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NEITHER BLACK NOR WHITE: ASIAN AMERICANS AND AFFIRMATIVE ACTION

FRANK H. WU*

I. INTRODUCTION

The time has come to consider groups that are neither black nor white in the jurisprudence on race. There are many fallacies in the affirmative action debate. One of them, increasingly prominent, is that Asian Americans somehow are the example that defeats affirmative action. To the contrary, the Asian-American experience should demonstrate the continuing importance of race and the necessity of remedial programs based on race.

Most recently, for example, House Speaker Newt Gingrich has carefully included Asian Americans in his attack against affirmative action. Gingrich has asserted that “Asian Americans are facing a very real danger of being discriminated against”1 because they are becoming too numerous at prestigious universities which have affirmative action. Similarly, the sponsors of the anti-affirmative action ballot proposal in California refer to Asian Americans as a “cultural group” that has become “overrepresented” in the University of California system, in contrast to “other groups.”2

Again and again, claims are made that Asian Americans, like whites, suffer because of affirmative action for African Americans. By the rhetoric, it would almost seem as if Asian Americans, more than

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2 Living By the Numbers; Has the Time Come To Abolish Affirmative Action?, S.F. CHRON., Feb. 12, 1995, at Z1 (interview with organizers of the “California Civil Rights Initiative”).
whites, have become the “innocent victims” of so-called “reverse discrimination.”

The deployment of Asian Americans as an exemplary group in race relations is nothing new. The model minority myth of Asian Americans has been used since the Sixties to denigrate other non-whites. According to the model minority myth, Asian Americans have suffered discrimination and overcome its effects by being conservative, hard-working, and well-educated, rather than through any government benefits or racial preferences.

If they are hurt at all by affirmative action, Asian Americans are harmed no differently from whites. The real risk to Asian Americans is that they will be squeezed out to provide proportionate representation to whites, not due to the marginal impact of setting aside a few spaces for African Americans.

The linkage of Asian Americans and affirmative action, however, is an intentional maneuver by conservative politicians to provide a response to charges of racism. The advocates against affirmative action can claim that they are racially sensitive, because, after all, they are agitating on behalf of a non-white minority group. These opponents of affirmative action also claim that if racial “quotas” are to be used, they should be used to benefit whites as well.

The attention paid to Asian Americans is disingenuous. It pits Asian Americans against African Americans, as if one group could succeed only by the failure of the other. Asian Americans are encouraged to view African Americans, and programs for them, as threats to their own upward mobility. African Americans are led to see Asian Americans, many of whom are immigrants, as another group that has usurped what was meant for them. Indeed, Asian Americans frequently are imagined as the beneficiaries of special consideration, although they almost always are excluded from race-based college admissions and employment programs.

The very fact that Asian Americans are praised as a race belies the cause of color-blindness. The perception of even assimilated Asian Americans as perpetual foreigners reveals how important race remains. To be a citizen, an Asian American must be thought of as an honorary white, someone who is not considered a minority.

The economic success of Asian Americans, while it has been exaggerated, also suggests that there are pervasive and deeply-rooted causes creating the primarily black underclass. To address these problems requires the consideration of race.

The argument against affirmative action is significantly weakened when Asian Americans are honestly acknowledged. The objection must
be more than that affirmative action refers to race, because society looks at race in so many contexts. The objection must be that affirmative action discriminates against whites. But if Asian Americans and whites compete against one another equally and fairly, affirmative action cannot be said to single out either group, much less be said to subjugate whites.

This Article argues that although there are many real issues that result from the dramatically changing demographics of the country, the dilemma of Asian Americans and affirmative action should be understood as an issue which has been manufactured for political gains.

This Article uses the affirmative action debate to examine the complex interplay of the model minority image and the law. Through the controversy over affirmative action, the model minority myth and its legal implications become apparent. The relationship of Asian Americans to affirmative action represents the relationship of Asian Americans to the law generally—this study extends beyond Asian Americans to other unrecognized racial and ethnic groups, but also beyond affirmative action to other areas governed by the law.

