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Rethinking Racial Divides--Panel on Affirmative Action

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PERSPECTIVES ON AFFIRMATIVE ACTION

For more than 20 years, the issue of affirmative action has spawned major legal and political battles. On October 14, 1997, The University of Michigan, Ann Arbor found itself on the front lines of those battles when the Center for Individual Rights (CIR) filed suit in federal court on behalf of several White students who failed to get into the undergraduate college.[1] In their complaint, the plaintiffs charge the University with unconstitutional discrimination on the basis of race, claiming that they were not admitted as result of the race-conscious admissions policy maintained by the school.[2] On December 3, 1997 CIR filed another action against the University of Michigan Law School on behalf of a White woman who had similarly not been admitted to the Law School.[3] The advent of these lawsuits sparked a range of responses among members of the University of Michigan community. Law students debated the issue, developed statements, and held press conferences.[4] Additionally, students brought in speakers and panels to discuss, debate and explore affirmative action and related issues.

The student editors of the *Michigan Journal of Race & Law* were among those who participated in this process, debating and adopting a brief statement in support of the Law School's policy. Other groups, like the Black Law Students Alliance, used the opportunity to research the issues and adopt statements of a more comprehensive nature. In addition to preparing their own statement,[5] the Asian Pacific American Law Students Association took the opportunity to incorporate the issue of affirmative action into their symposium *Rethinking Racial Divides: Asian Pacific Americans and the Law*, which took place on February 21, 1998. The *Journal* is pleased to present these perspectives on affirmative action as examples of the intellectual activity around the topic taking place at this law school.

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1. *See* Complaint, Gratz v. Bollinger, Civ No. 97-75231 (E.D. Mich. filed Oct. 14, 1997).

2. *See id.* at 5-7.

3. *See* Complaint, Grutter v. Bollinger, Civ. No97-75928 (E.D. Mich. filed Dec. 3, 1997).

4. *See, e.g.*, Rusty Hoover, *U-M Law Students Step Up to Defend Affirmative Action Policy*, DETROIT NEWS, Dec. 9, 1997, at A1. For a larger sampling of law student opinion on the question of affirmative action, see Special Feature, *Affirmative Action Statements*, 5 MICH. J. GENDER & L. 205 (1998).

5. *See* Asian Pacific American Law Students Association, *Statement Regarding the Lawsuit Against the University of Michigan*, 5 MICH. J. GENDER & L. 217 (1998).

STATEMENT IN SUPPORT OF AFFIRMATIVE ACTION

In the United States, race is a fundamental part of everyone's existence. To ignore a person's race is to deny his or her individuality. Affirmative action acknowledges race and its role in American society. By acknowledging the importance of race in furthering social equality, affirmative action redefines the concept of meritocracy from one based on arbitrary measures to a more comprehensive view of the individual. For this reason, the *Michigan Journal of Race & Law* supports the University of Michigan Law School in its defense of its affirmative action policy.

Our *Journal* was founded on the understanding that race is essential to a complete discussion of the law. As with most mainstream legal institutions, discussion of the inherently intertwined nature of race and law is marginalized on this campus. As aspiring legal scholars and practitioners, we must understand the racial dynamics that form the social and historical context in which fundamental legal themes exist.

A complete legal education requires that students of all backgrounds be afforded the opportunity to contribute to classroom discussion. Affirmative action makes this possible by opening doors to students who face institutionally imposed barriers to a legal education. As a public institution that trains future lawyers, judges, and policy makers, the Law School must remain open to students of color and provide opportunities that historically have been denied to them.

Adopted April 23, 1998

THE UNIVERSITY OF MICHIGAN LAW SCHOOL BLACK LAW STUDENTS ALLIANCE STATEMENT ON AFFIRMATIVE ACTION

The members of the Black Law Students Alliance of the University of Michigan Law School ("BLSA") support affirmative action as a result of our experience as African Americans. Race continues to play a significant role in American life. Affirmative action attempts to account for the historical exclusion of racial minorities and women from society's resources and opportunities, an exclusion that has impacts across generational lines. Not long ago, the doctrine of "separate but equal" was used to exclude minorities from colleges and universities solely on the basis of race.[1] This exclusion was integral to the Jim Crow policies that relegated persons of African descent to overwhelmingly resource-poor communities or to the least desirable and rewarding opportunities in the white community. While the legal basis of Jim Crow was repudiated by the efforts of the civil rights movement, the racial attitudes that formed the foundation of those policies and the institutions that developed within it persist today.[2] The persistence of these attitudes and institutional forms creates quite different life experiences for Americans on the basis of race.

The dynamics of the college and professional school admissions process themselves suggest the need to take race into account through an affirmative process. Institutions of higher education use admissions criteria that tend to favor the wealthy, a group that is disproportionately white.[3] Additionally, the small number of

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1. Between 1896 and 1954, the Supreme Court refused to overrule the doctrine of "separate but equal" established in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899). For a discussion of the rise and fall of the separate but equal doctrine within the context of higher education, see JOHN A. HANNAH ET AL., U.S. COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 12–39 (1960).

2. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) (discussing the lasting economic and social effects of Jim Crow).

3. *See* ALLAN NAIRN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS, 223–25 (1980) (discussing the correlation between family or household income and LSAT performance among law school applicants); CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUC., SELECTIVE ADMISSSIONS IN HIGHER EDUCATION: COMMENT AND RECOMMENDATIONS AND TWO REPORTS 15 (1977); *see also* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1870–72 (1996); Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 375–78 (1986).

minorities in the applicant pools[4] necessitates taking race into account to achieve the societal and educational benefits that are derived from a racially diverse student body. The history of racial hostility on many university campuses, together with present tensions, makes many institutions unattractive to the individual minority applicant. Affirmative action helps create the critical mass of diverse students necessary to provide minority applicants with a sense not only that they will receive support in the institution's environment, but also that it is committed to their education and well being. Creating this critical mass also actualizes the institution's recognition that understanding and communicating with persons of different racial backgrounds is an essential aspect of the education to be received by *all* of its members.

Affirmative action recognizes the need to overcome the barriers to full inclusion and the full use of the nation's human capital. One sees this recognition reflected in the executive orders of Presidents Truman through Nixon that have applied affirmative action to policies designed to promote racial inclusion.[5] Against this background of government action, race-conscious admissions further the remedial goal of alleviating socio-political inequality while fulfilling the institutional purposes of colleges and universities.[6] With this understanding, racial experiences become part of the measure of determining who can best contribute to and utilize the higher educational process, and therefore merit admission to its rights, privileges, and opportunities.

The influence of racial experience as a foundation for identity, analysis, and conceptualization, makes a racially diverse student body a necessity for high-quality university education. In its original conception, the university was purely a training and credentialing ground for individuals to achieve their predetermined station in life.[7] Under this view, those who were to benefit from college education hailed from the wealthy class; new knowledge was to be

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4. *See, e.g.*, Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 678–85 (1998) (discussing the small number of minorities in the applicant pool seeking admission to the University of Texas Law School in the years leading up to the *Hopwood* decision).

5. *See generally* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990 (2nd ed. 1991) (discussing presidential treatment of affirmative action).

6. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.).

7. Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1778), *reprinted in* JEFFERSON, WRITINGS 372–78 (Merrill D. Peterson, ed. 1984); Letter from Thomas Jefferson to Peter Carr, (Sept. 7, 1814), *reprinted in* JEFFERSON, *supra* at 1222–23.

produced by an enlightened leisure class.[8] As a nation, our vision of the role and function of higher education has become significantly broader, more populist, and more democratic. In stark contrast to the old vision of higher education—providing those already certain to become leaders by virtue of their wealth the necessary tools to contribute to the nation through fulfillment of the responsibilities of their inherited social office—we currently view education as a means of both social mobility and the creation of enlightened leaders.[9]

While colleges and universities continue to play a strong role in helping people acquire knowledge and training in a particular area, our society also has come to see developing new forms of knowledge, as well as critically analyzing and rethinking traditional ideas and systems of knowledge, as a crucial aspect of their mission.[10] A diverse student body provides necessary support for these educational goals.

A university's mission of creating leaders must be considered in the national and international context in which we live. Each school seeks to create well-equipped leaders across a variety of communities. Thus, race-conscious affirmative action serves this diversity purpose in the same way that geographically-conscious admissions does.[11] Bringing the bright and capable members of these different communities together facilitates the development of leaders from and for these communities, while providing the opportunity to develop leaders adept at building bridges across the racial maginot line that separates us.[12]

Race-conscious admissions is critical to the core educational purposes of the University. A minority student's racial experiences provide expertise necessary to assist non-minority students in developing the critical thinking and other skills necessary to succeed in business or professional life. As we move into the twenty-first century, success in business or a profession increasingly requires the ability to analyze from many different perspectives. Minority students will often interpret issues differently than their majority counterparts. A critical mass of such students is necessary for two reasons: 1) such a critical mass provides exposure to majority students of a broad range

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8. *See* sources cited *supra* note 7.

9. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 93, 160 (1998).

10. *See id.* at 92–93.

11. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.); Robert S. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 J.C. & U.L. 637, 661 (1998).

12. *See* BOWEN & BOK, *supra* note 9, at 220–24, 239.

of experience they otherwise would not likely encounter, and 2) exposure to talented minority students will enable others to see members of these groups as individuals.[13]

One sees, therefore, that the value of a significant minority presence at our institutions of higher education arises both from the experience of minorities as members of disadvantaged groups and from the value of the diversity that they contribute as individual members of such groups. Both aspects of this process help to break down racial stereotypes, thereby promoting the ability to profit from difference. Consequently, a university requires an inclusive, racially diverse student body to achieve its educational goals of professional competence and the development of enlightened leaders.

In a similar way, racial diversity assists universities' efforts to produce graduates adept at critical thinking. An idea's acceptance in the marketplace of ideas depends upon its ability to adequately address and prevail over competing alternatives.[14] Modern scholarship is richer and stronger now than it ever has been. This strength results, in part, from the critical discourses that have been developed as a result of student and academic activism. The development of these discourses has paralleled the process of democratization and increased minority inclusion in institutions of higher education during this century.[15] Abandoning race-conscious admissions threatens to substantially reduce the number of these individuals who can contribute to this process, either as students or professionals.

Affirmative action is about opportunity, but it has only been able to remedy the problem of disparity caused by racial discrimination to a certain extent. Affirmative action does not represent the triumph of the incapable. Rather, it represents an opportunity for a more diverse pool of persons to contribute their voices and talents to the definition of "merit" or "qualified." Let us not waste time debating whether race is a relevant consideration in university admissions. Instead we should be having a discussion on the barriers to inclusion in the university community of all those who will benefit from and contribute to its purposes. The road of inclusion and expansion of opportunity to disadvantaged communities is the only path to a just and equitable society. Only when we reach that point will it be time to discuss the question of colorblindness.

BLACK LAW STUDENTS ALLIANCE
University of Michigan Law School

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13. *See* BOWEN & BOK, *supra* note 9, at 229–30.

14. *See* Abrams v. United States, 250 U.S. 616, 630 (1919).

15. *See* PETER NOVICK, THAT NOBLE DREAM, THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 471 (1988).

ASIAN PACIFIC AMERICAN LAW STUDENTS ASSOCIATION SYMPOSIUM:

RETHINKING RACIAL DIVIDES: ASIAN PACIFIC AMERICANS AND THE LAW

While the dialogue on race in the United States has intensified in recent years, this discussion remains focused primarily on the relationship between Blacks and Whites. Consequently, this bipolar dialogue often discounts the experiences of other racial and ethnic minorities and marginalizes the issues facing these groups. Asian Pacific Americans (APAs), in particular, have been subject to this marginalization. Discussions of how APAs fit into the race debate often center on squeezing APAs into the Black-White dichotomy rather than confronting the distinctive issues posed by the APA community's history and experience.

To address some of these concerns and to broaden the discussion on race to include this broader perspective, the Asian Pacific American Law Students Association at the University of Michigan Law School (APALSA) held its first symposium entitled "Rethinking Racial Divides: Asian Americans and the Law" on February 20–21, 1998. The Symposium gathered many prominent legal scholars to begin an examination of some of the challenges presently facing the APA community. These two days of legal and social discourse provided a dynamic forum for legal scholars and the more than 200 participants to explore issues such as immigration, affirmative action, gender and sexual orientation, and the future development of APA jurisprudence. The panel addressing the role of APAs in the affirmative action debate provided some of the most lively discussion during the Symposium. Accordingly, APALSA and the *Michigan Journal of Race & Law*, are proud to present portions of this panel discussion.

APALSA greatly appreciates the financial support of the University of Michigan Law School, the Center for the Education of Women, Office of Academic Multicultural Initiatives, Office of Development and Alumni Relations, Rackham Graduate School, South Asian Network of Graduate Students at Michigan, Student Affairs Programming Council, University of Michigan Business School, University of Michigan Multi-Ethnic Student Affairs, University of Michigan Programs for Educational Opportunity, University of Michigan School of Public Policy, and the Diversity and Career Development Committee of the University of Michigan Medical School.

SYMPOSIUM: RETHINKING RACIAL DIVIDES— PANEL ON AFFIRMATIVE ACTION

*Gabriel J. Chin**
*Sumi K. Cho***
*Marina C. Hsieh****
*Deborah C. Malamud*****

PROFESSOR MALAMUD: Organizing this conference has been only one part of the activist social practice that the Asian Pacific American law student community has been involved in at Michigan this year. The planning for this conference predates the now-pending law suits against the University of Michigan Law School's affirmative action program. And what that meant was that when the lawsuits hit, the Asian Pacific American Law Students Association (APALSA for short) was already activated and intellectually engaged as a group and was in an ideal position to start addressing the issues that affirmative action and the lawsuits raised for the Asian American community. What APALSA needed to do was work very hard, first and foremost, to decide what its stance ought to be as an organization, to see whether there was enough consensus to even have a stance as an organization. That became a central part of the group's intellectual activity during the current academic year. I was uniquely privileged to be a part of some of those discussions and have leaned a great deal from the students. I will introduce the panel by describing to you some of their debates.

