law enforcement and in the fire department. For example, there were virtually no Asian American firefighters in San Francisco prior to a 1988 court order aimed at integrating the San Francisco Fire Department ("SFFD"). Asian Americans joined a class action suit in federal district court against the City and County of San Francisco, alleging racial and sexual discrimination.[98] The SFFD hired no Black, Hispanic, Asian, or Filipino firefighters before 1955.[99] There was strong evidence supporting a finding that entry-level testing adversely impacted minority applicants.[100] It was not until 1987 that promotions to supervisory positions were made from within the SFFD. According to the court, "[o]f the 352 permanent supervisory positions in the SFFD, none [were] held by women, none [were] held by Asians, four (1%) [were] held by

96. Gabriel J. Chin, et. al., *Rethinking Racial Divides: Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 199 (1998).

97. *Id.* at 202-03.

98. United States v. City and County of San Francisco, 696 F. Supp. 1287 (N.D. Cal. 1988).

99. *Id.* at 1289-90.

100. *Id.* at 1291.

Blacks and sixteen (5%) [were] held by Hispanics."[101] The court held that a consent decree was required to address deficiencies in minority hiring and promotion and, moreover, to provide for the recruitment, retention, and promotion of qualified minority firefighters in San Francisco.[102]

Asian Americans were also involved in prolonged federal litigation concerning employment discrimination at the San Francisco Police Department ("SFPD").[103] The federal district court for the Northern District of California determined that the department was in violation of Title VII of the Civil Rights Act by using examinations for the hiring and promotion of minority applicants and officers.[104] Among the court's findings was the determination that the minimum height prerequisite for applicants adversely impacted Latinos, Asians, and women, and such a requirement therefore presented a *prima facie* case of employment discrimination.[105]

The experiences of Asian Americans in the higher education context provide additional evidence that Asian American support for affirmative action has been longstanding. As Professors Frank Wu and Reggie Oh have indicated, Asian Americans have always existed on the periphery of the debate, even in the major Supreme Court affirmative action decisions.[106] Discussions about the college admissions process often cite Asian Americans as a justification for overturning affirmative action, while rarely explaining why they are excluded from benefits. During the time period from *Bakke* to *Grutter*, the number of Asian American law students and attorneys increased dramatically.[107] In *Grutter*, Asian American civil rights groups submitted supporting amicus briefs for the University of Michigan based on the principle of diversity.[108] Even though Asian Americans were not included in affirmative action programs and lacked representation within the student body, they nonetheless continued to support such programs on the basis that diversity is a compelling interest, the burdens of which they were willing to shoulder equally with everyone else. As the recent Supreme Court cases on affirmative action have demonstrated, the presence of Asian Americans has and will continue to inform the debate over racial preferences.

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101. *Id.* at 1293.

102. *Id.* at 1312.

103. Officers for Justice v. Civil Serv. Comm. of San Francisco, 473 F. Supp. 801 (D.C. Cal. 1979) (approving consent decree to assure the future integration of the SFPD by providing equal and meaningful opportunities for the entry and advancement of minorities and women).

104. *Id.*

105. *Id.*

106. *See* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L., 165, 179-81 (1996).

107. Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 1-2 (2003).

108. *See* Amicus Brief of the AABA, *supra* note 88.

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The divergent opinions about affirmative action began as soon as the programs were implemented. During the 1960s, affirmative action combined past discrimination and diversity rationales to garner broad support for the limited principle that white male institutions should be dismantled to ensure inclusion of women and previously excluded minorities.[109] Caste systems developed based on both race and sex to exclude African Americans, Asian Americans, Latinos, and other groups on a wholesale basis at various times and places.[110] The civil rights movement won broad support for the principle that these exclusions were wrong, and that remedying the problem required "affirmative action"—at least until individuals could receive equal consideration of their relative merits.[111]

However, by the 1990s, opponents of affirmative action began to argue that affirmative action had achieved its purpose, and was no longer necessary. They contend that most institutions now include women and minorities, and will continue to do so, and that, to the extent that remaining institutions discriminate in ways reminiscent of a caste-like system, anti-discrimination laws should be the answer, rather than any affirmative action policy. Furthermore, opponents allege that the continuation of affirmative action creates a racial "spoils" system.[112] Nevertheless, supporters of affirmative action counter that even if such a caste-like system is dismantled, the intended beneficiaries are a long way from actual equality.[113]

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109. *See* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 28 (1996) (acknowledging that although affirmative action was initially justified as compensation for past discrimination, it was expanded for the new justification of diversity); NICOLAUS MILLS, *To Look Like America, Introduction* to DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 10-14 (Nicolaus Mills ed., 1994) (outlining the history of affirmative action and noting the shift from the past compensation rationale to the goal of diversity).