Part II presents an historical overview of the model minority image. The examples include Chinese immigrant experiences in the nineteenth century, Japanese-American experiences prior to and during World War II, and the modern myths of Asian-American experiences. In Part III, the model minority image is evaluated using aspects of contemporary critical race theory scholarship. The model minority image confounds bipolar essentialist approaches to equal protection jurisprudence, demonstrates the ambiguity of racial stereotyping, and emphasizes the importance of context in understanding the use of racial references within the law. In Part IV, the model minority image and its political purposes are analyzed. The model minority image is criticized as a means of attacking affirmative action for other racial minority groups. The historical and sociological materials presented set the stage for the normative analysis, and critical race theory provides the tools for that analysis. Finally, Part V offers general principles for legal reform that may be taken from the specific case study.3

3 Throughout this Article, I refer to Asian Americans and other non-black racial minority groups, and occasionally to Asian Americans alone without mentioning other non-black racial minority groups. I may be thought, then, to repeat the mistake of creating a false universality, as if to recommend that a white-black model be replaced with a white-black-Asian model. Recognizing this risk, the point is to extend legal analysis beyond an exclusively white-black approach. Including Asian Americans in the analysis represents a beginning rather than an end, and the
II. AN HISTORICAL PERSPECTIVE ON THE MODEL MINORITY MYTH

From Garry Trudeau’s “Doonesbury” comic strip:\(^4\)

A white boy: “Hey, good goin’ on the National Merit Scholarship, Kim! Fairly awesome!”

An Asian-American girl: “Thanks, Sean.”

“Must be easier to be a grind if you grow up in an Asian family, huh?”

“I wouldn’t know.”

“Huh?”

“I’m adopted. My parents are Jewish.”

“Jewish? Yo! Say no more!”

“I wasn’t planning to.”

Although the model minority image has become well-known, its nineteenth-century origins are less familiar:\(^5\) The conception of Asian perspectives of Latinos, Arab Americans, Native Americans, and many others also must inform the discussion.

The Asian-American example has parallels, especially with the American Jewish example. Although the analogy can be overextended, some of the legal issues discussed here make it appear that Asian Americans are the “New Jews,” an ironic twist on the idea of Jews as “Orientals.” In particular, the college admissions controversies for the two groups raise similar issues.

I have purposefully expanded the definition of “Asian American” to include individuals who were unable to naturalize due to discriminatory immigration laws (without assuming that all Asians, any more than all foreign nationals, wish to become citizens). I recognize that my analysis has been biased toward Chinese Americans and Japanese Americans, and has not addressed Pacific Islanders, for reasons of my own familiarity with the literature and also due to patterns of immigration. I do not mean to suggest that Chinese Americans and Japanese Americans should be taken as the model within the model minority. The composition of Asian-American communities has changed rapidly in the past decade and is likely to continue doing so. See infra notes 128–30 and accompanying text.

I am reluctant to provide any further identification of the term “Asian American,” in part because it is a social construct, but also because of the importance of self-identification; some of these issues themselves are worth further consideration.


\(^5\) Two standard sources on Asian-American history are RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989), and SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY (1991) [hereinafter CHAN, INTERPRETIVE]. The social science literature on Asian Americans has been growing at an impressive rate and should be incorporated into future legal scholarship.

While I was working on this piece, two other authors addressed related but distinct sets of issues. I have benefitted from their work, and while I disagree with them on particular points, I hope an Asian-American legal community will emerge with general agreement on some shared goals. See PAT K. CHEW, ASIAN AMERICANS: THE "RETIENT" MINORITY AND THEIR PARADOXES, 36 WM. & MARY L. REV. 1 (1994); ROBERT S. CHANG, TOWARD AN ASIAN AMERICAN LEGAL SCHOLARSHIP: CRITICAL RACE THEORY, POST-STRUCTURALISM, AND NARRATIVE SPACE, 81 CAL. L. REV. 1243 (1993). Cf BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA, 1850–1990 (1993). Given the unfortunate con-
Americans as an exemplary subordinate racial group has roots in the Reconstruction Era. It is not an anomaly of recent invention, but a continuing theme in the experiences of Asian Americans.