First is the question of whether there is or ought to be a common Asian Pacific American standpoint on the issue of affirmative action. The Asian Pacific community is internally diverse, and there's a serious question as to whether its internal differences quite legitimately ought to stand in the way of the creation of a single Asian Pacific standpoint. One thinks of differences ranging from country of origin, to generation of residence in the United States, to

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**** Professor, University of Michigan Law School: B.A. 1977, Weslyan University; J.D. 1986, University of Chicago.

location within the United States, and I'm sure our panelists will think of many others.

Second, in working towards an Asian Pacific perspective on the issue of affirmative action, one has to acknowledge that the answer may be different depending on whether one is asking the question from the point of view of self-interest or the point of view of altruism. I'll take those one at a time and then I'll question the distinction.

Where is the self-interest of the Asian Pacific community—assuming it exists as a single community—when the issue is affirmative action? Some people speak of Asian Pacific Americans as a group still in need of affirmative action in education, in employment, or both. Some members of the Asian Pacific community see Asian Pacific Americans as having a continuing need for affirmative action across the board. Some see a need in the sphere of employment, but not particularly in the sphere of education. Others, who see that as a possible distinction, think for strategic reasons that you can't really draw the line—you're either for it or against it across the board. On the other side of the debate entirely are those who see Asian Pacific Americans as a "model minority" that is far more likely to be injured by affirmative action. At least in the setting of elite educational institutions, they are disturbed by the formal or informal anti-Asian quotas that often seem to crop up as part of diversity-based affirmative action plans.

What about the place of altruism? What are we to do if we come to the conclusion—or if you come to the conclusion as Asian Pacific Americans—that affirmative action isn't particularly needed by or helpful to the Asian Pacific community? What should Asian and Pacific Americans think about affirmative action from a more publicly minded standpoint? For many of the students with whom I spoke in the course of the year, their political coming of age was often a matter of beginning to identify with the community of color in general and to shake of some of the negative stereotypes that those in the parental or grand-parental generation might have had of members of other communities of color in the United States. For them, taking an altruistic stand on affirmative action is an act of personal and political identity and defines the stance of the Asian Pacific American community within the community of color in the United States.

Some of the students in Michigan's Asian Pacific American community came to question whether it even makes sense to make a distinction between self-interest and altruism. This opens up onto a broader discussion of whether Asian and Pacific Americans really can stand apart from the community of color as they think about their own interests. Can Asian and Pacific Americans in the United

States escape their racialization? That question has been the subject of interesting discussions within this building, at various student's homes, and in the cafes of State Street. I am sure those discussions will continue long after this conference ends.

We will now hear from a group of Asian Pacific American scholars who are themselves taking leadership roles on issues of affirmative action through their scholarship and practice.

Our first speaker will be Professor Gabriel Chin, or Jack Chin as he prefers to be called. He is currently on the faculty of Western New England College School of Law in Springfield, Massachusetts, but is en route to becoming an Associate Professor at the University of Cincinnati College of Law, effective this coming August. He is an alum of this law school. He and I are also both undergraduate alums of Wesleyan University, so it is my special pleasure to welcome him.

He has published extensively in the fields of equal protection, immigration, and criminal law in addition to affirmative action. With his talk we will have the opportunity to consider recent attacks on affirmative action through litigation and populist initiatives.

PROFESSOR CHIN: Thank you, Deborah. I want to say, it's a real pleasure to be back in Michigan for a couple of reasons. One is that as an alum, you get to your call your former professors by their first names. Hi Alex.[1] Hi Chris.[2] How are you doing?

See, that's really fun. But another reason is that in the 1985–86 school year, I was among a group of Asian American students[3] who started what was then known as the Asian American Law Students Association. The most ambitious project that we accomplished back then was a trip to Windsor for dim sum. So I take a great deal of vicarious pride in what the students now are doing.

I'd like to talk with you about a piece that I'm working on. It's called, "I'm Losing as Fast as I Can." My premise is that lawyers litigating affirmative action cases and policy makers who deal with affirmative action, particularly in the education context, have not done a good job of protecting affirmative action.

As it has since the beginning, affirmative action has been very controversial throughout the '80s and '90s. In the '80s and '90s, every term, or every other term, there has been a case in the Supreme Court involving some form of affirmative action. But there

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1. T. Alexander Aleinikoff, Professor of Law, Georgetown University Law Center.

2. Christina Brooks Whitman, Associate Dean and Professor of Law, University of Michigan Law School.

3. The other founders of what is now APALSA included Fred Bismonte '88, Linda Kim Burakoff '88, Il Y. Byun '87, Earl Lui '86, Steven Merino '87, Richard Tom '85, and John Yamamoto '88.

have been no Supreme Court cases in the education context since *Bakke*[4] in 1978. There have been a handful of lower court cases since then, but they've been mostly odd, obscure cases that didn't really call *Bakke* into question in any serious respect.[5]

Now, of course, there are a number of factors that make supporters of affirmative action worry: an increasingly hostile Supreme Court; organized public opposition to affirmative action, reflected in things like Proposition 209;[6] more and better White litigants willing to challenge affirmative action;[7] and the complexities of dealing with non-White, non-Black people, as reflected in the case at the University of Maryland[8] that involved a Latino plaintiff challenging a scholarship program reserved for African American students. Nonetheless, I think that inexplicable litigation decisions by defendants in affirmative action cases are among the most important reasons that affirmative action in education is presently at risk.

I think that one of the most serious threats to affirmative action is presented by people who are supposed to be its supporters. There are two primary ways that I see this happening. One is that policy makers who create educational affirmative action programs have reserved to themselves the right to decide who is going to be included in affirmative action, even when the justification is diversity.

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4. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See generally* Gabriel J. Chin, Bakke *to the Wall: The Crisis of* Bakke*an Diversity*, 4 WM & MARY BILL OF RIGHTS J. 881 (1996), *reprinted in* 3 AFFIRMATIVE ACTION AND THE CONSTITUTION 129–95 (Gabriel J. Chin ed., 1998) (criticizing implementation of the *Bakke* decision and its diversity rationale).

5. *See* Chin, Bakke *to the Wall*, *supra* note 4, at 924 n.184 (citing Doherty v. Rutgers Sch. of Law-Newark, 651 F.2d 893, 900 (3d Cir. 1981) (denying standing to White plaintiff whose LSAT score and grade point average were below those of minority candidates admitted under affirmative action program)); McAdams v. Regents of the Univ. of Minn., 508 F. Supp. 354, 357, 359 (D. Minn. 1981) (granting summary judgment for defendant law school because even if the university had no affirmative action program, plaintiff would not have been admitted and therefore lacked remedy).

6. The California Civil Rights Initiative was passed by voters in 1996 and eliminated consideration of race or gender in state decisionmaking, including university admissions. For an in-depth discussion of Proposition 209, see Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996). A similar ballot measure, Initiative 200, recently passed in Washington State. *See* David Postman & Barbara A. Serrano, *Big Victories for Murray and I-200*, SEATTLE TIMES, Nov. 4, 1998, at A1.

7. *See, e.g.*, Wessman v. Gittens, 160 F. 3d 790 (1st Cir. 1998), Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) *rev'g* 861 F. Supp. 551 (W.D. Tex. 1994); Gratz v. Bollinger, Civ. No. C-97-75231 (E.D. Mich. filed Oct. 14, 1997); Smith v. University of Wash. Law Sch., 2 F. Supp.2d 1324 (W.D. Wash. 1998) (decision granting in part and denying in part motion for class certification).

8. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *rev'g*, 838 F. Supp. 1075 (D. Md. 1993) (rejecting challenge brought by Latina/o student to scholarship program limited to African American students).

And what that means, particularly, is that a number of institutions have insisted that Asian American people—as well as other racial groups, but primarily Asian Americans—do not contribute to diversity at an institution. The second problem is that many of these institutions don't seem to take the law—the Supreme Court's decisions in affirmative action cases—particularly seriously. The *Hopwood*[9] case is a prime example.

In *Hopwood*, as I'm sure you all know, the University of Texas Law School's affirmative action program was challenged and the University of Texas lost.[10] This is an important case. This is a critical transition. *Bakke* was injured. *Bakke* was bloodied in that case and it changed the landscape. Even now, opponents of affirmative action look at *Hopwood* as the beginning of the end—the case that led to the downfall of educational affirmative action.

The University of Texas Law School justified their affirmative action program largely on the basis of promoting diversity.[11] There were a couple of interesting features of that policy. One is that they had a two-track admissions process; separate admissions committees for minorities and for other people who weren't in their diversity program, their special admissions program.[12] The other feature of the policy was that it assisted only Chicanas/os and African Americans.[13] Only Chicanas/os and African Americans were considered "diversifying" at the University of Texas Law School.

The problem with both of these aspects of *Hopwood* is that they had been held illegal in *Bakke*.[14] Since then, I can think of nothing in subsequent Supreme Court cases that would have made it appear that either of those features would be constitutional. Even the concurring judge in the 5th Circuit—the one who rejected the idea that affirmative action is unconstitutional, and who defended affirmative action and thought the majority had gone too far—thought that the Texas policy was unconstitutional.[15]

The judge said,

> Blacks and Mexican Americans are but two among any number of racial or ethnic groups that could and

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9. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *rev'g*, 861 F. Supp. 551 (W.D. Tex. 1994) (rejecting challenge to law school admissions policy by unsuccessful White applicants).

10. *Id.*

11. Hopwood, 861 F. Supp. at 570.

12. *See Hopwood*, 78 F.3d at 939; 861 F. Supp. at 558–59, 562, 578–79.

13. *See Hopwood*, 78 F.3d at 936 (citing 861 F. Supp. at 563 (noting targets of 10% for Mexican American students, and 5% of African American students)).

14. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315, 317 (1978).

15. *Hopwood*, 78 F.3d at 962 (Weiner, J., concurring).

> presumably should contribute to genuine diversity. By singling out only those two ethnic groups, the initial stage of the law school's . . . admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.[16]

How could this have happened? How could it have happened that a policy that was so obviously flawed from the beginning became effective at the University of Texas? I'm willing to bet that the faculty at that school made sure that their employment contracts were drafted in such a way that they would be legally enforceable. I'm even willing to bet that the faculty of that law school—even the most senior faculty—made sure that they got their text book orders for the next semester into the book store by the date imposed by the dean. Yet they treated law school affirmative action so casually—as so trivial, so unimportant—that they couldn't come up with a program that was even arguably legal. As soon as Texas was sued, they abandoned the program because there was no question that it was unlawful.

They didn't just make strange policy decisions, they made strange litigation decisions as well. Texas chose to defend their program on the merits. I understand that the University of Texas had the opportunity to settle the *Hopwood* case in exchange for admitting the four named plaintiffs in the suit and paying the attorney's fees. Now as a law school professor, I'd have no way of knowing this myself, but I understand that *real* lawyers, when faced with tactical choices, ask themselves, "How can this help me? How can this hurt me?"

The best-case scenario for Texas, the most wildly successful thing they could have hoped for, as that they wouldn't have to pay the other side's attorney fees and they wouldn't have to admit the White plaintiffs. The concern of avoiding copycat litigation didn't exist in this case because they changed their admissions program. So winning on the merits in this case wouldn't insulate their new program and losing to the *Hopwood* plaintiffs wouldn't impeach it.

So Texas had virtually nothing to gain, but they didn't want to let those four White applicants in. They won in the district court by persuading the judge that just because a person has been subjected to unconstitutional discrimination doesn't mean they should win their case. Texas persuaded the district court that the plaintiffs should also have to prove that not only were they discriminated against, but that the discrimination was consequential.[17] That is to

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16. *Id.* at 966.
17. *See Hopwood*, 861 F. Supp. at 579–80.

say, they would have gotten the thing at issue, but for the unlawful discrimination.

The problem was that the Supreme Court had previously held that once a plaintiff proves unconstitutional discrimination, the burden shifts to the discriminator to show that the decision would have been the same even in the absence of that unlawful discrimination.[18]

Texas said that that rule no longer applied. Texas said that that principle was gone. So if a person were interviewed for a job and told "Sorry, we don't hire Blacks, so go away," the Plaintiff would have to prove not only that that policy was illegal, which it surely is, but also that they would have been hired had they been White. They said current rule was out the window.

There were two problems with the Law School's argument in the district court. First, in my view, it was doctrinally nonsensical. The Supreme Court had established these rules in a line of cases that has never been overruled.[19] And second, thank God the Supreme Court hasn't overruled those cases. For opponents of discrimination, this is a good rule, not a bad one. The discriminator should bear the burden. But Texas persuaded the district court that the rule had changed, and at that great cost, Texas didn't have to issue the four admissions letters.

Again, at that stage, rather than mooting or settling the case, they suffered an appeal. In my view, there was no way that Texas could expect to win that appeal on the procedural ground and winning would have been a disaster. Getting the Fifth Circuit to adopt that rule would have been a disaster. At this point, there was really nothing in it for them. They were going to have to pay attorneys' fees and they were going to have to bear the burden of proving that these applicants would not have been admitted under a constitutional system.

I've spoken to some of the lawyers on both sides of this case. I've read the trial transcript and the briefs on appeal and I don't understand why Texas let this appeal proceed. It can't have been the money; they hired Vinson and Elkins, a very expensive, very reputable law firm to represent the Law School. It can't have been the principle, because the principle against shifting the burden once unconstitutional discrimination has been proven is a bad one. The only explanation I can think of for their conduct is that this was recreational litigation.

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18. *See* Carey v. Piphus, 435 U.S. 247 (1978) (using burden shifting rule in discussing damages); Mt. Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977) (invoking the burden shifting rule).

19. *See, e.g.*, *Carey*, 435 U.S. 247 (1978); *Doyle*, 429 U.S. 274 (1977).

They seem to have thought to themselves: "It's a neat case. It's exciting. It's a constitutional case and maybe it's going to go to the Supreme Court." I don't think they asked the lawyer's question, "How does this help me? How does this hurt me?" And I really don't think they took into account the consequences on the individuals whose lives are changed by the availability of affirmative action and how this could hurt them. There's an old legal saying, "Let justice be done though the Heavens fall."[20] But what Texas did was, "Let justice be done though the Heavens fall *on you*."