110. *See* Jean Carey Bond, *Affirmative Action at the Crossroads: An Essay*, 53 NAT'L LAW. GUILD PRAC. 35, 36-38 (1996) (summarizing the history of social and racial discrimination against women and racial minorities and explaining the origins of affirmative action).

111. *See* BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 9-10 (1996) (explaining the three original motives for affirmative action as: to fight discrimination, to be used as a tool for integration, and to reduce the poverty of women and certain racial groups); Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 190-92 (1999) (describing the origins and original design of affirmative action). Affirmative action was initially directed primarily at employment, but it was later expanded to other areas, including admissions programs in higher education. *Id.*

112. *See* CHARLES MURRAY, *Affirmative Racism, in* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND POLITICS OF INCLUSION 204-08 (Nicolaus Mills ed., 1994) (asserting that racial preferences, instead of providing equal opportunities in education and in employment, will actually perpetuate racism and discrimination).

113. *See* Erin Anadkat, *Affirmative Action Hailed and Attacked by Student Speakers*, DAILY ILLINI, Mar. 10, 1999, *available at* http://www.illinimedia.com/di/mar10/news/news05.html (reporting on Frank Wu's argument that affirmative action is still necessary to alleviate past discrimination that created grave inequalities amongst racial minorities and whites).

Such divergence in opinion was equally present within the Asian American community. The Asian American Legal Foundation (AALF), based in Northern California, was one group that urged an end to race-based admissions policies.[114] However, nearly thirty Asian American political and legal organizations filed amicus briefs in support of the University of Michigan's race-based admissions program.[115] The National Asian Pacific American Legal Consortium (NAPALC), for one, asserted that "Michigan's decision to treat Asian Pacific Americans differently from [other] underrepresented minorities is justified by the fact that Michigan already admits Asian Pacific Americans in significant numbers."[116] The NAPALC argued that the University of Michigan program was extremely flexible and consistent under *Bakke*.[117] NAPALC's brief was supported by a broad range of Chinese, Filipino, Japanese, Korean, Hmong, South Asian, Pacific Islander, Cambodian, Laotian, and Vietnamese public interest groups representing the civil rights, business, legal, education, labor, women, and health communities.[118] Interestingly, in *Bakke*, Justice Powell only briefly mentions Asian Americans in a footnote discussing preferential admissions, stating that, "[t]he inclusion of [Asians] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process."[119] Equally intriguing is the fact that the U.S. Department of Justice also filed an amicus brief in disfavor of the special minority admissions program at the University of California Medical School at Davis.[120] The Government became one of the first participants to challenge the involvement of Asian Americans in a minority program.[121] According to the Government's brief, Asian Americans have been adequately admitted into the medical field without aid of special admissions.[122] However, the brief contained misleading and irrelevant suggestions that Asian Americans were financially

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114. Brief of Amici Curiae National Asian Pacific American Legal Consortium et al. in Support of Respondents at 5, Gratz v. Bollinger, 539 U.S. 244 (2003) (Nos. 02-241 & 02-516), *available at* 2003 WL 400140 [hereinafter Amicus Brief of the NAPALC]. NAPALC is a national civil rights organization that focuses on a broad array of policy issues dealing with civil rights. *See also* David G. Savage, *University of Michigan's Admissions Policy, to be Debated by the Supreme Court this Week, Is Seen as a Threat and a Crucial Protection, Lawyers Say*, L.A. TIMES, Mar. 30, 2003, *available at* http://aad.english.ucsb.edu/docs/untitled-1.html.

115. Amicus Brief of the NAPALC, *supra* note 114, at Listing Counsel.

116. *Id.* at 12.

117. *Id.* at 9 n.3.

118. *Id.*

119. Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 257 (1995) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 n.45 (1978)).

120. *See* THE *BAKKE* CASE AND ASIAN/PACIFIC AMERICANS 7 (1977), *available at* http://www.msue.msu.edu/imp/moddp/02080077.html (last visited Apr. 12, 2004).