In several respects, the general public reaction to the earliest Asian Americans is mirrored in today's mainstream perceptions of the newest Asian Americans. First, Asian Americans as a racial group have been and continue to be praised for their intelligence, diligence, and efficiency. Second, Asian Americans were and are compared to other racial minorities. In the nineteenth century, they were compared to recently freed blacks and to white ethnic immigrants; today, they are compared primarily to African Americans—always to the disfavor of the latter groups. Third, in the nineteenth century, Asian Americans soon enough became the threat of the "Yellow Peril," based on a reversal in the value of the same traits that led to the initial praise for them, as well as arising from the derogatory comparisons to other racial groups. This Janus-like character of the stereotype has its contemporary counterpart, in the threat of "Japan Inc.," the so-called "Pacific Century," and the rise of the East and the decline of the West.6

The reversible nature of the model minority images—which permits ostensibly "positive" characteristics to be turned into "negative" attributes held against the stereotyped—is integral to the social construction of Asian Americans as a racial group. The stereotype of Asian Americans contains certain essential elements. The societal reaction to Asian Americans, however, based on these "fixed facts," is fluid. When and where the economic and cultural circumstances change, the previously positive model minority image turns negative, and Asian Americans become subject to the familiar phenomenon of scapegoating.

In reviewing the development of the model minority myth, historian Richard Hofstadter’s insightful description of anti-intellectualism applies to Asian Americans, whose perceived success has been based so much on perceived intellectual abilities: “the resentment from which the intellectual has suffered in our time is a manifestation not of a decline in his position but of his increasing prominence.” Historian Ronald Takaki’s excellent narrative history of Asian Americans, Strangers from a Different Shore, discusses the early recognition of the phenomenon that stereotypes could so easily be reversed: “Chinese were persecuted, not for their vices, but for their virtues.” The increasing prominence of Asian Americans, and of their virtues, is neither accidental nor exclusively due to the efforts of Asian Americans.

A. Chinese Americans in the Nineteenth Century

In the modern era, the first Asians to arrive in large numbers in the Americas were Chinese laborers. Today, the schemes to import “Coolies” are forgotten or may seem somewhat fantastic, due to their failure. In their time, the plans had a political impact disproportionate to the actual number of immigrant workers. After the Civil War, Chinese began to appear on Southern plantations, at Northeastern factories, and among the work crews for the transcontinental railroad, cast as an economic boon by their promoters to their prospective employers.9

During Reconstruction, Southern plantation owners who previously had relied on black slave labor turned to imported Chinese laborers as replacements.10 The plan, although it ultimately proved unsuccessful, had prominent backers who extolled the abilities of the Chinese laborers.11 One plantation owner, for example, ordered twenty-five Chinese laborers and wrote to the local newspaper that they accomplished more per month than his black slaves previously had: “First,

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8 See Takaki, supra note 5, at 115. Hing describes a cycle of “recruitment followed by repudiation.” Hing, Making, supra note 5, at 76.
10 See Loewen, supra note 9, at 26; Cohen, supra note 9, at 125-32; Barth, supra note 9, at 193-97.
11 See Barth, supra note 9, at 189-94.
they work much more steady, without the loss of half-Saturday; and second, they do not run over their work. What they do is done well."12

The Southern press also lauded the Chinese. A Baton Rouge, Louisiana, newspaper stated, "[Chinese] are more obedient and industrious than the negro, work as well without as with an overseer, and at the same time are more cleanly in their habits and persons than the freedmen." The newspaper continued, "[t]he same reports come from all the sugar estates where they have been introduced, and all accounts given of them by planters in Arkansas, Alabama, and other States where they are employed in the culture of cotton."13

The praise was part of an agenda expressed in explicit racial terms. As the Reconstruction Governor of Arkansas explained, "Undoubtedly the underlying motive for this effort to bring in Chinese laborers was to punish the negro for having abandoned the control of his old master, and to regulate the conditions of his employment and the scale of wages to be paid him."14

Similarly, Northern industrialists faced with the nascent labor movement sought to use Chinese laborers as strikebreakers.15 As in the South, the prominent experiments proved to be less than entirely satisfactory. In the most widely cited incident, one factory owner brought in seventy-five Chinese laborers in response to a strike by what was then the largest labor union in the country. With the Chinese laborers, he was able to increase his profits by $840 per week.16 Within days of the arrival of the Chinese laborers, the employer's competitors were able to institute wage reductions at their own factories.17

The Northern press also praised the Chinese, specifically in comparison to Irish immigrants. The New York Times argued that "'John Chinaman' was a better addition to [American] society than was 'Paddy.'" It "complained" that the Chinese men did not drink whiskey, stab one another, or beat their wives.18 As a leading historian of the subject has observed, "[n]eedless to say, such sarcasm was not lost on the Irish."19 Numerous "defensive articles on behalf of the Chinese were thinly disguised attacks on the Irish."20