Texas put the educational opportunities, and in many ways, the lives of people of color on the line for no good reason that I can see. I think Texas should have followed another maxim in this case: "She who fights and runs away lives to fight another day."

Unfortunately, as many of you know, there's a very similar suit by the same conservative legal group in Washington—the Center for Individual Rights—against the University of Michigan Law School.[21] Tragically, I think there's a risk that the Michigan suit is going to replay along similar lines because Michigan has put itself in a very difficult situation.

In 1992, the faculty at the Michigan Law School adopted a bulletproof affirmative action program. It's completely legal, assuming that *Bakke* is still good law. It's as defensible as an affirmative action plan could possibly be. It's what Justice Powell endorsed in *Bakke*,[22] only better. Unfortunately, from what I can see, the Law School failed to follow one of the primary rules applicable to CYA memos. And that is you've got to at least appear to follow it going forward. Michigan didn't do that.

One way Michigan failed to follow the memo is that even after 1992, when it changed what, in my humble opinion, was a patently illegal policy,[23] a *Hopwood*-style policy, it continued some of the problems of the previous policy.

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

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20. Calambro v. Second Judicial Court of Nev., 964 P. 2d 794, 805, (Springer, J. dissenting) (quoting Rex v. Wilkes, 4 J. Burrow 289 (K.B. 1770)).

21. *See* Grutter v. Bollinger, Civ. No. 97-75928 (E.D. Mich. *filed* Dec. 3, 1997).

22. In *Bakke*, Justice Powell's controlling opinion included, as an appendix, the affirmative action plan of Harvard College, which he identified as an example of the kind of program which would pass muster. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 321–24 (1978). Because it has already received judicial approval, this kind of plan may have the best chance of being sustained by the Supreme Court.

23. *See* Chin, *supra* note 4.

States—out of more than 100,000 total[24]—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.[25] Therefore, they specifically decided not to include Asian Americans in the affirmative action program at Michigan.[26]

Since then, Michigan has continued to have a racially selective affirmative action admissions program, so far as I can see. In the 1995 to 1997 University of Michigan Law School Bulletin, they say,

> Michigan recognizes the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession. In particular, we strongly encourage prospective students who are African American, Mexican American, Native American or Puerto Rican and raised on the U.S. mainland to apply.[27]

This is the same language from the 1975 policy which was not substantively changed after *Bakke*.[28] And I think that catalog policy is going to have some of the same problems as the program in *Hopwood*.

There are a number of reasons that the Supreme Court may not be crazy about that kind of policy. First, how can any faculty, the University of Texas Law School Faculty, for example, decide that Mexican Americans are in, but Native Americans are out? How can

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24. *See* ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1984, at 66, 68 (1985). By objecting to the exclusion from diversity and other special admissions programs of Asian Pacific Americans and other non-African American, non-Whites, I certainly do not mean to deny or minimize the history of discrimination against African Americans. However, I also believe that other aspects of racism in American law should not be overlooked. *See*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA LAW REVIEW 1 (1998) (describing anti-Asian bias in American immigration law); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA LAW REVIEW 151 (1996) (arguing that Justice Harlan expressed racist attitudes with respect to Chinese immigrants).

25. Admissions Policy—Special Admissions, University of Michigan Law School 2 (adopted May 16, 1975) (on file with author) [hereinafter 1975 policy].

26. *Id.*

27. 25 UNIV. OF MICHIGAN LAW SCHOOL BULLETIN 1995–1997, at 81 (1995) [hereinafter BULLETIN].

28. *Compare* 1975 Policy, *supra* note 25 (justifying special admissions policy *inter alia* on "recognition that these groups have been substantially underrepresented in the student body and the legal profession") *with* Admissions Guidelines, University of Michigan Law School ¶ 3 (Sept. 7, 1978) (on file with author) ("[T]he presence of a substantial number of minorities in the student body is important to the educational environment of the school and to increasing minority representation at the bar.").

they do that on a fair basis? How do they know? Do they know the history and culture and the situation of each group? Have they thoroughly considered all the arguments? It's a Solomonic decision that, again, in my humble opinion, no law school faculty in America is prepared to make on a really careful and intelligible basis.

Second, Michigan's policy also strikes me as inconsistent with *Bakke*. *Bakke* held an affirmative action program unconstitutional because it was limited to race and didn't take into account diversity factors beyond race.[29] This one is even more limited than that. It just takes into account some races as contributing to diversity. I don't think that's going to fly.

Another defect in the Michigan program, at least as reflected in this bulletin, is its avowed goal. The 1992 memo talks about affirmative action strictly for diversity purposes, which is safe, given that it's the only compelling interest the Supreme Court has recognized in this context to date—at least where there's no proven history of discrimination. But they haven't stuck to that story. The catalog talks about building the bar, building communities of lawyers outside the law school context.[30] And I think that's a risk. Justifying affirmative action simply on the ground that it increases the number of minority professionals was rejected by the Supreme Court in *Bakke* and it's been rejected by the federal courts several times since then.[31]

Now there's no question in my mind that the Supreme Court was wrong when they limited affirmative action in that way,[32] but what schools like Texas—and hopefully not Michigan—realized too late is that it's not an academic question. The justifications and rationales for affirmative action are no longer an academic, intellectual question, they also must be evaluated in the context of what the courts are going to permit because, whether we like it or not, any affirmative action program that is questionable is going to be the subject of litigation.

My tentative thought is that just as Texas was the wrong party, at the wrong time, to take this issue to the Supreme Court, Michigan is the wrong party, at the wrong time to defend affirmative action on this ground. I can just hear Justice Scalia's questions now: "The professors at one of the finest law schools in the United States couldn't understand and apply *Bakke*, but you want us to treat it as a work-

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29. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

30. *See* BULLETIN, *supra* note 27.

31. *See* Chin, *Bakke to the Wall*, *supra* note 4, at 886 n.20.

32. The reasons for my support of affirmative action are set out in a recent article. *See* Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action* (last updated Oct. 21, 1996) (visited Feb. 28, 1999) <http://merton.sscnet.ucla.edu/aasc/policy/>, *reprinted in* 3 UCLA ASIAN-PAC. AM. L.J. (forthcoming 1999).

able rule? You thought that the rule of *Bakke* was so compelling and so valuable that you ignored it for decades, but now you think we should uphold it?"

My initial reaction is that Michigan, in this situation, should do what Texas should have done: find a way to make the case go away.

I see that my time is up so I'll stop. Thank you.

PROFESSOR MALAMUD: We will, of course, have plenty of time for questions and comments. I'm sure that Jack's talk, in particular, has stimulated some desire to respond immediately, but those aren't the ground rules that we set, so we will rigidly stick with them despite the circumstances.

I'm particularly pleased to introduce Marina Hsieh to you as our next speaker. She's on the faculty of Berkeley's Law School and will be speaking to us from the point of view of the California experience.

I have known Marina for 11 years, I figured out, much to both of our mutual shock. For those of you who are current students or recent alums and have gone through the clerkship process, take note of this: Marina and I have been friends and colleagues since she interviewed with Hon. Louis H. Pollak the year that I was clerking for him, and she immediately got the job. We were, from that moment on, looking for Marina's co-clerk, and I think Judge Pollak is probably going to be doing that for the rest of his career.

She, in her scholarship, has been involved in civil procedure issues and civil rights issues more broadly. Her contributions in the affirmative action field have been important ones from an activist standpoint. She was a litigator for a number of years with the NAACP Legal Defense & Educational Fund, Inc. before going into law teaching and is currently—let me get the title right—the Northern California Affiliate Representative and an Affirmative Action Committee Member of the ACLU. And the ACLU, as any of you who are Mark Rosenbaum's[33] students know, has been taking a leading role in fighting, losing, and continuing to fight Proposition 209.

Marina.

PROFESSOR HSIEH: I, too, am very excited to be here. I think it's fascinating to watch Asian Pacific American law students across the country begin to grapple with these issues, to frame them, to try to stay ahead of their inevitable involvement in these issues of affirmative action and race politics. I say "inevitable" because I think that,

33. Visiting Professor, University of Michigan Law School, Winter 1997–1999; Director, ACLU of Southern California.

whether we want to be there or not, we will be part of the dialogue and debate. We will be used. We will be assuming roles in the racial politics debates, whether we define them ourselves or are cast into them, and so it's exciting to be here.

My talk was tentatively titled—and I think this now fits quite well—"After the Loss: The Report from California." It's just a little preview of what might be your grim future. Sorry. I brought the rain from California, and I also am going to bring the news of what's going on there. It's stunning just to watch what's happening; you keep thinking the next thing can't happen, but it does.

I'm going to ask the question of what's happening in California in the post-Proposition 209 era from a few perspectives. First, what's been happening in the state generally since the vote? Next, I'll ask that question in terms of public law schools, specifically Boalt Hall. (I call it the epicenter of the crisis.) Finally, what has been the effect on lawyers and Asian Pacific Americans? Obviously I'll touch only briefly on the answers to some of these very broad questions.

First, a bit of background. As you know, Proposition 209—which barred any form of preference on the basis of race, ethnicity, national origin, sex, and so on, in the areas of education, public employment, and public contracting—was passed by the state of California in November 1996.[34] That vote was fairly overwhelming—54% to 46%[35]—there was a lot of daylight between those votes.

Polls suggested that Asian Pacific Americans, at least in urban areas, did substantially oppose the passage of Proposition 209. Those polls, conducted after the fact, suggested that there had been some movement in the opinions of Asian Pacific Americans in California during the campaign that preceded Proposition 209. There was initially some worry about how much various minority groups, particularly Asians, might embrace an anti-209 posture.[36] In fact, all

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34. Proposition 209 provides, in relevant part, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST., art. I, § 31 (as amended Nov. 5, 1996).

35. 4,736,180 votes were cast in favor of the initiative, and 3,986,196 were cast in opposition. *See* Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1494 (N.D.Cal. 1996), *vacated*, 122 F. 3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 17 (1997).

36. In an *Asian Week* poll conducted between June 25 and July 2, 1996, Asian American registered voters *supported* Proposition 209 by a 3-to-1 margin; by the first week of October (1–8), a Field poll showed Asian Pacific American voters evenly divided at 41% for and 41% against, with the remaining 18% undecided. *See* Bert Eljera, *Equal Access or Discrimination?*, ASIAN WEEK, Oct. 24, 1996, at 12; Annie Nakao, *Asians Deeply Divided over Affirmative Action*, S.F. EXAMINER, Sept. 22, 1996, at C1. On the eve of the vote, the University of California Berkeley's Institute of Governmental Studies polled non-White voters in proportion to their social and economic standing in the state, revealing that 53% of California's Asians opposed the

minority groups wound up voting against the passage of Proposition 209,[37] but obviously it still passed.

Proposition 209 was a popular initiative. California is, after all, the land of democratic rule, the land of Constitutional Amendment by popular vote. It's the state that brought us the already infamous Proposition 187, for example, and is getting ready to bring us "reform" of bilingual education by ballot. Elsewhere, Washington's Initiative 200, which will similarly alter affirmative action in the State of Washington, is pending,[38] while another affirmative action initiative was recently defeated in the City of Houston.[39] Similarly, Amendment 2 to the Colorado Constitution prohibiting recognition of anti-gay discrimination under state law was passed by initiative.[40]

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proposition. Seth Rosenfeld & Scott Winokur, *Prop. 209 Divisive*, S.F. EXAMINER, Nov. 3, 1996, at C1.

37. The racial breakdown of the vote was:

	Yes	No
White:	63%	37%
Black:	26%	74%
Latina/o:	24%	76%
Asian:	39%	61%

Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1494 (N.D.Cal. 1996), *vacated*, 122F. 3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 17 (1997).

38. Like Prop 209, the Washington initiative combined anti-affirmative action language with anti-discrimination language: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Initiative 200, sec. 1(1). WASHINGTON OFFICE OF SECRETARY OF STATE'S VOTER SERVICES DIVISION, STATE OF WASHINGTON VOTERS PAMPHLET 30 (18th ed. 1998). *Cf.* source cited *supra* note 34. Unlike Prop. 209, I-200 only has the force and effect of a state statute. *See id.* (stating that if passed, the initiative would add a new section to RCW 49.60). I-200 was passed by a majority of voters on November 3, 1998. *See* Tom Brune, *Now that I-200 is Law, What's Next? UW Alters Admission Policy*, THE SEATTLE TIMES, Nov. 5, 1998, at A1.

39. Houston's Proposition A, which was defeated 54%-46% on November 4, 1997 asked voters to decide the following issue: "Shall the charter of the city of Houston be amended to end the use of affirmative action for women and minorities in the operation of city of Houston employment and contracting, including ending the current program and similar programs in the future?" Ron Nissimov, *Affirmative Action Case Will Be Heard: Texas Supreme Court to Look at Ballot Language*, HOUSTON CHRONICLE, Feb. 5, 1999, at A29 (internal quotation marks omitted).

This language differed from the petition originally circulated. The original petition proposed: "The City of Houston shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment and public contracting." *Id.* The change in language prompted the original circulator of the petition to sue the City of Houston. *Id.* The Texas Supreme Court is scheduled to hear arguments in the case on April 8, 1999. *Id.*

40. Colorado's Amendment 2 prohibited state actors from enacting or enforcing any policy granting "preferences, protected status or claim[s] of discrimination" on the basis of homosexual, lesbian, or bisexual orientation. COLO. CONST., art. II, § 30b.

It's significant that this is a political decision, not a court decision, that we are faced with in California.

By the way—an aside that some of you have heard me speak about before—when we say the Supreme Court denied review of the 9th Circuit decision that upheld the constitutionality of 209, it is important to read behind the news stories. I'm sure some of you have picked up the newspapers and asked, "What exactly was the legal challenge to 209?" The case was not primarily about affirmative action, although that's hard to realize. I suspect that most people reading the newspaper don't see, first, that the Court in the 209 case merely denied review. People mistakenly interpret the news stories to mean that the Supreme Court has decided the constitutionality of affirmative action bans like California's. While such denials do have the effect of binding the parties in the case, and creating procedural authority within that circuit, the broader interpretation is not, of course, what a mere denial of *certiorari* by the Supreme Court means.[41] Second, people also read the stories to mean that the courts have held that affirmative action is no longer constitutional.