121. *Id.*

122. *Id.*

successful and, therefore, were not eligible for any preferences because they did not suffer past discrimination.[123]

Nonetheless, even though Asian Americans were admitted to the Davis Medical School Program in significant numbers, the Asian American Bar Association (AABA) believed that affirmative action was still necessary to ensure that Asian American enrollment would continue to increase.[124] In the face of the model minority myth, the AABA argued that affirmative action should be supported because many Asian American communities are underserved due to a dearth of Asian American professionals, especially in the legal profession.[125] Of paramount concern to the AABA was whether the growing Asian American community, especially in California, would receive adequate legal representation.[126] To the organization, a major factor to be considered in the training of more lawyers for advocacy was language ability.[127] In their view, not every applicant to law school can speak fluent Chinese, Japanese, Korean, or Tagalog.[128] They claimed that due to the large number of immigrants, it is doubtful that non-Asian attorneys could even begin to deal effectively with the legal needs of Asian Americans.[129] They believed that an essential prerequisite to the delivery of effective legal services is the ability to communicate with the client.[130] Affirmative action might address this problem by admitting a law student body more representative of the community at large.

Perhaps the most compelling argument is the tremendous under-representation of Asian Americans in the legal profession itself. "In 1970, the ratio of Asian American attorneys to the Asian American population in the United States was only one-half the comparable ratio for white persons. In the 1970 Census, there was a total of approximately 2.09 million Asian Americans, of whom only approximately 1,000 were attorneys."[131] Asian Americans comprised almost exactly one percent of the nation's total population, but only three-tenths of one percent of the nation's total lawyers.[132] The AABA further argued that these statistics "demonstrate the lingering effects of past racial discrimination against Asian Americans" and underscored the need for programs directly aimed at substantially increasing the number of Asian American attorneys to serve the growing need for legal services in the Asian American community.[133]

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123. *Id.*
124. Amicus Brief of the AABA, *supra* note 88.
125. *Id.*
126. *Id.* at 14.
127. *Id.* at 14-15.
128. *Id.*
129. Amicus Brief of the AABA, *supra* note 88, at 15.
130. *Id.* at 29.
131. *Id.* at 15-16.
132. *Id.* at 16.
133. *Id.*

In their brief, the AABA asserted,

> Special admissions programs that use racial classifications to remedy the disadvantages resulting from prior discrimination against minority groups are thus historically and conceptually distinguishable from those racial classifications traditionally found invidious and do not call into play the protective policies necessitating strict judicial scrutiny. Further, since the program's purpose is remedial . . . the use of racial classifications in this context is constitutionally permissible.[134]

Since the mention of Asian Americans in the *Bakke* decision, the relationship between Asian Americans and affirmative action has not changed. American society continued to think of Asian Americans as not needing affirmative action to compensate for past discrimination.[135] Reinforcing this notion is the fact that university catalogs and minority scholarship programs that mention minorities still exclude specific mention or inclusion of Asian Americans.[136] In addition, many government programs that target poverty exclude Asian Americans from receiving benefits.[137] There is also a tendency to exclude Asian Americans as parties in class actions involving employment[138] and housing[139] discrimination. It is apparent that under the guidelines of these programs, Asian Americans are not seen as sufficiently disadvantaged or under-represented to warrant the same consideration

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134. Amicus Brief of the AABA, *supra* note 88, at 19-20.

135. *See* U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 1 (1992) (discussing a 1991 *Wall Street Journal* and NBC News national poll which revealed that the majority of American voters believe Asian Americans do not face any societal prejudices); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 900 (1993) (refuting popular misperception that Asian Americans do not experience effects of discrimination and racial stratification); Elisa Rocha, *Asian American Group Backs Preferences, Decries Bid to Ban Affirmative Action*, SACRAMENTO BEE, Feb. 28, 1996, at B1 (relating popular notion that Asian Americans are not in need of affirmative action); *cf.* Patricia K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 28 (1994) (dispelling fallacious assumption that all Asian Americans are excelling in the workplace and on college campuses).

136. *See* Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth: Why Asian Americans Support Affirmative Action*, 53 NAT'L LAW. GUILD PRAC. 35, 45 (1996) (discussing the widely held belief that Asian Americans do not need affirmative action).

137. *See* GLENN OMATSU, *The 'Four Prisons' and the Movements of Liberation: Asian American Activism From the 1960s to the 1990s*, *in* THE STATE OF ASIAN AMERICANS: ACTIVISM AND RESISTANCE IN THE 1990S 19, 54 (Karin Aguilar-San Juan ed., 1994) (discussing the increasing poverty among Asian Americans and activist efforts to address issues of working poor Asian Americans).