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12 See Cohen, supra note 9, at 109.
13 See id. at 124.
14 See Loewen, supra note 9, at 23.
16 Takaki, supra note 5, at 198.
17 See Miller, supra note 15, at 175–89.
18 Id. at 186–87 (quoting New York Times editorial).
19 Id. at 199–201 (discussing Irish responses).
20 Id. at 241 n.84.
Ironically, the most famous use of Chinese laborers indirectly led to their exclusion. The Central Pacific Railway, with 12,000 Chinese constituting ninety percent of its workforce, completed its part of the transcontinental railroad in 1869 at Promontory Point, Utah.\textsuperscript{21} Afterward, the laborers who built the railroad were terminated. Many of them moved to San Francisco, California.\textsuperscript{22} There, as the nation entered an economic downturn in the 1870s, the Chinese "problem" took on proportions beyond the actual numbers of immigrants.\textsuperscript{23} In California, Chinese constituted nearly nine percent of the population and a quarter of the workforce. Nationally, Chinese made up less than 1/100 of one percent of the population.\textsuperscript{24}

While Chinese were concentrated in California, the movement to exclude them gained support from the entire country.\textsuperscript{25} The Chinese Exclusion Movement extended from factories to farms, and from employers to employees.\textsuperscript{26} The rallying cry "The Chinese Must Go!" built upon the same stereotypes that formerly had passed as positive.\textsuperscript{27} In an economic slump, the exaggerated efficiency of the Chinese was transformed into a potent threat.\textsuperscript{28} On farms, where many Chinese had migrated, as a white farmer complained, "[o]ne Chinaman rents a place; he hires two or three to help him . . ." and whites "are driven away from here by the Chinese." The farmer was galled because, "If the Chinese were not

\textsuperscript{21} See Takaki, supra note 5, at 85–86. The employment of the Chinese on the railroads was accompanied by the same praise of their docility and efficiency as in the South and Northwest. See Shihs-Shan Henry Tsai, The Chinese Experience in America 15–19 (1986) [hereinafter Tsai, Chinese Experience].


\textsuperscript{23} See generally Miller, supra note 15, at 167–204.

\textsuperscript{24} See Takaki, supra note 5, at 110.

\textsuperscript{25} The national scope of the anti-Chinese movement is a thesis proposed by Miller, supra note 15, at 191–204.

\textsuperscript{26} The importance of the anti-Chinese campaign to the development of the labor movement is a thesis of Saxton, supra note 22; see also Miller, supra note 15, at 196.


\textsuperscript{28} Racially-based economic competition turned violent on many occasions. In 1871, a lynch mob killed nineteen of the 172 Chinese living in "Negro Alley" in Los Angeles. See Tsai, Chinese Experience, supra note 21, at 67. In 1877, the Order of Caucasians attempted to burn down Chinatown in San Francisco and successfully burnt down a ranch in Chico, California, also shooting to death four Chinese farmhands. See Chan, Bittersweet, supra note 22, at 370–86. After passage of the Chinese Exclusion Act, white miners attacked their Chinese co-workers and killed twenty-eight in Rock Springs, Wyoming. See Tsai, Chinese Experience, supra note 21, at 70.
here, white men would be; but the Chinese are here, so the white man can’t be. . . . [A]nd so we are compelled to Hire Chinese . . . against our will, because our neighbors will lease to them when they have no need."

The New York Times recognized that "the hapless Mongolian . . . that presumptuous individual, having faithfully served out the period for which he contracted, now wishes to turn his skill to account by engaging in the manufacturing of goods for his own benefit," and underselling his former bosses.

The passage of the Chinese Exclusion Act31 signalled the end of the ideal of open borders. When the Supreme Court subsequently upheld the constitutionality of the Act, the transformation of an insincere compliment was complete.32

B. Japanese Americans Before and During World War II

The Japanese American internment cases have their share of infamy. In the internment cases, the Supreme Court upheld the imprisonment of thousands of U.S. citizens, selected as suspect because of their race, and deprived of any due process despite the lack of even a single case of disloyal conduct.33 The internment cases, moreover, derive importance in legal literature as the source of the "strict scrutiny" standard of equal protection doctrine.34 With the reparations movement culminating in 1988 legislation providing payments to Japanese-American internees,35 the United States government at long last owned up to the wrongfulness of this episode.