The Constitutional argument made in 209 was much more subtle. It has more serious implications for us. The argument is that the political power—the participatory access—of minorities in the state of California is constrained by this constitutional amendment. The political access of groups that support affirmative action legislation is unequally constrained because the amendment bars any kind of program allowing affirmative action.

So, for example, if the quarter of the population of San Francisco that is Chinese wanted their supervisors to implement a program of affirmative action for minority contractors for the City and County of San Francisco, it would no longer be constitutional after Proposition 209. Veterans, on the other hand, could go to their local supervisors and pass the exact same type of preferential program in contracting, without the constitutional constraint that is imposed on race-based affirmative action supporters. That inequality is the 14th Amendment violation claimed in the case, and there is

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In striking down this Amendment, the Supreme Court stated, A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

41. *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1698–99 (4th ed. 1996). *But see* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979) (concluding that the court denies certiorari most often when the majority of the justices agree with the decision of the lower court). My own view follows that of Justice Stevens: decisions denying certiorari have no bearing on the merits of the case. *See* Equality Found. of Greater Cincinnati, Inc. v. Cincinnati, 119 S. Ct. 365 (1998) (opinion of Stevens, J. respecting denial of certiorari).

a good line of Supreme Court precedent, starting in the 1960's (that still technically stands), that establishes that unequal access to remedies can unconstitutionally restrict political participation by protected groups.[42]

That is the constitutional argument that the Ninth Circuit found was not viable and that the Supreme Court chose not to review. I think that this substantive decision about political access should be more disturbing to us, as Asian Pacific Americans, than a negative court holding on the issue of affirmative action. We will not be powerful political actors—in terms of being able to control a whole state or these major initiatives—for quite a long time. Failure to recognize and to explore the meaning of equal political participation by minorities will therefore affect us for a much longer time and to a greater degree than some of these more headline-grabbing issues.

So what, besides the Constitutional challenge, has been happening in the state since the vote? You may have heard that there's a counter-initiative circulating. Ron Takaki at UC Berkeley drafted a nice, short statement that could be a counter-initiative. There's also language that Berkeley students, including a tremendous number of Asian Pacific American students, have drafted, which would reverse Proposition 209 in just the educational area.[43] I think the odds are quite low that it will have any realistic chance of making the November 1998 ballot. It costs a tremendous amount of money to get the qualifying signatures, and, frankly, I think that the polls and the voting would go the same way.

Why do I say that? I read the other day in the "Comical," that is the *San Francisco Chronicle*, that a recent poll of Californians said they actually are very happy.[44] The economy is better; that, of course, makes everyone happy. But we're also very happy because in California, we think we're in a state that makes the right kinds of

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42. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). *See also* Vikram Amar & Evan Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996).

43. The initiative, circulated by Students for Educational Opportunity, stated, "In order to provide equal opportunity, promote diversity, and combat discrimination in public education, the state may consider the economic background, race, sex, ethnicity, and national origin of qualified individuals." *See Students for Educational Opportunity* (visited Feb. 14, 1999) <http://www.hotbed.com/eeoi.htm>. This position was filed with the California Secretary of State's office, but failed to garner enough signatures to qualify for the November 1998 ballot. Robert Selna, *Berkeley Students Seek Vote to Regain Racial Consideration in Admission*, MILWAUKEE JOURNAL SENTINEL, Oct. 11, 1998, at 29.

44. Carla Marinucci, *Californians on Cloud 9, Survey Says*, S.F. CHRONICLE, Feb. 12, 1998, at A21 (citing Field poll in which a majority believe California is heading in the "right direction," the first time in almost a decade of annual polls that this positive vote outnumbered those choosing the "wrong track").

decisions, while the rest of the country is out of sync with California.[45] Between the lines of that poll, I read that the state that brought us Proposition 187 (against immigrants) and Proposition 209 (against affirmative action) is perfectly happy doing exactly what it did. The state that brought us "three strikes" thinks that it's doing the right thing.

Pete Wilson has spun this phenomenon to send the message that he is the 'progressive' from the West: I see the future. I'm the leader for the new millennium. He wants to spread that joy across the country. I think he knows that Californians really do think that this is the better way to go.

Here's the nasty underside of that polling. It's not from this poll, but some of the "good guys," as I would call them, have done some very subtle polling in the post-Proposition 209, post-"Zero African Americans at Berkeley" headline era of public education in California. Some of that polling, which has not been publicly released, suggests that Californians are happier than ever with Proposition 209. Some people assume that, in the aftermath of 209, "we're shocked, simply shocked, to see what this really means. Gosh, we didn't mean to do *that*." This assumption does not appear to be true. Were we to have the vote again today, it looks like those who voted for Proposition 209 would do so again and they might even gain some who voted against it originally who are now wavering. That is a sobering thought. I believe it is also part of why you don't see major dollars flowing from the obvious left organizations to back those counter-initiatives: if they would fail anyway, it's better not to replay the defeat on a grander scale.

So much for the doom and gloom. What's to come? You might have heard about the English for the Children Initiative, the so-called "Unz Initiative," that's pending in California. It would replace bilingual education with one-year English language immersion classes. It is a very complicated initiative, and it will be on the ballot.[46] Its effects could be amazing: two-thirds of Asian and Pacific Islanders in the United States are foreign-born,[47] and 40% of Asian Pacific American children in California are "limited-English profi-

45. *Id.*

46. Proposition 227 passed with 61% of the vote on June 2, 1998. David R. Baker, *Prop. 227 Wins; Bilingual Ed Revision OK'd in Landslide*, L.A. DAILY NEWS, June 3, 1998, at N1; Nanette Asimov, *Prop. 227 Challenged in Lawsuit*, S.F. CHRONICLE, June 4, 1998, at A1.

47. *Majority of APAs New Arrivals, Census Says*, ASIAN WEEK, Sept. 1, 1995, at 1 (discussing Census data).

cient."[48] Obviously an initiative like Unz's will have an huge impact on the Asian population. It is just another example of the impact that this popular, majoritarian initiative process will have upon us.

Moving on, what has been the effect of Proposition 209 on public schools? Switch from the broad state of happy California and telescope directly in to Boalt Hall. The Regents of the University of California had already ordered the University to get rid of all of race-based factors before Proposition 209.[49] As a result, we had some numbers earlier than we would have had from implementing 209. Under the Regents' order, the first entering class to the UC Davis Medical School—the school that brought us *Bakke*,[50]—had no African Americans in it.[51] Boalt Hall followed suit, and the class that entered in 1997 included only one African American.[52] He was a deferral from the year before, admitted under the old admissions policy. No Blacks at all entered through the new 1997 admissions process.[53]

Here are some of the numbers behind the headlines. I think they speak for themselves. The 90% of the class that entered in 1997 that was admitted under the new, post-209, post-Regents admissions policy (as opposed to totals diluted by transfers and deferred admittees) was 84% Non-Hispanic White.[54] Of the 16% of minorities, 13% were "Asian Pacific Islander." This breaks into two categories: 11% were "Asians:" 21 Chinese, seven Korean and four Japanese

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48. Victoria Lee-Jerrems & Ellen Wu, *A Crude Way to Teach Asian Pacific Americans English*, L.A. TIMES, Apr. 19, 1998, at M6 (reporting on 1997 Language Census data for California public schools).

49. *See* Adoption of Resolution: Policy Ensuring Equal Treatment–Admissions, Minutes of University of California Board of Regents 27 (Jul. 20, 1995); *see also* Regents of the University of California, *Regents Briefing July 19–21, 1995* (visited Mar. 1, 1999) <http://www.ucop.edu/ucophome/commserv/regjul95.html>; Amy Wallace & Dave Lesher, *UC Regents, In Historic Vote, Wipe Out Affirmative Action; Diversity: Decision Signals End of California's National Leadership in Opening Top Universities to Minorities. Jesse Jackson, Who Led Protest Against Rollback at Meeting, Says It Casts a "Long Shadow"*, L.A. TIMES, Jul. 21, 1995, at A1.

50. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

51. OFFICE OF THE PRES. OF THE UNIV. OF CAL., TABLE ON ACADEMIC ADVANCEMENT (Oct. 17, 1996) (compiled from submissions by the Association of American Medical Colleges, campus submissions, and UCLA). The University of California at Davis Medical School not only had no Black matriculants, but no American Indian/Alaska Natives or mainland Puerto Ricans. *Id.* The two Mexican-American/Chicana/o matriculants were the only "underrepresented" students in the entering class of 93 total students. *Id.* At the University of California at Irvine Medical School, only 3 of 92 matriculants entering in 1996 were from underrepresented minorities. *Id.*

52. The University of California at Berkeley School of Law (Boalt Hall), 1997 Annual Admissions Report 3.

53. *Id.* at 4.

54. *Id.*

students. Two percent were what Berkeley calls "Asian Subgroups:" five Vietnamese/others, one Pacific Islander, and zero Filipinas/os.[55]

So certain racial and ethnic categories at Boalt Hall were "zeroed out." Filipinas/os zeroed out from about nine per class in previous years to zero—zero admits leading to zero students. In the entering class admitted under the new system, there were zero Native Americans as well. And of course, the most publicized, zero African Americans (despite 15 offers, a terrific drop in the previous number of African American admits).[56]

Aside from Asian Pacific American admits, who else was in that 16% of the class that was minority? No African Americans. No Native Americans. The three percent balance was Latinas/os and Chicanas/os. Like African Americans, this was also a huge drop from previous years.[57] Increasingly, the minority numbers in higher education will be filled by Asian Pacific Americans—at least certain ethnic subsets of Asians. We will be used to cover the gaps of minority groups harder hit by these new policies.

Those are the numbers. What's going to happen this year? You'll see a little bit of a perk-up in some of the minority figures. Why? Boalt Hall will make some changes on the margin, although there won't be any great adjustments this year. Boalt is eliminating the Law School Admissions Council (LSAC) adjustments for undergraduate institutions, i.e., differential "weighting" of GPAs based on the college attended. It has also added a socioeconomic index as a factor for some admissions on the margin. More files will go to faculty members for discretionary reads, where the policy exhorts consideration of more factors, but nothing that's clearly defined. The Admissions Director described the new approach as "a bigger net to cast into deeper waters."[58] So we'll see some minority students here and there. You won't see those zeroes.

But what Boalt did *not* do, at least this year, is more significant. It did not decide to move away from the LSAT. It did not go to an index score system, like UCLA, with multiple factors systematically included. It did not fundamentally re-examine what merit means in the law school admissions context. It did not entirely rethink admissions. (I'm sure we'll have a discussion about Jack's presentation.) It

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55. *Id.*, at 4, 13. Only one Vietnamese student actually enrolled. *See id.* at tbl. 2 ("Minority Admissions, 1987–97"). The "Southeast Asians" category was confusingly redefined that year to include subcontinental Indians as well as Vietnamese.

56. *Id.*

57. *Id.* at 4. There were seven total Chicana/o-Latina/o students admitted in 1997, 3% of the class. An additional seven Chicana/o-Latina/o students who had deferred from 1996 also entered in 1997. *Id.* at 3.

58. Conversation with Edward Tom, Director of Admissions for the University of California at Berkeley School of Law (Boalt Hall) (Feb. 18, 1998).

did not consider what our goals should be and what our law school, particularly as a public law school, should be doing with its slots.

By the way, you might have heard that UC was thinking about getting rid of the SAT. They're not going to. The latest report is that they like the SAT because it's a "good indicator," and they've concluded that getting rid of it would not help minorities anyway.[59]

What has been the effect of Proposition 209 on lawyers and Asians? Those are my last two questions.

The effect on lawyers is that we'll have lots to do, but we'll probably keep losing. The pre-209 lawsuits that Pete Wilson initiated to get rid of affirmative action—suing his own state agencies to stop discriminating against Whites—will continue to be an uphill battle.[60] There is also a suit against the University Regents alleging that they violated the Open Meetings Act because of the way they assembled for their vote. This case is stalled, and 209 obviously preempts much gain from it.[61]

On the margins, we are preparing to defend affirmative action against various interpretations of the scope of 209. For example, how far can recruitment go? How much can scholarships consider race? And so on.

From the left, MALDEF has brought a complaint against Boalt Hall under Title VI.[62] That complaint alleges that Boalt knew that the

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59. Pamela Burdman, *UC Regents Set Aside Proposal to Drop SAT*, S.F. CHRONICLE, Feb. 20, 1998, at A21. Professor Keith Widaman, chairman of the Board of Admissions and Relations with Schools, testified at a recent Regents meeting that the SAT did a better job of predicting freshman performance for Black and Latina/o students than for White students, and that eliminating the SAT would increase number of Latinas/os eligible for UC from 3.8 percent to only 4 percent. *Id.* This contradicted the conclusion of a recent Task Force on Latino Eligibility that had called for the SAT to be optional in admissions; indeed, Widaman said the committee has considered increasing the role of the SAT in admissions. *Id.*

60. *See, e.g.*, Wilson v. State Personnel Board, No. 96-CS01082, slip op. (Cal. Super. Ct., Sacramento Cty. Nov. 30, 1998). On November 30, 1998, Judge Connelly ruled that some state programs were and some programs were not violative of equal protection and/or Proposition 209. *Id.* at 10–28. As this goes to print, that decision is likely to be appealed. *See* Harriet Chiang & Robert B. Gunnison, *Affirmative Action Laws Clear Hurdle/Ruling Deals Blow to Wilson's Lawsuit*, S.F. CHRONICLE, Dec. 1, 1998, at A1. For an additional example of this type of challenge, see *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (ruling that specific state contracting goals for affirmative action to be violations of equal protection under strict scrutiny, in a suit by a private plaintiff).

61. *See* Molloy v. Regents of Univ. of Cal., No. 97-6123 (Cal. Super. Ct., San Francisco Cty., filed Feb. 16, 1996) (action stayed pending decision by Court of Appeals).