138. Gee, *supra* note 17.

139. *See* Simkus v. Gersteun Co., 816 F.2d 1318, 1318 (9th Cir. 1987) (holding the district court abused its discretion in issuing a consent decree involving low-income housing without joining non-black minorities).

offered to African Americans and Latinos.[140] For example, discussions regarding diversity issues on campus and admissions policies at many of the nation's finest colleges and universities rarely mention Asian Americans.[141] At California's most prestigious public universities, Asian American students are often overlooked due to their over-representation. However, members from Asian subgroups such as Filipinos, Vietnamese, Cambodians, and the Hmong remain underrepresented.[142]

But almost thirty years after *Bakke*, stronger disagreement is emerging over affirmative action within the Asian American population.[143] Opinion surveys show that most Asian Americans still support affirmative action.[144] Asian American affirmative action supporters stress that we have not yet reached a strictly 'merit'-based, colorblind society, and discrimination still exists in both college admissions and employee hiring processes. They contend that as past beneficiaries of affirmative action, Asian Americans should not retreat from this legacy of the civil rights movement.[145] However, there are also a growing number of Asian American conservative voices. These recent writers and activists stress the importance of hard work and individualism.[146] Asian American conservatives are proud of their heritage, yet critical of liberal and progressive political activism.[147] They view affirmative action as a limitation on their chances for success.[148] As such, they strongly believe that every individual should be judged on his or her merits alone, with no special preferences given for race or any other immutable characteristic.[149]

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140. *See* Gee, *supra* note 17, at 622.

141. *Id.*

142. *See* Gee, supra note 19, at 317; Harvey Gee, *Renegotiating America's Multicolored Lines*, 5 N.Y. CITY L. REV. 203, 227 (book review).

143. These divergent viewpoints have been voiced frequently. Gee, *supra* note 17, at 640-41.

144. *See* David G. Savage, Affirmative Action Defense Project,, *Affirmative Action Case Splits Asian Americans*, Mar. 30, 2003, *at* http://aad.english.ucsb.edu/docs/untitled-1.html (last visited July 18, 2003).

145. *See* Theodore Hsien Wang & Frank H. Wu, BEYOND THE MODEL MINORITY MYTH IN THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE 197 (George E. Curry, ed., 1996).

146. *See* Hua Hsu, *Asian American Conservatism*, *at* http://www.hardboiled.org/2-2/convervatism.html (last visited July 18, 2003).

147. *Id.*

148. *See* Nanette Asimov, *A Hard Lesson in Diversity: Chinese Americans Fight Lowell's Admissions Policy*, S.F. CHRON., June 19, 1995, at A1 (discussing Chinese American parents suing Lowell High School because enrollment of Chinese Americans had unexpectedly exceeded proportion allowed under court-sanctioned desegregation plan); Karen Avenoso, *Asian Americans Question Latin Quotas; Many Say the System Works Against Them*, BOSTON GLOBE, Oct. 14, 1996, at B1 (reporting on Asian American parents who believe their children are excluded from school admissions due to racial quota system).

149. *See* Sarah Lubman, *Asians Say They Must Outscore Others Under School Admission Criteria*, ASIAN WALL ST. J., July 24, 1995, at 5 (addressing dissatisfaction amongst Asian Americans over preferences given to other minorities in admission to Lowell High School and the University of California). *But see* Frank H. Wu, *Asian Americans: Pawns in the Battle*, LEGAL TIMES, July 3, 1995, at 26 (disagreeing with idea that more Asian Americans would be admitted if affirmative action were abolished).

United States Civil Rights Commissioner Peter Kirsanow claims that if Asian Americans were not discriminated against in the college admission process, they would constitute the largest minority group on campus.[150] He cites to the increases in the percentage of Asian American applicants granted admission to the University of Texas at Austin after the *Hopwood* decision, and the increase of Asian American freshmen at Berkeley after the passage of the California Civil Rights Initiative in 1996.[151] As a racial and ethnic group, their admission rates have been intentionally suppressed.[152] Kirsanow says,

> [I]t is clear that there are no objective standards justifying the exclusion of Asians (however defined) from the list of preferred minorities. The determination of what constitutes an under-represented minority and who gets a preference is entirely within a given college's discretion. That is nothing less than a license to discriminate.[153]