The internment highlighted the racial element of the stereotyping of Asian Americans.36 Despite, or possibly because of the significance

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29 See Chan, Bittersweet, supra note 22, at 331.
32 The line drawn to divide Chinese and others was one of race, not nativity. Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting). It was not "sojourner" status: Asian immigrants were much like European immigrants in returning to their homelands. See Takaki, supra note 5, at 11.
34 See also Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating conviction); Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987) (vacating conviction).
36 See generally Roger Daniels, Concentration Camps USA: Japanese Americans and World War II (1972) [hereinafter Daniels, Concentration Camps]; Irons, At War, supra.
of the internment cases and the consensus that they were wrongly decided, the internment has not been given sufficient attention as a source of doctrine on race. The prejudices faced by the Japanese Americans were not only racial, but also contradictory in nature—a relatively recent antecedent of the model minority myth.

When they arrived, Japanese were tolerated as much as the Chinese had been disliked. Overseas, the Japanese military victories over Russia engendered a fearful respect of Japanese immigrants. Although Japanese immigrants could not naturalize, their native-born children sometimes were regarded as "model citizens." Their productivity was especially visible on their farms, and they transformed agriculture on the West Coast.

In an early sign of backlash, however, that very success led to alien land laws restricting real property ownership to citizens; these laws were facially neutral, but were targeted at Japanese immigrants. The dualism of the stereotyping came to the fore during the debate over the Japanese-American internment, after the bombing of Pearl Harbor and the entry of the United States into World War II. Formerly benign characteristics suddenly took on a much more sinister interpretation. Even assimilation and loyalty turned out to be questionable and dangerous, because, according to the mayor of Los Angeles, "Of course they would try to fool us. They did in Honolulu and in Manila, and we may expect it in California." Furthermore, the mayor stated in a circular argument, the fact that whites had discriminated against Japa-


37 See HING, supra note 5, at 26–27; IRONS, AT WAR, supra note 33, at 9; TIMOTHY J. LUKES & GARY Y. OKIHIRO, JAPANESE LEGACY: FARMING AND COMMUNITY LIFE IN CALIFORNIA’S SANTA CLARA VALLEY 50–52 (1985); DENNIS M. OGAWA, FROM JAPS TO JAPANESE: THE EVOLUTION OF JAPANESE AMERICAN STEREOTYPES (1971).

38 See DANIELS, ASIAN AMERICA, supra note 6, at 114–15.

39 See generally LUKES & OKIHIRO, supra note 37.

40 Id.

41 See DANIELS, CONCENTRATION CAMPS, supra note 36, at 61.
Asian Americans was another reason that they, the Japanese Americans, could not be trusted during a crisis. Echoing the commander of the Western defense, Lieutenant General John L. DeWitt, distinguished newspaper columnist Walter Lippman reasoned that the lack of sabotage "is a sign that the blow is well-organized and that it is held back until it can be struck with maximum effect." The features ascribed to Japanese Americans could be neatly reversed because they were racialized. Lieutenant General DeWitt's remark that "A Jap's a Jap, and that's all there is to it," was backed up by an elaborate rationalization of racism. He stated, "I have little confidence that the enemy aliens are law-abiding or loyal in any sense of the word. Some of them yes; many, no." As for who he meant, he specified: "[p]articularly the Japanese. I have no confidence in their loyalty whatsoever." As DeWitt explained, "I am speaking now of the native-born Japanese—117,000—and 42,000 in California alone." He rationalized his focus on United States citizens, because, "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." DeWitt concluded, triumphantly, "It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today." Executive Order 9066 "evacuated" the "enemy" to internment camps.

42 See Geoffrey S. Smith, Racial Nativism and Origins of Japanese American Relocation, in JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 79, 85 (Roger Daniels et al. eds., 1986). The proponents of the internment effectively controlled the discourse through circular reasoning in several ways. First, most Japanese Americans were prevented by law from naturalizing, so the Issei could not help but be enemy aliens. Second, submission to internment would demonstrate loyalty, but any protest would be a sign of disloyalty. See DANIELS, CONCENTRATION CAMPS, supra note 36, at 77. Third, people who were interned would be protected from discrimination and potential violence. See id. at 34. German Americans, Italian Americans—two large ethnic groups who provided electoral support to the Democratic Party—and foreign nationals of German and Italian ancestry were subjected to individual prosecution, not group persecution. See id. at 82. Japanese Americans in Hawaii, who were politically powerful (relatively), were not interned. See TAKAKI, supra note 5, at 380–85.