62. Complaint letter filed by *Mexican American Legal Defense and Educational Fund et al.* with the *Office for Civil Rights of the U.S. Department of Education*, file number 09-97-2089-I (March 19, 1997) (pending). MALDEF, the NAACP Legal Defense and Educational Fund, and the Asian Pacific American Legal Center of Southern Califor-

new admissions policy would disparately impact minority admissions, but knowingly went ahead with it. Then sure enough, look at what happened. That complaint is before the Office of Civil Rights, which is currently in a terrible political position over it.[63]

In addition to these, there is a new lawsuit: Boalt Hall is being sued for having minority scholarships. These are funded solely through private alumni contributions, and Boalt itself doesn't administer the program, the alumni do. However, the plaintiffs allege state action because our alumni office created and compiled lists of eligible students for the alums.[64]

The message is that you *will* be sued. No matter what you do, no matter how much you try to follow the rules, no matter how much you anticipate defending approaches that seem reasonable, you're going to be sued. So you might as well live in a world in which you assume that you will be sued and decide what you are going to defend.

I've run out of time just as I was going to talk about the impact on Asians. But much of what I was going to say has already been suggested: we are not a monolith. The numbers from Boalt that I read earlier illustrate the tremendous diversity within the Asian community. To telescope to one example, we have extreme per capita differences in income. If we substitute socio-economic factors for race and ethnicity in California, consider that Japanese, Asian Indians (subcontinental), and Chinese are above the national average per capita income. On the other hand, Filipinas/os, Thais, Koreans, Pacific Islanders and Southeast Asians are below it.[65] Annual per capita

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nia also have filed an action against Boalt Hall in federal court. *See* Complaint, Rios v. Regents of the Univ. of Cal., Civ. No. C99-0525 (N.D. Cal. filed Feb. 2, 1999).

63. *See, e.g.*, Craig Roberts, *Running away with the Law*, THE WASH. TIMES, Aug. 23, 1997, at C1 (noting that Norma Cantu, head of the Education Department's Office for Civil Rights "was denounced last week by Senate Judiciary Chairman Orrin G. Hatch and other senators for riding roughshod over the 'will of the people, the courts and the Constitution' in her determined effort to impose illegal racial quotas on the University of California and the University of Texas.").

64. *See* Driscoll v. Kay, No. 790351-7 (Cal. Super. Ct., Alameda Cty. dismissed Jan. 4, 1999). On January 4, 1999, after a confidential settlement by the parties, the case was dismissed with prejudice. *See* Email correspondence from Annemarie C. O'Shea, Attorney, Morrison and Forester, to Marina Hsieh, Acting Prof. of Law, University of California, Berkeley (Boalt Hall) (Feb. 18, 1999) (on file with author).

65. The following figures for per capita income by enthnicity appear in *We're in the Money*, ASIAN WEEK, Jan. 19, 1996, at 19 tbl. 2.

Japanese	$19,373
Asian Indian	17,777
N-H White	16,074
Chinese	14,876
US	14,420
Filipino	13,616

income ranges from over $19,000 for Japanese Americans to $2,700 for Hmongs.[66] We have enormous differences.

We also have great disparities in educational levels, not only by ethnic subgroup, but within them. You've probably heard that many Asians have higher rates of college education than Whites or the national average. But Vietnamese, Pacific Islanders, Samoans, Tongans, Cambodians, Laotians, and the Hmong lag far behind.[67] And the differences within groups can be extreme: seven percent of Asian American adults in this country have not completed the fifth grade, lagging far behind not only non-Hispanic Whites, but African Americans.[68] Some groups, like Chinese Americans, have high rates of both college graduates and adults with less than a fifth grade education.[69] We have enormous educational disparities.

I'm supposed to stop talking. The big question is "Where will Asians be in the affirmative action debate?" I think we must be particularly sensitive to being what I will call the "displacers," the fillers of the minority numbers. Whether or not we have been or will be targeted for affirmative action, we are going to be cited in with the minorities to pad out the numbers. We are almost all of the Boalt Hall minority student population, the White versus minority figure.

I was just at the University of Maryland in Baltimore, a majority African American city. There, after an important decision about use of race in scholarships,[70] the University of Maryland, the largest public law school in that state, has moved to a race-blind admissions system. The student body dropped from being about 20 percent African American to 10 percent African American.[71] But their total

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Thai	11,970
Korean	11,177
Pac Islander	10,342
Vietnamese	9032
Samoan	7690
Tongan	6144
Laotian	5597
Cambodian	5120
Hmong	2692

66. *Id.*

67. Arthur Hu, *Making the Grade*, ASIAN WEEK, Jan. 19, 1996, at 18 (reporting 1990 Census data showing that Asian Indians, Chinese, Filipino, Japanese, Korean, and Thai are all above the White and U.S. averages.)

68. *Id.*

69. *Id.*

70. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

71. In 1995, the entering class included 59 African American enrollees (21%). Letter from Jim Forsyth, Associate Dean for Admissions and Registration, University

minority numbers haven't dropped. Why? Because in six years the Asian American population in the law school rocketed from 3.5 percent to 12 percent.[72] The University of Maryland 1997 entering law school classes was more Asian American than African American.[73]

Now that's Maryland, hardly an Asian stronghold compared to California. What does that tell us about the Asian Pacific American role in minority headcounts?

I'll stop there, on an ambivalent note, but Sumi will fix that!

PROFESSOR MALAMUD: Our last panelist is Sumi Cho from DePaul University College of Law. Sumi and I have been joined at the waist for the last couple of years. I have commented on her work in panels and she has commented on mine. I'm now adding a moderator role to our repertoire. Sumi, it's your turn next.

She has a PhD in Ethnic Studies from Berkeley. She was a very involved activist on the Berkeley campus and has carried that activism into her work as a law professor. She has written extensively on issues having to do with Asian Americans, Asian Americans and the law, Asian Americans in relation to African Americans and race/gender interactions in American law and social reality.

Sumi Cho.

PROFESSOR CHO: Thank you. First I want to congratulate the organizers of this very successful event. It is really quite an achievement to behold and a pleasure to be a participant. And toward that end, I also want to acknowledge the alumni, who have had a large role in the success today. Not simply Jack, but I see some people who have returned, traveling quite a distance to be here. Emmeline Kim Owyang, Emily Houh, and Colin Owyang are alums who formed the first Critical Race Theory reading group here at the University of Michigan. That group laid the ground work for the *Michigan Journal of Race & Law*. Your symposium's success today is really built upon a tradition of APALSA activism.

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of Maryland School of Law, to Marina Hsieh, (Sept. 11, 1998) (on file with author). That fell to 28 enrollees in 1996 (10%). *Id.*

72. In 1991, the entering class included 10 Asian/Asian American enrollees (3.5%), that figure grew to 32 enrollees in 1997 (12%); by contrast, the 1991 entering class included 75 African American enrollees (26%). Telephone conversation between Jim Forsyth, Associate Dean for Admissions and Registration, University of Maryland School of Law and Marina Hsieh (Feb. 11, 1999). The 1997 class only had 28 (10%). *Id.*

73. In 1995, there were 59 African Americans and 25 Asian/Asian Americans of 277 enrollees. Forsyth letter and telephone conversation, *supra* notes 71–72. In 1996, there were 28 of each of these minority groups of 267 enrollees. *Id.* In 1997 there were 28 African Americans and 32 Asian/Asian American enrollees. *Id.*

In addition, the amount of faculty support that you have is impressive. It's not simply the number of moderators who join us today on the panels, but at how many other universities would you have such a turnout among the faculty for an APALSA event on a Saturday? So that's a real credit as well to the support and resources that you have to draw on from the law school as well as from the main campus, with Professor Gail Nomura[74] here from the Asian American Studies department. I really think that you are fortunate to have developed such a community.

I want to address a phenomenon I've been observing in the various talks that Jerry,[75] Jack,[76] Frank,[77] Marina,[78] and I have been giving on affirmative action across the country, often at the behest of Asian Pacific American students. Typically, in these talks during the question and answer period, at least one APA student will voice concerns about how s/he perceive affirmative action to be hurting, not helping, APAs as a group, and express heightened anxieties about where we fit within a Black/white[79] race paradigm. On the one hand, we suffer from white-inflicted racism, but on the other hand, we are excluded from racial remedies designed for African Americans. I sense from supportive yet discomforted crowd reactions to this type of question, that the sentiment is shared by more than one student. I want to address what I perceive as the sense of APA "ambivalence" on the issue of affirmative action and consider how Critical Race Theory ("CRT") and Critical Asian Pacific American perspectives may help us to overcome this ambivalence.

Let me start with a CRT insight—that is, the critique of civil rights and anti-discrimination law as a false panacea for society's racial ills. The CRT critique embraces, alternatively, a synergistic

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74. Director of Asian/Pacific American Studies Program, University of Michigan.

75. Jerry Kang, Acting Professor, University of California, Los Angeles, School of Law.

76. Gabriel Chin, Associate Professor, University of Cincinnati College of Law.

77. Frank Wu, Associate Professor of Law, Howard University School of Law.

78. Marina Hsieh, Acting Professor, University of California, Berkeley, School of Law, Boalt Hall.

79. Kimberlé Crenshaw explains that she capitalizes "Black" and does not capitalize "white" because "Black constitutes a particular cultural group, and thus requires a proper noun, while "white" encompasses many cultural and ethnic groups and therefore does not. *See* Kimberlé Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 2144 n.6 (1991). For similar reasons I also capitalize "Black" but do not capitalize "white," but I expand the category of "cultural group" to "political-cultural group" to respond to the anti-essentialist critique and to recognize that the externally imposed racialization of groups of color based upon white supremacy interacts with the internally generated cultural group formation. *See* Sumi Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1037 n.8 (1997).

and systematic understanding of racism as foundational to US society and law, rather than understanding racism as an individual, aberrant prejudice—a view that tends to undergird much of anti-discrimination law as evinced by the strict causation and intent requirements built into the proof structures of Title VII.

Critical Race Theory maintains that there are a wide range of racial injuries and a narrow range of effective remedies. Conservatives and the Supreme Court, on the other hand, would have you believe that it's just the opposite: that there is a wide range of remedies (including affirmative action) that requires narrow-tailoring mandated under strict scrutiny review to address the very abbreviated range of injuries in this allegedly colorblind world.[80]

Critical Race Theory reminds us that employment discrimination and affirmative action are but two very limited and increasingly compromised remedies. Imagine the limits of their scope and their reach by envisioning the vista of the Grand Canyon as representative of the complex of US racisms. Then imagine that you have two narrow cylinders through which you may glimpse only a small portion of that canyon range and that these cylinders represent the reach of employment discrimination laws and affirmative action programs that are legally permissible means to address the Grand Canyon of racial discriminations.

Now this Critical Race Theory insight might assist us in lessening APA ambivalence towards affirmative action, but we also need to address, more fully and specifically, latent APA community concerns. For that I will introduce what I will refer to as an Asian critical or "APA Crit" insight of what has been referred to as the "critique of the Black/white paradigm."

In light of critiques of the critique of the Black/white paradigm[81] on which I won't elaborate here, I am going to suggest a shift in terminology and focus toward an analysis of *differential racisms under white supremacy*[82] to ground an APA Crit methodology. Let me

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80. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 449–51 (1997) (arguing that the benefits of affirmative action have not been proven and that Blacks have made significant progress without it); Missouri v. Jenkins, 515 U.S. 70 (1995) (evaluating the scope of remedy imposed in school desegregation case).

81. *See* Leslie Espinoza and Angela Harris, *Afterword: Embracing the Tar-Baby—Lat Crit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585 10 LA RAZA L.J. 499, 506–07 (1997) (describing Lat Crit Theory as an attempt to complicate our understanding of the mechanics of racial oppression by expanding the analytical focus to include non-white, non-Black others, as well as gender-based and international critiques).

82. For a comparison of the related concepts of "differential racialization" and "differential forms of disempowerment" forwarded by race theorists Tomás Almaguer, Jeff Chang, and Eric Yamamoto, see TOMÁS ALMAGUER, RACIAL FAULT LINES:

explain what I mean by analyzing our topic for this panel from an APA Crit perspective.

As an imperfect remedy, affirmative action does not address many of the prevalent forms of discrimination commonly experienced by Asian Pacific Americans, nor, I would argue, the varying ways in which APAs are uniquely racialized in U.S. society. What makes it *Asian* Crit or *APA* Crit? The APA part of the APA Crit insight is the recognition of this particular difference among groups of color. But what makes it "crit" is the commitment to understand the consistency of racial hierarchy and white supremacy among these differential racisms.

In today's talk I'm going to try to explore two forms of these differential racisms—over-parity discrimination and cultural v. material injuries—as they pertain to APAs and the mainstream understanding of affirmative action. I will close by demonstrating why, despite these differential racisms, it is necessary for APAs to support and defend affirmative action as part of a larger, ongoing movement against white supremacy, a movement that benefits not only APAs directly, but human society overall.

I turn first to the analysis of differential racisms to understand APA ambivalence toward affirmative action. This differential racism is comprised of and reflects the varying types of material cultural injuries that APAs experience as a group as distinct from those of other groups of color. To forward this discussion, I'd like to introduce the concept of what I refer to as "over-parity discrimination"—that is, the problem of conflating the concept of over-parity with non-discrimination.

But in order to set up the discussion of over-parity discrimination, indulge me in a little bit of critical race historicization of affirmative action's genesis and development. Affirmative action was created and endorsed as a result of a political compromise forged against a backdrop of mounting racial and political turbulence and social criticism throughout the 1960s and early 1970s. It was seen as necessary to lay to rest a period of very intense racial conflict.[83]

THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 4–7, 9 (1994) (forwarding concept of "differential racism"); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 116–23 (1999) (same); and Jeff Chang, *Race, Class, Conflict and Empowerment: On Ice Cube's "Black Korea,"* 19 AMERASIA J. 102–03 (1993) *reprinted in* LOS ANGELES STRUGGLES TOWARD MULTIETHNIC COMMUNITY 87, 103 (Edward Chang & Russell C. Leong eds., 1994) (discussing "differential forms of disempowerment").

83. *See* MANNING MARABLE, BEYOND BLACK AND WHITE: TRANSFORMING AFRICAN AMERICAN POLITICS 83–84 (1995) (detailing the effects of the Nixon Administration's affirmative action policies in laying the foundation for the current popular perception of those policies); *see also* CHARLES R. LAWRENCE III & MARI J.