The ambivalence, and sometimes reluctance, on the part of Asian Americans to support affirmative action has been brewing for the past decade. The decisions of *Grutter* and *Gratz v. Bollinger*[154] represented a defining moment for both the Supreme Court and Asian Americans on civil rights issues.[155] The important goal of diversity was again recognized by the United States Supreme Court in *Grutter*[156] when it decided whether diversity is a compelling state interest. The Court was also given the opportunity to define specific guidelines for constitutionally permissible race-conscious admissions systems. In *Grutter*, the Supreme Court considered a challenge to the University of Michigan Law School's admissions policy, which affirmed the law school's commitment to racial and ethnic diversity with "special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans."[157] Under the policy, the law school presented

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150. Peter Kirsanow, *The Non-Preferred Minority: Michigan, Asians, and Arbitrariness*, June 19, 2003, *at* http://www.nationalreview.com/comment/comment-kirsanow061903.asp (last visited July 17, 2003).

151. *See* Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1149 (1996) (arguing that both the *Hopwood* decision and the California Civil Rights Initiative represent an extremist version of the colorblind vision).

152. Kirsanow, *supra* note 150.

153. *Id.*

154. Gratz v. Bollinger, 539 U.S. 244 (2003).

155. These cases are expected to have broad effects on the future of race-conscious affirmative action in the United States. *See also* Angelo N. Ancheta, Harvard University Civil Rights Project, *Revisiting* Bakke *and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases*, *at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/ Revisiting_diversity.pdf (2003).

156. Grutter v. Bollinger, 539 U.S. 306 (2003).

157. Frank Wu reports that,

evidence that the goal of the policy is not to remedy past discrimination, but to admit students who may bring a different perspective to the classroom as compared to students who are not members of underrepresented minority groups.[158]

Writing for the 5-4 majority, Justice O'Connor said that, in upholding the University of Michigan Law School's race-conscious admission policy, the Court was endorsing Justice Powell's view in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[159] However, Justice O'Connor required that affirmative action programs be narrowly tailored and of limited duration.[160] O'Connor stated,

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer . . . . We have recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.[161]

During that same term, the Court also considered a challenge to the University of Michigan's admissions guidelines for undergraduates.[162] Under those guidelines, implemented in 1998, each applicant was assigned points on a 150-point "selection index" based upon various criteria including high school GPA, standardized test scores, high school academic qualifications, in-state residency, and other factors.[163] Chief Justice Rehnquist, writing the majority opinion in *Gratz*, struck down Michigan's undergraduate admission program as "not narrowly tailored" in part because it gives an automatic twenty points for minorities toward the hundred points needed for admission.[164] The

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> In 2001-02 . . . Asian American [sic] representation exceeds that of other racial minority groups. To take a specific example, at the University of Michigan Law School, a "top ten" school, the number of Asian American [sic] students graduating in the class of 1991 was eight out of a [sic] overall class of 401, less than two percent. A decade later, the number of Asian American [sic] students matriculating in 2001 was 41 out of class of 361, more than eleven percent. These numbers are especially dramatic since the Asian American population as a whole increased at a rate far below the quintupling of Asian American [sic] representation among Michigan students . . . . It is likely that other elite schools on the East and West coasts displayed equal or greater increases in Asian American enrollment.

Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 1-2 (2003).

158. Grutter v. Bollinger, 539 U.S. 306 (2003).
159. *Id.* at 2329.
160. *Id.* at 2330.
161. *Id.* at 2339.
162. Gratz v. Bollinger, 539 U.S. 244 (2003).
163. *Id.*
164. *Id.* at 249.

Court in *Gratz* required that race only be used as part of an "individualized review" of applicants.[165] Both of the Michigan cases were framed as a limited debate over whether the educational benefits of a racially diverse student body are sufficiently compelling to justify affirmative action.

To be sure, Asian Americans were active participants in *Grutter* and *Gratz* and took, as expected, opposing stands on university affirmative action. On the one hand, the AALF sided with the white plaintiffs and urged the Court to end race-based admissions policies.[166] On the other hand, other Asian American political and legal organizations filed amicus briefs in support of the University of Michigan's race-based admissions program.[167] The latter groups echoed Professor Frank Wu's testimony in the case; he spoke about the benefits that Asian Americans have received from affirmative action.[168] Professor Wu noted that "while much of the litigation over affirmative action has referred to Asian Americans at length, his testimony was the first time an Asian voice has been heard in the actual litigation."[169]

On the other hand, Professor Jim Chen, along with other law professors who oppose affirmative action, filed an amicus brief in *Grutter*.[170] They believed the race-based admissions policies employed by The University of Michigan's Law School were unconstitutional.[171] In their view, "diversity" is employed by universities as a short-hand term for discrimination on the basis of race, is indistinguishable from the use of quotas, and is not a remedial interest.[172] They assert that "racial 'diversity' in the classroom does not constitute academic diversity; to the contrary, it is based on racial stereotyping and fosters stigmatization and hostility."[173] Further, they contend that,

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165. Since the *Grutter* decision, the University of Michigan has unveiled a new affirmative action policy for undergraduates, dropping the point system that was deemed unconstitutional by the Court. *See* Sarah Freeman, *University of Michigan Drafts New Policy on Affirmative Action: Process Still Takes Race Into Account*, SAN DIEGO UNION-TRIB., Aug. 29, 2003, at A16.