44 See DANIELS, CONCENTRATION CAMPS, supra note 36, at 45–46 (quoting Lieutenant General John L. DeWitt, commander of the Western defense).

45 See TAKAKI, supra note 5, at 391 (quoting DeWitt).

46 Id. (quoting DeWitt).

The negative perception of Japanese Americans as enemy aliens has persisted since World War II. Four decades later, the largest newspaper in Indiana editorialized in favor of internment, arguing that there had been a genuine threat from the Japanese Americans. The editorial reasoned that Japanese Americans could have been the seed of a colonizing force, and moreover, they were lucky to have had the safety of camps for the duration of the conflict. Thus, the editorial concluded that “few Americans will, or should, feel ashamed of it.”

When the Smithsonian Museum presented an exhibit on the internment, it was visited by protest from veterans and their families, who angrily stated that they and their relatives had fought valiantly against Japanese during the war. During the movement for reparations, Senator Jesse Helms argued that there should be no moneys paid until Japan had compensated the families of those killed at Pearl Harbor.

C. The Modern Model Minority Myth

1. Constructions of the Image

The modern model minority image came to prominence in the mid-Sixties after the passage of the Civil Rights Act and before the unrest which was to erupt in major urban areas. During this time of great social and political change, the New York Times Sunday Magazine published what one scholar has called “the most influential single article ever written about an Asian-American group.” This article was entitled “Success Story, Japanese American Style.”

48 See Jay Mathews, Japanese Americans Continuing Struggle; Full Social Acceptance in U.S. Proves Elusive, Despite Economic Success, WASH. POST, Aug. 15, 1985, at A26. Some members of the Supreme Court held fast to their views of the internment cases. Justice Black believed that Japanese Americans “all look alike” and internment was justified. See DRINNON, supra note 36, at 321–22. Justice Douglas believed in the correctness of the internment decisions until shortly before his death. See IRONS, At War, supra note 33, at 361–62; see also infra note 157.

49 See Voices From the Bridge, BRIDGE, Winter 1981–82, at 18.


51 See Edwin M. Yoder, Jr., They Are As American As Jesse Helms, WASH. POST, Apr. 28, 1988, at A23.

52 DANIELS, ASIAN AMERICA, supra note 6, at 317.

a professor from the University of California, Berkeley, opened his lengthy and largely sympathetic account of Japanese Americans by recounting official discrimination against them, including the internment. The point of his remarks was that “[g]enerally, this kind of treatment, as we all know these days, creates what might be termed, ‘problem minorities.’”

In contrast to so-called “problem minorities,” Petersen argued that the Japanese-American experience “challenges every such generalization about ethnic minorities.” Their story was “of general interest precisely because it constitutes the outstanding exception.”

Petersen put in place all of the elements of the model minority image, including an invocation of Horatio Alger as “patron saint.” Although he acknowledged no historical antecedents, Petersen could be imagined as a writer lavishly praising the Chinese Americans in the nineteenth century or the Japanese Americans before World War II. Japanese Americans were “a minority that has risen above even prejudiced criticism.” They had overcome discrimination and “[b]y any criterion of good citizenship that we choose, the Japanese Americans are better than any group in our society, including native-born whites.”

Throughout the piece, Petersen all but asked, “they made it, why can’t you?” Every detail of his positive description of Japanese Americans stood in contrast to negative stereotypes of blacks and Mexican Americans. In his article, Petersen praised a novel about the internment, which showed “the hero strugg[ing] to find his way to the America that had rejected him and that he had rejected.” In contrast, the works of James Baldwin, the important African-American author, could not meet that standard. Petersen also noted that most Japanese-American juveniles were well-behaved, except for a few delinquents who joined gangs comprised of “Negroes or Mexicans;” the worst offenders became followers of Islam.