As such, affirmative action had a very narrow reformist scope, often targeting high-profile points of socioeconomic entry, including admissions into higher educational institutions and entry level hiring in certain professions and civil service occupations.[84] Indeed, it was President Richard Nixon who sought to co-opt the movement for Black Power into Black capitalism through affirmative action policies.[85] He was also one of the strongest advocates of promoting affirmative action in the corporate world.[86]

So these modest racial reform measures often failed to address other important areas of racial imbalance, such as graduation in college or employee advancement and promotion, as well as other forms of on-campus or on-the-job environmental discrimination. Why? Because they were not intended to do so. Nor has affirmative action successfully addressed the societal lockout of low income people of color who have, by and large, been defined out of affirmative action programs, prompting critics to attack this limited reform on the basis that it serves a predominantly middle-class constituency.[87]

Now, because persistent and institutionalized and often subtle forms of discrimination are very difficult to uproot and have been left unaddressed by Title VII,[88] governmental officials in charge of monitoring affirmative action compliance began, in the early 1970s, to compare the percentage representation of an eligible, disadvantaged minority group in the relevant labor, business, or applicant pool (the baseline percentage or the "applicant pool," as it's known) against their percentage representation in employment, contracting, or university admissions—their actual representation (or what's referred to as the "applicant flow").

MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 23–25 (1997) (discussing the rise of affirmative action programs in corporate America); Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, (Frank Valdes et al. eds., forthcoming 1999).

84. LAWRENCE & MATSUDA, *supra* note 83, at 25.

85. *See* MARABLE, *supra* note 83, at 83–84 (describing the Nixon administration's affirmative action polices as working towards the suppression of radical factions and the adoption of conservative measures).

86. *Id.* at 83–84.

87. *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1333–34 (1986) (criticizing an objection of affirmative action programs that states that the programs benefit middle-class Blacks, one of the populations least harmed by discrimination). *But see* Deborah Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 COLO. L. REV. 939 (1997) (arguing that the minority middle class, as well as lower income groups, have been subject to race-based inequity and thus are an appropriate target of affirmative action policies).

88. 42 U.S.C.A. § 2000e (1994).

This parity, as it's popularly known, reflects a close approximation or a balance between the baseline representation or applicant pool and the actual percentage or the applicant flow. If a protected group is significantly under-parity, liability may ensue. As a result, the corporate world (and educational institutions) often adopted affirmative action plans as a defense mechanism to legal liability.

In 1977, the Court approved a theory of systemic disparate treatment in *Hazelwood*[89]—provable by statistics if one could demonstrate a "gross disparity" between the expected versus observed percentages of protected groups in the workplace.[90] And so we can see the developmental logic of employment discrimination of how this disparity or state of under-parity equates with the inference of discrimination. Parity is further enshrined one year later in the historic *Bakke*[91] decision. There, Justice Powell privileged the forward-looking rationale of diversity and dispensed with the backward-looking compensatory rationales, including the long history of white supremacy and the law's complicity thereto.[92] Thus, the stage was set for the exultation of "diversity" and the measurement of such, through proportionalism or the search for parity.

Now let me make clear that I'm *not* taking issue with the equation of under-parity representation with the inference of discrimination. Rather, I dispute the assumption that the kind of logically converse relationship that over-parity, or as it's been called, over-representation, automatically comports with an inference of non-discrimination or the absence of discrimination. I believe that this converse equation has also been made, not in legal doctrine, but flowing from the logic of legal doctrine, so that it has just become "common sense" that groups that are over-parity automatically are considered to be free from any type of discrimination.

For students of APA history, we know that this common sense is not in keeping with what we often have experienced. Rather, in keeping with our history of labor market exclusion, racialized and gendered labor, and immigration policies that created confined labor "niches" for APAs, our experiences confirm the co-existence of over-parity representation and discrimination. In other words, it has been at the very moment at which we exist over-parity in a particular labor market that we have been subjected to the most discrimination.

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89. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

90. *Id.* at 307–13.

91. 438 U.S. 265 (1978).

92. For a discussion of the diversity rationale as a permissible State interest in using a suspect classification, see *id.* at 311–14.

That was the exact situation presented in *Yick Wo v. Hopkins*,[93] which involved an over-parity representation of Chinese in the laundry business—a concentration resulting from a series of prior occupational exclusions. At the time of *Yick Wo* in 1886, there were 240 Chinese laundry operators in the city of San Francisco out of 320 total, with the remaining 80 laundries operated by whites. In percentages, Chinese operated 75% of San Francisco's laundries while comprising less than 10% of the city's population.[94] These numbers certainly reflect over-parity representation in the field of the laundry business. Yet the conflation of over-parity and non-discrimination really does not hold here, as of the 201 licenses denied to operate laundries, 200 were Chinese and only one was white! Such administration of the law—delivered with an "evil eye" and "uneven hand" rendered the ordinance unconstitutional.[95]

Nor did it hold for first-generation Japanese Issei immigrants in terms of their phenomenal agricultural productivity. When the Issei, who comprised 2% of California's population in 1920, and controlled less than 2% of the Golden State's agricultural lands began to produce over 90% of California's berry crop and over 50% of its onion, asparagus, green vegetable, and celery crops, they began to threaten agribusiness and white farmers.[96] Never mind that these agricultural crops were largely shunned by white farmers due to the hard manual labor required in a stooped position. It was at this moment that the Issei's over-parity representation in that labor market also brought down upon them increased legislation and enforcement of alien land laws[97] as well as anti-citizenship[98] and anti-

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93. 118 U.S. 356 (1886).

94. According to 1880 Census data, there were 21,745 Chinese in San Francisco compared to 210,496 Whites. *See* Elmer Clarence Sandmeyer, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 19 (1991).

95. *Yick Wo*, 118 U.S. at 373–74.

96. According to the 1920 Census, the population of California was 3,426,861, of which 70,196 were of Japanese ancestry. *See* K. K. KAWAKAMI, THE REAL JAPANESE QUESTION 259 (Arno Press 1978) (1921). The Japanese Agricultural Association of California recorded that in 1920, Japanese Californians owned .07% of the state's land, and farmed 1.64%. *Id.* at 265. Despite these modest numbers, Japanese immigrants cultivated disproportionate percentages of fruits and vegetables in California: 91% of the total berry crop, 81.2% of onion; 65.4% of asparagus; 58.8% of green vegetables, and 53.3% of celery. *Id.* at 266 (citing data compiled for 1920 by the Japanese Agricultural Association).

97. *See* Keith Aoki, *No Right to Own? The Early-Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C.L.REV. (forthcoming 1999); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 12–17 (1947) (depicting anti-alien land laws as a response to a perceived threat from Japanese land ownership).

98. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L. REV. 1111, 1120–21 (1998)

immigrant measures,[99] and eventually, I would argue, internment. So I maintain that over-parity is inappropriately conflated with the concept of non-discrimination in APA History, as well as in contemporary experiences.

Now I have time only to describe briefly five areas of contemporary over-parity discrimination that remain unaddressed through the policy of affirmative action or, for that matter, Title VII. I gave a talk for the Asian Pacific Americans in Higher Education Conference a couple years ago and my comments are recorded on this matter for people who want the more detailed version of this.[100] But in that article, I identified the most common types of over-parity discrimination that we face in the particular employment field of academe.

First, there is tenure and promotion denial: Asian Pacific American faculty suffer one of the lowest tenure rates, at 41 percent, compared to a 52 percent overall rate.[101] Perhaps model minority stereotypes may trigger, for example, academic jealousy and fears of unfair competition that may serve to isolate Asian Pacific Americans from established and voting colleagues, as well as from other junior faculty. Fears of Asian superiority are often compensated by negative model minority ascriptions of deficits in intangible categories, such as "presence," "self-confidence" or "collegiality" that are often used to deny candidates promotion or tenure. That's just one example.

A second category is professional tracking. For example, almost 70% of all APA Ph.D.s awarded in 1993 were in the fields of engineering, life sciences, and physical sciences.[102] By contrast, APAs are severely underrepresented in many humanities and social sciences fields and in professional schools. Data on full-time faculty from 1992 reveals that APAs were less than 3% in the following fields: history (2.2%); English/literature (2.1%); philosophy (1.8%); education (1.6%);

(discussing the discriminatory effects of the Supreme Court's interpretation of naturalization laws).

99. *Id.* at 1121 (discussing how the Chinese Exclusion Laws used national sovereignty as an argument for disallowing Asians from immigrating to the United States).

100. *See generally* Sumi Cho, *Confronting the Myths: Asian Pacific American Faculty in Higher Education, in* Affirmative Action and Discrimination, Proceedings of the 9th Annual Conference of Asian and Pacific Americans in Higher Education 31 (Ling-chi Wang ed. 1996). This topic will also be the basis for an expanded article examining contemporary employment discrimination cases involving APAs.

101. *Id.* at 35.

102. Cho, *Confronting the Myths, supra* note 100, at 38 (citing LINDA ZIMBLER, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, FAULTY AND INSTRUCTION STAFF: WHO ARE THEY AND WHAT DO THEY DO? 7, 14–15 (1994).

psychology (1.4%); political science (1.3%); law (0.9%).[103] Now some may argue that such categorical concentration represent "free choice" or the cultural priorities of APAs as a group, as opposed to exclusionary practices. But this analysis begs the question by failing to see how exclusionary practices or stereotyping may shape both the cultural priorities of a group and individual choices.

Another problem is the phenomenom of academic caste. At the executive and managerial levels, APAs comprise only 1 out of 100 positions.[104] Lawsuits filed by APAs alleging employment discrimination against universities suggest that stereotypical notions of a groupwide lack of leadership and communication skills adversely affect the selection and promotion of APAs as CEOs or lower level university administrators. This problem, combined with the problem of tenure denial discussed earlier, has been referred to as the "glass ceiling" that societal out-groups hit when attempting to advance to the upper echelons of an institution or industry.

The particular susceptibility of APA women to the problem of sexual and racial harassment is a fourth area of over-parity discrimination. This problem may stem in part from the convergence of racial and sexual stereotypes in a process that I have referred to in previous work as the 'model minority meeting Suzie Wong.'[105] Unfortunately, as critical race feminists have pointed out, claims of sexual or racial harassment by women of color often fail due to the bifurcated, non-intersecting nature of race versus gender-based harassment and discrimination causes of action, combined with a legal standard requiring the harassment to be "pervasive and severe."[106]

The final over-parity problem I'll discuss today is accent discrimination. This problem often arises when students complain about the accents of faculty members of Asian-ancestry. The problem usually arises in subject areas such as mathematics, physical or biological sciences, or engineering. In these difficult subjects, the alleged failure by a professor of Asian-ancestry provides a convenient excuse for a student's poor performance. Even when evidence of racial and national origin bias accompanies complaints of accent and teaching problems, the conflation of parity with nondiscrimination may lead courts to discount such evidence and deny the operation of discriminatory intent.

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103. *Id.*

104. Cho, *Confronting the Myths*, *supra* note 100, at 39 (citing EEOC Survey, Equal Employment Opportunity Commission, Higher Education Staff Survey, 1989 EEO-6 Detail Summary report, unpublished data, 1991).

105. Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Myth Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997).

106. *See* 42 U.S.C.A. § 2000e et seq. (1996); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

These five forms of over-parity discrimination against APAs in employment highlight distinct types of racial discrimination underappreciated by law and society. Cases alleging over-parity discrimination of these kinds tend to be spectacularly unsuccessful, perhaps due to judicial (and societal) discomfort with the possibility that discrimination can co-exist in a state of over-parity representation. Such a conclusion seems to defy our "racial common sense"—at least that which is forged under the dominant liberal Black/white race relations paradigm. For this reason, APA progressive political activism, combined with APA Crit research and analysis, is necessary to understand both the differentiated nature of racial discrimination as well as the consistency of white supremacy.

With one third of my talk left and only 30 seconds to go, let me just give short shrift to my distinction between cultural versus material injuries, which is a second difference that may explain APA student ambivalence to affirmative action, gleaned from, perhaps, a sociological understanding of APA student life experiences to date. When you teach Asian American Studies, you find out quickly what the most impassioned discussion topic is. Is it anti-Asian violence? No. Is it employment discrimination? No. Is it Asian admissions? No. What is it? Interracial relationships, dating, and raced/gendered stereotypes, without question, in my experience, hands down, has been the hottest topic. That is to say that there are cultural injuries of racism that are suffered by APA students of such a breadth and depth at a formative period of their adult lives, that may, perhaps, skew an appreciation for the material injuries that one encounters out in the workplace. Because affirmative action is in large part a material remedy addressing material injustices,[107] APA students may feel affirmative action misses the centrality of the culturally-based oppression they are confronting.

In conclusion, in light of "over-parity discrimination" (and to a lesser extent, the cultural versus material injury distinction), I hope we have a better understanding of APA ambivalence toward affirmative action. I'd also like to say that despite these ambivalences toward affirmative action, I hope that the following three insights

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107. This is to deny neither the cultural nature of racial discrimination and the cultural disrespect attending it, nor the impact that affirmative action has had on rectifying this cultural disrespect through physical inclusion of "others." It is simply to acknowledge the primary function of affirmative action policies to redistribute scarce material resources (quality education and jobs) for redress of materially-based injuries of white supremacy. *See* MARABLE, *supra* note 83, at 81 (discussing how affirmative action was never construed as a law or continuous policy); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1777–91 (1993) (expounding a theory of affirmative action as a means toward deconstructing and eliminating white supremacy).

will prompt other APA students in the country to join with the University of Michigan APALSA in defending affirmative action: first, that we need a Critical Race Theory understanding of racial discrimination that is synergistic and systemic, and that comprehends that affirmative action is no panacea, but one, limited remedy that has been continually compromised by its opponents; second, that we must have an APA Crit understanding of differential racisms, how they impact us through fears of cultural superiority, as opposed to what Judge Leon Higginbothom refers to as the "precept of inferiority"[108] imposed on African Americans, and the largely unremediable practice of over-parity discrimination through either affirmative action or employment discrimination; and finally, how we must take this understanding of differential racisms, not to attack the unfinished project of Black liberation[109] towards a more narrow nationalism, but rather to develop a coalitional theory of the transitivity of white supremacy and how the differential racisms directed towards people of color and the differential oppressions directed towards women, the poor, and gays and lesbians, for example, are inextricably linked to one another.