> The new undergraduate policy was modeled in part on the less rigid law school policy, which tried to ensure that minorities make up 10 percent to 12 percent of each class. Undergraduate applicants will now be asked to give more information about their socio-economic status and give a short answer explaining their thoughts about diversity.

Id.

166. Brief of Amicus Curiae Asian American Legal Foundation in Support of the Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516), *available at* 2003 WL 152363 [hereinafter Amicus Brief of the AALF]); *see also* Savage, *supra* note 114.

167. Amicus Brief of the NAPALC, *supra* note 114.

168. *See BAMN: Coalition to Defend Affirmative Action & Integration and Fight for Equality by Any Means Necessary*, Trial Report, No. 4, *at* http://www.bamn.com/doc/2001/010214-trial-report-4asp (last visited July 18, 2003).

169. *Id.*

170. Brief of Amici Curiae Law Professors Larry Alexander, et al., Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

171. *Id.* at 1.

172. *Id.* at 2.

173. *Id.*

> [E]ven stereotypically assuming it resulted in a greater diversity of views and information, such a result is not a compelling interest that would outweigh constitutional rights in this or other contexts . . . . '[D]iversity' is a race-balancing interest that would, by its own terms, require race discrimination for eternity.[174]

Similarly, other affirmative action opponents view these programs as a zero-sum game of sorts. For instance, Yale University law professor Peter Schuck recently argued that "affirmative action programs are unjustified because the social benefits are negligible.[175] It is narrowly targeted, and is unjustified."[176] Essentially, he asserts that racial minorities should not be pitted against one another. "[T]he Constitution should be interpreted to permit Congress to adopt a law preferring blacks so long as it does not violate the heightened constitutional protection that other racial minorities enjoy."[177] Schuck contends,

> A [racial] preference program . . . is a zero-sum game in two senses. It not only puts favored groups against nonfavored groups as they compete for a fixed set of resources or advantages - a competition that forments complaints of reverse discrimination - but it also pits each favored group against the other favored groups. Blacks' success in gaining a preference is at the expense, not only of whites, but also of Hispanics, Asians, and other preference-eligible groups—and vice-versa. This intergroup competition is most notorious in higher education and contract preference programs. Such rivalries exacerbate the already-tense conflict over politically-distributed, racially-defined spoils.[178]

Not surprisingly, as with many affirmative action opponents, he also provides his self-professed concern for Asian American interests:

> [S]ubstituting Asians for whites makes the picture look very different and more troubling. Indeed, relatively high-

174. *Id.* By the early 1980s, the soaring admission rates for Asian Americans prompted university officials to drop them from the minority category. These programs ended when they were no longer needed and there was no longer a need for Asians to be included. This change has coincided with the rise of opposition to affirmative action by Asian American conservatives.

175. Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. POL'Y REV. 1, 2 (2002).

176. PETER SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 135 (2003).

177. *Id.*

178. *See* Schuck, *supra* note 175, at 65.

> achieving Asians are probably the group most unfairly treated by preferences for blacks. Increasingly, affirmative action in effect punishes the stunning academic and economic achievements of many Asians by excluding them from eligibility for preferences. Because the number of Asian applicants is so much smaller[,] preferences for blacks reduce the exact admission probability of [Asian Americans] much more than they do for whites.[179]

But, Schuck is willing to consider a different perspective on affirmative action. It is true that certain nationalities or ethnicities within Asian American groups are over-represented in colleges, universities, and law schools. Nevertheless, affirmative action is constitutional when it is properly designed to distribute its costs equally, rather than singling out any particular group not a beneficiary at that time, including people of Asian and Jewish descent.[180] Such a scheme also contains inherent variables as to the context and circumstances. In the end, however, as Professor Wu asserts, it would serve to dispel the fallacy that affirmative action singles out whites or Asians (so-called reverse discrimination).[181] Moreover, it is unconstitutional when imposed quotas result in one African American or Latino being admitted, and one Asian American being denied admission.[182] Affirmative action does not inflict specific racial harm, like invidious discrimination.