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54 Petersen, supra note 53, at 20–21.  
55 Id. at 21.  
56 Id.  
57 Id.  
58 Id.  
59 Id.  
60 Id. at 36.  
61 See id.  
62 Id. at 36, 40.
According to Petersen, Japanese Americans "could climb over the highest barriers our racists were able to fashion in part because of their meaningful links to an alien culture."63 Again, Petersen distinguished the "American Negro," who was "as thoroughly American as any Daughter of the American Revolution."64

With that article, the model minority myth was ready for use. Since then, it has become the predominant image of Asian Americans.65 Indeed, from the 1960s through the 1980s, the media presented virtually no other image of Asian Americans. In the eyes of other Americans, Asian Americans are college whiz kids and champion entrepreneurs, winning the annual Westinghouse Science Talent Search and selling cheap and fresh fruits and vegetables in New York City.66 Asian Americans are intelligent, hard-working, family-oriented, law-abiding, and as a result, highly successful and upwardly-mobile. Thus, an entire racial group can be rendered the equivalent of a single successful white man. An advertising consultant, trying to sell products to the Asian-American market segment, stated that while real estate developer Donald Trump was the Horatio Alger of the 1980s, Asian Americans were "the Donald Trumps of the 1990s."67

In the 1980s, the model minority myth developed into a powerful expression of anxiety over assumed Asian-American accomplish-

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63 Id. at 43.
64 Id.
ments. At college campuses, non-Asian Americans sarcastically suggested that M.I.T. meant “Made In Taiwan” and U.C.L.A. (pronounced “U.C.R.A.”) meant “United Caucasians Lost Among Asians.” At the peak of the controversy over Asian Americans and quotas in college admissions, a white Yale University student stated, “If you are weak in math or science and find yourself assigned to a class with a majority of Asian kids, the only thing to do is transfer to a different section.” The student body president of the University of California, Berkeley, explained, “some students say if they see too many Asians in a class, they are not going to take it because the curve will be too high.” The white President of Stanford University repeated an apocryphal story about a professor who asked a student about a poor exam result in an engineering course, only to be asked in return, “What do you think I am, Chinese?”

The modern model minority image, furthermore, couples Asian-American success with conservative values. Asian-American success is attributed to persistence in conservative Asian values or assimilation to conservative American values. Ancient Asian traditions are analogized to Republican party planks. In either event, the model minority myth posits that Asian Americans gain prosperity and acceptance into the mainstream only if they reject the lead of “problem minorities” who challenge racial hierarchy.

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69 See Takaki, supra note 5, at 479.
70 See Brand, supra note 65, at 42.
72 See Butterfield, supra note 65, at 18. Note that each of these examples implicitly assumes an audience that is white or non-Asian.
73 See Osajima, supra note 6, at 170.
74 See supra text accompanying notes 54-64.
76 See Dana Y. Takagi, The Retreat From Race: Asian American Admissions and Racial Politics 12-16 (1992) (using social formation theory of race to analyze Asian Americans and
of the term is a double entendre, referring to Asians copying whites, as much as to other racial minorities copying Asians. As Asians are to become like whites, other racial minorities are to become like Asians. By becoming like whites, Asians acquiesce in the superiority of whites, even as whites allow them superiority over other racial minorities.\textsuperscript{77} Asian Americans become the preferred racial minority.\textsuperscript{78}

As with any stereotype, however, the model minority image abounds in ironies.\textsuperscript{79} A white student at Vanderbilt University in 1988 found himself amidst controversy for interviewing a Ku Klux Klan member on a campus radio program. In his own defense, the white student D.J. explained that blacks complain too much about discrimination, and that they take advantage of their race. He opined that they should imitate Asian Americans: “Asians have a subtle approach. They go out into the community and prove themselves as individuals.”\textsuperscript{80}

2. Uses of the Image

By now, the reversal of the model minority myth is banal.\textsuperscript{81} In the stereotype, every positive element is matched to a negative counter-

\textsuperscript{77} Cf. Daniels, Asian America, supra note 6, at 318.