Thank you.

PROFESSOR MALAMUD: On the assumption that generating discussion will not be this panel's problem, we have the potential, at least, to extend this session as much as an additional fifteen minutes if the questioning justifies it. So prove the organizers right, please, and jump on in.

Yes.

AUDIENCE MEMBER: This is a question for both Jack and Sumi. Sumi says that we have to take a much more sophisticated approach and not just focus on diversity, but Jack, you say that if we want to be lawyerly about it, we can have the policy, but never say it publicly because that's not what Bakke permits. Is that what you're recommending or are you recommending that we do something else?

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108. *See* A. LEON HIGGINBOTHOM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7–17 (1996) (describing the precept of inferiority as a "state of the mind and the logic of the heart" and detailing its effects on the civil rights actions).

109. Here, I refer to "Black liberation" in the British sense, i.e., Black refers to all those who are non-White. Thus, Black liberation in the British sense also includes Brown, Yellow, and Red liberation in the U.S. sense. *See* PAUL GILROY, THERE AIN'T NO BLACK IN THE UNION JACK 60–61 (1991).

PROFESSOR CHIN: Of course we should think about it for the future because the pendulum swings back and forth. There may be an opportunity to get future Supreme Courts to accept different compelling interests that would justify affirmative action. But at the moment, at the moment, to stand our ground and to say that building the Black bar, building the Asian American bar, or building the Filipino bar is a legitimate justification and we're going to do it means we're going to get an injunction against us that says you can't take race into account. It's a losing strategy. It's an immediately losing strategy.

The latest suit is more sophisticated. They have named individual deans and admissions officers as defendants with unlimited personal liability. Are these defendants going to stick to the idea that they're going to admit Filipino applicants because they deserve to have their bar built even if it means going to jail? It's not going to happen.

PROFESSOR MALAMUD: If I can add something in response to this and also in response to Jack. I've done writing that has raised exactly this puzzle of whether we are allowed to talk about socioeconomic inequality anymore. If this will kill us because we'll have that used against us in depositions, we may not be able to do so. Needless to say, when you're at an institution that's been sued and you're a scholar in this field, that's a question that comes very much to mind.

But to be somewhat conventional about this, I don't think that the sense that these kinds of arguments are undervalued should be taken too far. What the Supreme Court has told us is that we are not allowed to name things like building the Filipino bar or curing generalized social and economic discrimination as the basis for the compelling state interest in affirmative action. But where I disagree with Jack is that I don't think that we have to be blind to those issues when it comes to addressing the question of whether affirmative action is or is not narrowly-tailored towards achieving what we are allowed to want, which is diversity. In other words, I don't think that we are required to say that for every form of diversity we value, we need to use affirmative action as a way of achieving it. I don't know what's behind the choice of the words in the catalog, but I don't think that there would be anything wrong with an institution saying, "Yes, we value diversity and we want to have Asian and Pacific American students at our schools, but we have noticed a trend in the direction of not needing to use affirmative action in order to achieve that," whereas for reasons having to do with present and past discrimination, members of other minority groups are having a harder time competing at the entrance level for those scarce slots.

So, again, what the Supreme Court has said is that there are a narrow range of compelling state interests, but I don't think we're required to blind ourselves to socioeconomic and other types of relevant differences in deciding who needs affirmative action in order to be included in a diverse community like this and who does not.

Other questions? Jack, of course you get a chance to come back if you would like.

Yes?

AUDIENCE MEMBER: I have two questions and they're for all four panelists. The first is a very practical question of politics. I find that with many audiences that are Asian American, affirmative action is a very tough sell. If they support affirmative action, it is purely out of a calculation of what benefit they, themselves, stand to gain; that is you talk about small business set asides and that appeals to them in very practical terms, not in ethical terms, not in terms of this type of setting, but in the sound-byte format. What are you suggesting will work, other than just raw self-interest, other than just the argument that the benefits outweigh the burdens of having affirmative action? That's the first question.

The second question. Many of the strongest opponents of affirmative action proclaim color-blindness as either a legal doctrine or as a moral principal. However, they become quite quickly color-conscious when they talk about closing borders. It's a useful dichotomy to look at, say, Pete Wilson and some of his rhetoric. In other words, people who are very explicit in advocating color-blindness in affirmative action often immediately turn that around and say, "Oh, and by the way, another thing we should do while we're at is close the border. We've got too many people who don't look like us coming in." Why are those of us who support immigration, or at least very liberal levels or high levels or at least non-national origin-centered policies in that context, but who also support affirmative action, why are we not just the flip-side of that? Are we equally unprincipled?

PROFESSOR CHO: Why are we equally unprincipled?

AUDIENCE MEMBER: If we stand for color-blind immigration, but also for affirmative action, why does that not expose us, at least to the charge, that we're being inconsistent?

This is an argument Terry Eastland makes. He says that you can't have immigration and affirmative action, that they're fundamentally incompatible, that you have to pick one or the other.

PROFESSOR CHIN: Well, I think the thread is a common concern for ultimate racial justice. In addition, people who support affirmative action believe either that it will never happen without some color-consciousness or that it will take too long without some color-consciousness. So, in order to get to racial justice, you have to have affirmative action in the meantime, or as Sumi says, affirmative action is at least a small part of what really would be needed.

But when you talk about immigration, we can achieve justice immediately simply by not considering factors that we think are not relevant. We could have specific selection criteria for immigrants and if people met them, the system would be non-discriminatory.

PROFESSOR CHO: This is what I would say to Terry Eastland. I would first say that I do not worship at the shrine of colorblindness. In fact, I believe that colorblindness *lives next to* biological determinism. So if you consider the *Brown*[110] decision in the context of 1954, the enshrinement of colorblindness is necessary to be able to do battle with the widespread belief of inherent Black inferiority. Why else would we worship colorblindness so if it did not live next to the period that we have just emerged from, of Jim Crow segregation and enforced biological determinism?

So in that sense, because biological determinism doesn't even resonate with me, colorblindness is not the corrective lens or the filter device through which I attempt to achieve consistent policy-making. I would say, rather, that the challenge is to ensure that we fight and do battle with ongoing oppression and hierarchy, and in particular, in this case, white supremacy. Both the race-neutral immigration reforms and race-conscious affirmative action policies that you've mentioned are completely consistent with that goal.

AUDIENCE MEMBER: Can the panel comment on University of Texas Law School Professor Lino Graglia's comments that the disparity in the racial composition of classes admitted on purely academic merits is not due to racial discrimination or some racial superiority, but rather simply the result of the different emphasis that different ethnic groups place on education?

And as a policy matter, should we make college admissions a reward in the structure of our incentive systems in order to motivate young people to do the best?

PROFESSOR MALAMUD: Don't all speak at once.

PROFESSOR HSIEH: Jump into the breach, Sumi.

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110. Brown v. Board of Education, 347 U.S. 483 (1954).

PROFESSOR CHO: That's simply the cultural determinism argument, which is the flip-side of the coin of biological determinism. I think that we need to reject both of those arguments.

I was going to conclude my talk, if I had time, with a plea to keep the faith in the face of the opposition's onslaught against affirmative action and the unstated but widespread assumptions that undergird much of that opposition. I would say that about 98 percent of these assumptions are grounded in either biological or cultural determinism. We must reject that.

AUDIENCE MEMBER: I have a question for Professor Hsieh. You spoke about the different levels of representation and the different discriminations that affect, say, Filipinos and certain of the other ethnic groups that constitute the APA identity, as compared with those affecting Chinese, Japanese, and Koreans. That seems to contradict the idea that Asian Americans are all treated alike, in the sense that we all experience racial discrimination and that we're all seen as the same by society. How do you resolve those two ideas so that it makes sense to say that certain non-Asian groups deserve affirmative action, or that affirmative action for APAs is definitely needed because of the diversity within them?

PROFESSOR HSIEH: A lot of the questions have asked how do we deal with these two arguments and have suggested that we have to maintain a single position.

I think it's a question of perception from the inside and from the outside. There is a perfectly valid truth that, in many instances, all Asians will be treated alike, regardless of any subgroup distinctions. That is the majority culture. To some extent even Asian Pacific Islanders within the culture, with respect to each other, have certain broad assumptions that remain true in terms of external treatment, regardless of internal differences.

On the other hand, you start looking at the internal differences, for example to build an argument that even under narrow justifications for specific affirmative action slots, we might still be able to sneak past what's left after *Bakke*. Then we might make arguments based on specific Asian subgroups. We may also make that argument for other purposes, not just as a calculation in our self-interest, but simply to gain an understanding of what is happening within these groups.

One of the reasons I cited the various statistical breakdowns was to show that obviously affirmative action has affected certain Asian subgroups disproportionately. For example, in Boalt Hall admissions, Proposition 209 has had the same impact on Filipinas/os that it has on African Americans. But who's talking about

Filipinas/os as opposed to Asian Pacific Islanders as a group? The big category is "APA" and that's the statistic that's being cited.

So I think that distinction is important.

AUDIENCE MEMBER: But how do you argue that this is not something that is taken care of by other admissions standards?

PROFESSOR HSIEH: Right. I was telling Sumi this before our panel, but didn't have time to get to it in my presentation. If you're only looking at bottom lines and self-interest, it *may* be possible to cobble together, using socioeconomic loopholes—which the Regents have given Boalt explicit permission and encouragement to use—something resembling the class of Asian American/Pacific Islanders that used to get in to Boalt. I've said to look behind the numbers, because we have a different group of Asians now. That's true now, but we might be able to re-fill those slots by using, as a proxy, factors like income that we're allowed to use.

So if you want to know if we *must* have a race conscious admissions policy in a place as narrow and as rarified as Boalt—and that really is quite a narrow situation—you may be able to cobble together factors like income to tailor a solution on a case by case basis. That may be possible, although I'm not sure everyone will do it.

I also think this goes back to the question, "What's the broader reason for us to deal with affirmative action?" And it may not be just for some bottom line number, because once you've used loopholes creatively, you may be able to preserve your numbers. It may be just because—and this goes back to what Sumi said—there is discrimination out there. You may or may not be able to show differences with parity, under-parity, and over-parity, but there's discrimination out there. Asking Asian/Pacific Islander communities to understand the meaning of affirmative action is, in part, asking the communities to acknowledge and recognize the existence of discrimination.

PROFESSOR MALAMUD: Before I recognize the next questioner, I just want to add something. There's an analogy here. In some of the work that I've done on affirmative action in relation to African Americans, I've been trying to make the point that when you make a switch in the direction of something resembling class-based affirmative action, the group that generally gets left out is at least the upper end of the African American middle class. One of the things that's, disturbingly, happening during the course of the debates about rethinking affirmative action is that people are losing track of the fact that becoming middle class is not the be all and end all, meaning that all discrimination is over.

Certainly Sumi's idea of over-parity discrimination is one way to think about this, but there is a great deal of denial. The groups that have been traditionally victimized would like to believe that there is an end to it, but sometimes the role of scholarship can be to say "Sorry, you may not want to hear this, but you only think that you've arrived. You only think that the discrimination is over." And this is an issue for the APA community. If one switches in the direction of saying, "Ah-ha, the Asian Pacific Americans who really need help are the Hmong and the Filipinas/os and what we have to do is move away from giving any kind of assistance to the Japanese and the Chinese and the Koreans," does that constitute a declaration from within the APA community that Japanese, Chinese, and Korean Americans no longer face discrimination? You have to be prepared to see discrimination operating in different ways for different socioeconomic and national origin subgroups of the populations that you're looking at in order to not completely lose track of all of this variety that Sumi's talking about.

Yes, in the back?

AUDIENCE MEMBER: Professor Hsieh, you briefly discussed Asians as the model minority. As an Asian American, by supporting affirmative action don't I effectively propagate the model minority myth? Many universities just see that I'm Asian American, so they may just cut me off from any affirmative action. I'm a university student. I have a voice, small though it may be. There are many people in communities of lower economic status than mine who don't have a voice and can't speak out. Indeed, they should be receiving some affirmative action. But many universities would not consider them as potential candidates solely because of their ethnicity. So by supporting affirmative action don't we just shut out their concerns? For the purposes of unity, we might say we support affirmative action; we want it for our community. But by supporting affirmative action as is, a lot of lower income Asian Pacific Americans are being shut out. They can't speak out.

PROFESSOR HSIEH: Well, I think the key statement, if I understand your question, is your last phrase, "by . . . supporting affirmative action as is." That "as is" measures the need for affirmative action based on—to borrow from Sumi again—the formula that if there's no under-parity then there must not be any discrimination, therefore there must not be any need for affirmative action.

When we talk about what kind of affirmative action we support and why we support it, we must be very careful to create an understanding, a common understanding, of what we mean by "affirmative action." It may be a richly textured remedial response to broad-

based societal discrimination that may not be at all what Lewis Powell (a very gracious southern white gentleman) had in mind.

Whether Asians may be displacing each other or the Black middle class, or how socioeconomic factors affect which Asians might get slots, are rich and interesting questions. Aside from these concerns, however, I think there are a lot of reasons to support affirmative action. I think diversity is a great reason.

I had a discussion last night with Alex Aleinikoff about what do we do with Lowell High School and the fact that some Chinese parents have sued to get their kids in.[111] A consent decree binding San Francisco schools caps the number of any one racial group at special magnet schools at 40% of the total student body. The Chinese regularly hit the limit at Lowell. That's because Chinese are the largest users of the San Francisco public school system now.[112] What's my argument? My argument is "Mom, I don't want to go to a school that's 95 percent Chinese. I don't care if it's going to help me get into Harvard." Of course that's not the only response, but frankly, I think diversity is a great idea because I don't want to be in a school that's all Asian, much less all white. That's not the world that we live in. So I can disagree with Lewis Powell in one breath and then also sound like him I suppose. There are a lot of reasons why we should want affirmative action.