Grutter explicitly expanded the black/white paradigm to include everyone holding a stake in the continuing debate over affirmative action. Prior to the litigation, the debate was largely framed in an inaccurate and incomplete black and white binary vacuum.[183] Occasionally, some attention is given to Latino concerns, but the identity of Latinos tends to be subsumed by the African American experience. Moreover, discussions about affirmative action rarely included Asian Americans.[184]

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179. *See* SCHUCK, *supra* note 176, at 178.
180. *See* WU, *supra* note 62, at 1-32, 141-42.
181. *Id.*
182. *Id.*
183. *Id.*
184. *See* Deanna K. Chuang, *Power, Merit, and the Limitations of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School*, 8 ASIAN L.J. 31, 38 (2001); Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 5 (2003) (asserting that the black/white paradigm "is assumed to be factually correct without substantial analysis. Such an approach leads to the exclusion of Asian Americans, Latinos, and other non-African American minority groups, or implicitly deems them to be the equivalent of blacks or whites.").

Today, Asian Americans still need affirmative action in areas such as employment and public contracting.[185] For instance, Asian Americans are severely underrepresented in corporate sector managerial positions.[186] Although the statistics show that Asian Americans in the aggregate have done well in higher education, certain Asian American groups still need some type of assistance.[187] For example, some Southeast Asian groups are in need of some type of financial and educational assistance.[188] As Professor Robert Chang explains,

> Programs designed to help Asian Americans learn English and to find jobs have been denied funding by policymakers and government officials who believed that Asian Americans had succeeded and need no aid. College administrators, believing the same, have sometimes excluded poor Asian American students from Educational Opportunity Programs even though all students from low-income families are eligible for these programs.[189]

VI.

Interestingly, since *Bakke*, law school admissions have shown a dramatic increase in the number of Asian American students, even when Asian Americans were not affirmative action beneficiaries.[190] Although *Grutter* clarified *Bakke*, Asian Americans remain in a unique and sometimes precarious position. Affirmative action opponents, including some Asian Americans themselves, have suggested that eliminating affirmative action would increase the Asian American admission rate. They cite instances of Asian American achievement and integration into the mainstream of American society as proof that affirmative action programs are no longer needed, and that these in fact, hinder

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185. *See* Paul Rockewell, *Asian American Voices for Affirmative Action*, *at* http://www.inmotionmagazine.com/roacksasn.html (1997) (quoting Henry Der on his opinions of affirmative action). According to Edwin M. Lee of the San Francisco Human Rights Coalition,

> Affirmative action in public contracting has actually brought competition to an otherwise closed system. The public is benefiting from affirmative action. Now contracts are being advertised, where previously they were a secret. As a result of affirmative action, the public is getting lower bids, and taxpayers are saving money.

Id.

186. GABRIEL CHIN, et al., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE 21-22 (1996).

187. Gee, *supra* note 142 at 226-27.

188. *Id.*

189. ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 55 (1999).

190. Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, 1 (2003).

opportunities for qualified Asian Americans.[191] These Asian American critics claim that the *Grutter* ruling allows colleges and universities to put ceilings on the number of Asian American students.

As the recent affirmative action cases have shown, Asian Americans have, at times, seemingly stepped into the shoes of whites. This phenomenon occurs not just at the university level, and its salience at all levels of education heralds a very dangerous trend. For example, the Lowell High School controversy in San Francisco was one of the most contentious affirmative action cases, pitting Asian American civil rights groups against one another.[192] San Francisco is one of the most diverse cities in the nation, and Asian Americans represent the largest racial minority group in the city.[193] In that case, a group of Chinese Americans filed a challenge to the school desegregation consent decree.[194] They argued that their rights to equal protection were violated by admissions standards to Lowell High School, the district's premier magnet high school, which required that Chinese Americans score higher than anyone else, including whites, to gain admission.[195] Their pleadings described diversity rules in the San Francisco public schools that limited the percentage of Chinese Americans to forty-five percent of the school's enrollment. The rules also limited the number of Chinese students who could gain admission to the city's elite Lowell High School.[196] The *Lowell High School* case in San Francisco neither represented the beginning nor the end for parents of Asian American children who have challenged existing admissions policies.

While this issue divided Asian Americans, leading Asian American activists overwhelmingly supported affirmative action. This support should not gloss over their slight ambivalence and even staunch opposition towards affirmative action by other groups. Divergent stances are often seen in situations where it is unclear whether Asian Americans are beneficiaries of the program or if their interests are

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191. *See* Savage, *supra* note 144 ("[Asian Americans] are a racial minority group that has suffered from racism and blatant discrimination. However, some critics of affirmative action say Asian American students may be put at a disadvantage if universities give preference to other minority applicants who are black or Latino.").

192. David I. Levine, *The Chinese American Challenge to Court-Mandated Quota in San Francisco's Public Schools: Notes From a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER L.J. 39, 138-39 (2000).

193. Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U.L. REV. 811, 820-11 (1996).

194. *Id.*

195. Anthony K. Lee, *No More Chinese Need Apply: Fight to End Diversity Scheme in San Francisco Offers Different View on Michigan Cases*, LEGAL TIMES, Mar. 31, 2003, at 68 ("Lowell admits students on the basis of their index scores, derived from middle-school grades and performance on a standardized test. To limit Chinese to 40 percent of the student body, Lowell required Chinese applicants to shore higher than students of any other ethnicity to gain admission.").

196. *See* Savage, *supra* note 144.

actually harmed.[197] Norman Matloff responds to these divergent stances by calling them hypocrisy on the part of these Asian American organizations, such as the Chinese American Democratic Club that brought the lawsuit against Lowell High School.[198] Matloff points out that "the club's right to the moral high ground is shaky at best. The club seems to happily accept San Francisco's minority business enterprise law, which replaces merit with race in the awarding of city contracts; Chinese-owned businesses benefit greatly from this."[199] Similarly, Henry Der, former Chair of Chinese for Affirmative Action, said:

> If Asian American students were to attend certain UC campuses that are exclusively Asian and white, such segregated education would not prepare Asian American students to assume leadership positions in a multiracial California society. As a parent, I do not want any of my three children to experience or choose a segregated college education.[200]

At George Washington High School, a controversy has also started to stir itself over the issue of diversity. The high school is located in the Richmond District of San Francisco, which is predominantly populated by Asian and white residents. The school district has made attempts to allow students of other racial minority backgrounds who reside in other parts of the city to enroll at the school, in an effort to diversify the student body. Some parents of Chinese American students who reside in the neighborhood are crying foul. They insist that their children should be able to enroll on the basis of geographic locality alone, instead of being required to attend another school across town, which may not offer the same high quality of education available to Washington High School.[201] Regardless of how this controversy will work itself out, it is unlikely that this will be the last time this issue will be addressed.

VII. CONCLUSION

Undoubtedly, the role of Asian Americans in the affirmative action debate and racial stereotypes of them as foreign has demonstrated that a meaningful dialogue about race relations in America is much more complex and nuanced. The Asian American experience, and in fact, the unique cultural experiences of all individuals of different racial

197. *See* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 31 (1999).

198. Norman Matloff, *Lowell High Plaintiffs Want it Both Ways*, S.F. CHRON., Dec. 8, 1994, *available at* http://heather.cs.ucdavis.edu/pub/affirmativeaction/chron.html.

199. *Id.*

200. Rockewell, *supra* note 185.

201. *See* Nick Driver, *The City's Busing Bust*, S.F. EXAMINER, June 12, 2002.

backgrounds, reveal that a stratified racial hierarchy has always existed in the United States. As such, I propose that only when Americans consider the issue of race in new ways will race relations ever improve. For instance, racial issues should be studied in their social, historical, and political context in order to obtain insights about how social barriers were overcome, and what additional hurdles have yet to be cleared. Accordingly, I am hoping that the brief points made in this essay brings attention to the unfortunate manner in which Asian Americans are still perceived as "foreign," not American. I hope also to dispel perceptions that Asian Americans are apolitical and, at most, ambivalent about being involved in the affirmative action controversy. Despite some incidences of opposition to affirmative action, it is clear that the discrimination suffered by Asian Americans due to stereotypical and false perceptions justifies the continuation of including Asian Americans in all conversations about the viability of such policies. With this in mind, I respectfully disagree with Justice Steven's beliefs that Asian Americans no longer need affirmative action, and that the interests of Asian Americans on this important issue will just naturally work themselves out. Instead, I would suggest that only by inviting Asian Americans and other nonwhites into the conversation about civil rights, and by openly addressing the more subtle discriminations that continue to disadvantage them may the goal of improving race relations in America become closer to achieving a practical reality.