PROFESSOR CHO: I wanted to add something. I want to try to blur two things. One is affirmative action *as a policy* in which groups receive a plus factor, let's say, in admissions. The other is affirmative action *as a movement* overall in the war of position with white supremacy. I want to blur those two things—affirmative action as a policy and affirmative action as a movement against white supremacy—because it may often be the case, as it is in university admissions, that almost from the outset of affirmative action policy development in the 1960s and 1970s, that Asian Pacific Americans, as a group, were

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111. Ho v. San Francisco Unified Sch. Dist., No. C-94-2418 (N.D.Cal. filed July 11, 1994); NAACP v. San Francisco Unified Sch. Dist., No. C-78-1445 (N.D.Cal. filed June 30, 1978). A preliminary settlement in the Ho case was announced on February 17, 1999; a final settlement approval hearing is scheduled for April 20, 1999 before U.S. District Judge William Orrick. *See* Joyce Nishioka, *S.F. Schools Abolish Race Caps*, ASIAN WEEK, Feb. 18, 1999, at 13.

112. In 1998, 27.3% of all students in the San Francisco Unified School District were Chinese American. CONSENT DECREE MONITOR FOR STATE OF CALIFORNIA REPORT 27 (July 31, 1998). San Francisco's public schools are overwhelmingly non-White. Of the district's high school students, Asian Americans make up the largest proportion at 41.9%, followed by Latinas/os at 18.7%, African Americans at 14.5%, and non-Hispanic Whites at 12.2%. Stacey Lavilla, *Diversity and Divisiveness*, ASIAN WEEK, Mar. 19, 1998, at 16.

almost immediately at or above parity.[113] So many universities took them out of affirmative action "race-plus" consideration and didn't disaggregate by ethnicity, class, gender, et cetera, that we may recommend doing now. This is to say that as an aggregate group in undergraduate and many professional school admissions, we largely did not benefit for very long, if at all, from the plus factor that Lewis Powell was talking about.

However, I blur the distinction between the policy and the movement because I would argue that we benefit greatly from the movement against white supremacy, of which affirmative action is but one expression, because fields that had heretofore been closed off to us for consideration opened up through this new understanding and commitment to inclusion. And the data behind me that I have on the board, demonstrates the significance of this blurring:

ABA LAW STUDENT DATA

	1971–72[114]		1996–97[115]		% rate increase in proportional rep.
	%	Numbers	%	Numbers	
African Americans	4.10%	3744	7.42%	9,542	181%
Latina/o[116]	1.27%	1156	5.44%	6,995	428%
American Indian	0.15%	140	0.87%	1,116	580%
APA	0.53%	480	5.99%	7,706	1,130%

113. Jayjia Hsia, *Limits of Affirmative Action: Asian American Access to Higher Education*, 2 EDUC. POL'Y 117 (1988), *reprinted in* 63 THE REFERENCE SHELF: AFFIRMATIVE ACTION 76, 79–80 (Donald Altschiller, ed. 1991) (noting that the first racial demographic survey undertaken by UC Berkeley recorded Asian Americans as 6% of the student population, while the national APA population was less than 1% in 1970).

114. For the 1996–97 data, see American Bar Association Approved Law Schools: Statistical Information on American Bar Association Approved Law Schools 453 (Rick L. Morgan and Kurt Snyder, eds., 1998). For the years 1971–72 and 1996–76, five and three ABA approved schools respectively did not report their minority numbers.

115. Telephone conversation with ABA Minority Affairs Committee (Nov. 14, 1997).

116. I aggregated the three subcategories used by the ABA to create a Latina/o category. The original breakdown is as follows:

	1971–72		1996–97	
	%	Numbers	%	Numbers
Chicana/o	0.97%	883	1.89%	2429
Puerto Rican	0.10%	94	0.53%	686
Other Hispanic	0.20%	179	3.02%	3880

I think it's been widely reported that Asian Americans are not benefiting anymore from affirmative action policies. I was doing some research, based on the ABA statistics for law students and the change that's occurred in the past 25 years, in terms of representation. So I broke out, according to racial group, what the actual numbers were for each group in 1971 to 1972 in parenthesis, and what proportion percentage they represented of the overall law student population of 91,225 law students in 1971–72. If you compare the actual numbers, as well as the percentages and the rate of percentage increase with the numbers 25 years later in 1996–1997,[117] which group would you say has benefited the most in terms of the rate of the percentage increase?

AUDIENCE MEMBER: But what about the Immigration Act of, I believe it was 1975 [sic],[118] that removed all racial exclusionary boundaries from U.S. immigration policy? Because of that change, a huge influx of, for example, Koreans and after that a lot of southeast Asians came here. The Asian American population, in general, increased greatly. So wouldn't it be fair to say that the Asian American population increase was the reason for the increase in the number of APA law students?

PROFESSOR CHO: Well, we had an increase from something like one percent to three percent from the 1970 to the 1990 census. So the 300% increase in APA nationwide population (from 1–3%) from 1970 to 1990 is not commensurate with the greater than 1100% increase[119] in APA law student representation (from 0.53% to 5.99%) during the same period. If you look back to 25 years ago or so, the predominant understanding of Asian Pacific Americans was reflected on television sets through the top-rated show *Bonanza* in the form of Hop Sing; we were pre-linguistic and not really suited for arguing in a courtroom. Under that same stereotype, 25 years ago, we would probably not be law professors here, because we would be viewed as ill-suited for the Socratic method's verbal jousting in front of the

117. In the 1996–97 school year, there were a total of 128,623 law students at ABA approved law schools in the U.S.

118. The audience member is actually referring to the Immigration Act of 1965, Pub. L. No. 89-235, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1-14354 (1994)). For a detailed treatment of this Act, see 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 (1996).

119. Because a doubling of actual numbers is usually referred to as an increase of 100%, I have employed a similar methodology to describe the increase in APA law student population figures.

classroom. Instead, we would instead be law librarians, as a result of being viewed as best-suited to meticulous, behind-the-scenes research.

And it was the struggle with that type of racial stereotyping and job restrictions that the movement for affirmative action as a means to counteract white supremacy confronted, opening up a lot of these barriers. It was this opening up that led APAs to the largest percentage increase in law student representation enjoyed by any group of color. So I would argue that we have benefited the most under the movement for, if not the policy of, affirmative action. This blurs the altruistic and the self-interested nature of our arguments.

PROFESSOR MALAMUD: Let me end with Professor Chambers.[120]

PROFESSOR CHAMBERS: Let me just state one thing. I teach here and, though I'm not named in the complaint, I consider myself one of the defendants in this case. But since I'm not absolutely certain how I feel about how to get to a good resolution to this suit, I will say that I'm only mumbling for myself and I'm not mumbling for anybody else.

As to your claim, Jack, that it is dangerous for us to emphasize aspects other than diversity that motivate our program, I think simply that the *Bakke* case explicitly left open the possibility that Davis might have defended itself by showing that its graduates not only added to the numbers of Black or other minority persons in the profession, but provided service that was not otherwise likely to be provided. So, likewise, we may want to try to show that. I do not believe that this argument is yet foreclosed.

I agree with you that lots of us here would like to make this case go away. We would like to make it go away because we do not know for sure that the 6th Circuit or the United States Supreme Court will permit us to continue any form of program that we consider desirable. And I would love to know what you think could make it go away.

I do understand that we may be on unsound ground in not having included Asian Pacific Americans among the groups that we include within our program, but you can be certain that the people who are suing us would not be happy to settle the suit merely by having us agree that we will continue our program as it is and simply add in Asian Americans.

Finally, I believe that this time around there will be no offer for us to let the one person who is suing us into the law school and pay the legal fees. How do we make this case go away?

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120. David Chambers, Professor, University of Michigan Law School.

PROFESSOR CHIN: You could default the case and litigate the individual class members who want to get in. Then you don't have bad precedent. You don't have a 6th Circuit case that not only binds the University of Michigan, but also everybody else in the 6th Circuit. You could—

PROFESSOR CHAMBERS: I think they've already moved to certify a class.

PROFESSOR CHIN: They filed a class action, but only a certain number of people who are in the class are going to insist on litigation. Some will opt out and you can litigate the individual claims of the others.

You could make the individual named plaintiff an offer she can't refuse. She at least has to be given an opportunity to accept it or reject it. Once there's no named plaintiff, the class certification goes away.

PROFESSOR CHAMBERS: The reason you thought that making a concession down in Texas would have been sensible was that they had already abandoned their program for something that was much more defensible. Michigan would have a hard time doing that. We might expand the range of groups that we include, as you pointed out, but as you also said, on its face, our program is much more *Bakke*-centered than the Texas program.

PROFESSOR CHIN: Well, the '92 program is, but there are certain ways in which the school hasn't adhered, in my view, closely enough to what that 1992 policy says. So I think you would be better off having a plaintiff in a year when this bulletin wasn't in effect. But instead of having a party admission, like this bulletin, that's applicable to the admission year in which the person was applying, it would be better to have a plaintiff who was an applicant to the class of 1999 when the bulletin was clean. Then I might say, "This is as good as you're going to get. This is the test case."

On the other hand, I still wonder how the history of the policy is going to affect the case. You have 15 or more years of history where Michigan had a policy that's really questionable. Is that going to taint the case? Is that going to create the wrong atmosphere?

So even if you can say we're okay today, you still treated Bakke as carte blanche for non-diverse and non-representative faculty to create the world that they would like to see. And that, in some ways, went too far.

PROFESSOR CHO: Aren't you presuming that it's about constitutionality, though, Jack?

PROFESSOR CHIN: How am I presuming?

PROFESSOR CHO: Aren't you presuming that the whole debate at the Supreme Court level, at the level of litigation, is actually about good faith constitutionality? Isn't *Bakke* really a set up, in that if you're over-inclusive or if you're under-inclusive with regards to Asian Pacific Americans you've run afoul of the Fourteenth Amendment?[121]

If you're over-inclusive, that is, if you include APAs in your affirmative action plan, you run afoul of the second prong of the strict scrutiny standard of review, narrow tailoring. If you're under-inclusive, you are guilty of running a "racial spoils system" that discriminates against APAs.

PROFESSOR CHIN: Well, I think it depends on the numbers. I think if whatever group is the largest racial group in your school, if you don't give them the same level of diversity preference or if you give them no diversity preference then you don't have to worry about narrowly tailored. But in principal, the principal is we're looking for diversity, as much diversity as possible and whenever any individual applicant adds incrementally to diversity, we're going to take that into account. If you do that I think you're okay.

Now, that of course assumes that the Supreme Court would uphold *Bakke*. And maybe they wouldn't, even in the ideal case, but all I'm saying is that the case that goes up to test Bakke should be the cleanest possible record, the best possible case, because if it's one that's marginal, ambiguous, or seems problematic, then I think they're going to hesitate to uphold it.

PROFESSOR CHO: I just think you're ignoring an unstated Faustian bargain that was made in *Bakke* between conservatives and liberals.[122]

PROFESSOR HSIEH: The more I try to work within *Bakke*, the more I realize it's impossible to construct a meaningful, socially useful policy from what Lewis F. Powell, Jr. thought in a single opinion. I'm frustrated because one judge got to write the middle opinion[123]

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121. For an elaboration of this argument, see Sumi Cho, *Supreme Stereotypes: Asian Pacific Americans and Affirmative Action* (unpublished manuscript, on file with author).

122. I have developed this "bargain" analysis in Cho, *Multiple Consciousness*, *supra* note 87, at 1050–51 (1997).

123. The Court divided both on the result and the rationale as follows: Justice Powell delivered the judgment of the Court in an opinion in which Justices Brennan, Marshall, and Blackmun joined as to Parts I and V-C. Regents of the Univ. of Cal. v.

and therefore define the entire Supreme Court's equal protection jurisprudence for a decade. That's a ridiculous starting point. Moreover, he was thinking about Harvard, a very narrow context. Now we're stuck with this list that's crabbed and that doesn't apply to every situation.

PROFESSOR CHIN: But we've got no choice.

PROFESSOR HSIEH: I understand that. With my litigator hat on, I say, "Yeah, I've got to make the argument. You're right, Jack." But another part of me says, "What do I get? So I win this, I win *Bakke*, but what does that get me?" It gets me more of the same—using proxies to get to the kind of law school that's an appropriate, meaningful, forward-looking, justice-producing—you know the list. It gets me there if I say it's really "diverse," or if socioeconomic status lets me sneak some in, *if* it gets me there at all.

Why can't we, at some level—setting aside the Constitution and the nine Justices—why can't we just say, "Hey, a public law school should be educating lawyers who will serve the state. It's a public law school, and it's the responsibility of a public law school. We have pressing needs for legal services for populations in this state, and it's clear that bilingual lawyers, lawyers who understand the community, lawyers who are willing to go into communities and serve, are important."

I don't understand why, completely aside from affirmative action and diversity, we can't somehow come up with a public school that has as its public mission something that includes a statement like that.[124] The idea that we keep ignoring that just strikes me as nonsensical. It's as if we are all *Bakke* babies, and we can only think that way.

Bakke, 438 U.S. 265, 267 (1978). Justice White joined Parts I, III–A, and V–C of Justice Powell's opinion, and Justices Brennan, White, Marshall, and Blackmun filed an opinion concurring in the judgment in part and dissenting. Justices White, Marshall, and Blackmun each also filed separate opinions. *Id.* at 267–68. Justice Stevens concurred in the judgment in part, and dissented in part and filed an opinion joined by Chief Justice Burger, and Justices Stewart and Rehnquist. *Id.* at 268.

124. *See, e.g.*, Ronald Dworkin, *Affirming Affirmative Action*, THE NEW YORK REVIEW OF BOOKS, Oct. 22, 1998, at 91 (reviewing WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE ADMISSIONS (1998)). I agree with Dworkin (and Bowen and Bok) that:

> Elite education is a valuable and scarce resource, and though it is available only to a very few students, it is paid for by the community generally. . . . Universities and colleges therefore have public responsibilities: they must choose goals to benefit a much wider community than their own faculty and students.

Id. at 99.

PROFESSOR MALAMUD: I can't possibly top that and I think that the enforcers are going to shoot me if I don't end this session right now. So why don't I do that right now and thank the panelists.