\textsuperscript{79} In its ubiquity, the model minority image becomes laughable, intentionally and unintentionally. The best example may be a hilarious set of “Doonesbury” cartoons by Garry Trudeau, each exposing the uneasiness underlying the model minority myth. See supra note 4 and accompanying text. Another revealing example is the Asian-American version of an old joke, which appeared in print featuring a Laotian immigrant and, as always, an African American. The two characters involved become representatives of their respective races. The Laotian is repairing his car on the street, and an African American approaches the “foreigner” and insultingly demands to know how long he has been in America. The Laotian answers three years, immediately turning the question back on the African American and asking him how long he has been here himself. The African American proudly answers, “all my life.” The Laotian then gets the last word, asking the man who had insulted him, “Well, then, why don’t you have a car?” See Karl Zinsmeister, Asians and Blacks: Bittersweet Success, Current, Feb. 1988, at 9.


part. To be intelligent is to lack personality. To be hard-working is to be unfairly competitive. To be family-oriented is to be clannish, "too ethnic," and unwilling to assimilate. To be law-abiding is to be rigidly rule-bound, tied to traditions in the homeland, unappreciative of democracy and free expression.\(^{82}\)

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\(^{82}\)I have expanded on the point made by Gene Oishi. See Gene Oishi, *The Anxiety of Being a Japanese-American*, N.Y. Times Magazine, Apr. 28, 1985, at 54 (quoting Chris Iijima, a law school professor and folk singer, about the "flip side" to stereotypes).
An interesting demonstration of the reversal of the model minority myth appears in a guest column written for *Newsweek* magazine. Parallel to descriptions of Asian Americans in Petersen's original model minority article, under the headline, "The Dark Side of the Dream," James Treires wrote about "stories . . . of multitalented immigrants' children, usually Asian, who are valedictorians and superachievers in the arts and sciences."83 The "Dark Side," or the non-white side, was that "[t]he downside of these upward-mobility chronicles is never discussed."84

Like critics of the model minority myth, Treires recognized that the stereotype was transmitting "the message that native-born American workers are lazy and stupid, and that black families, in particular . . . are perhaps not as American as the newcomers."85 Unlike critics of the model minority myth, but sounding in spirit like the exclusionists of the nineteenth century, Treires accepted the stereotype to reject the stereotyped. He apparently believed that all Asian Americans were on their way to success, or were already there.86 His concerns lay elsewhere. "Using child labor in the family business is not just condoned but praised, and the willingness to accept poor working conditions and substandard pay is admired."87 The result, however, could be to reduce "the once powerful labor movement to impotence and irrelevance."88 Treires's conclusion was that "working Americans who may want to limit immigration . . . are motivated not by xenophobia or racism but by clear evidence that the new immigrants' gains are being made at their expense."89

For this observer, the appropriate attack was not against the model minority image, but against Asian Americans themselves. According to Treires, the "downside" of the model minority myth was not the perpetuation of false generalizations about Asian Americans, but the al-

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84 *Id.* at 11.
85 *Id.* at 10.
86 *Id.*
87 *Id.* at 11.
88 *Id.*
89 *Id.*
alleged cost of Asian-American presence to the rest of society. Asian Americans—or Asian immigrants, more appropriately, as Treires excluded Asians from the native-born, as well as the working class, and the labor union—were “the dark side” precisely because of their model minority status.

This type of reversal of the model minority myth was reinforced by the rise of Japan-bashing during the 1980s. As in the nineteenth century, Asian Americans were seen as economically-threatening permanent foreigners.\(^90\) Unsurprisingly, Asian Americans faced an increase in racially motivated violence.\(^91\) The murder of a Chinese-American man named Vincent Chin in 1982 sparked Asian-American awareness of civil rights issues. One night in Detroit, two white autoworkers used a baseball bat to beat Chin to death, blaming him for the troubles of their industry, “mistaking” Chin for a Japanese person.\(^92\) The model minority myth and Japan-bashing contribute to tensions among minority groups. Conflicts between Korean Americans and African Americans, especially in Los Angeles after the verdict in the Rodney King case, are the most dramatic examples.\(^93\)

The model minority myth works subtly as well.\(^94\) The positive and negative elements can stand alongside one another. Indeed, the same individual can embody both elements in different contexts. For example, in the 1960s, when he was first elected, Senator Daniel Inouye, an internee and combat veteran, was asked disingenuously by a white


\(^{92}\) Note, Racial Violence, supra note 91, at 1928.


\(^{94}\) When it is convenient, negative attributes can be given a positive spin. While Asian Americans historically have been maligned as foreign, the Petersen article glorified that foreignness. When U.C.L.A. was found to have discriminated against Asian Americans, an official complained that the statistical study should have counted foreign nationals and thereby exonerated the institution. Jay Mathews, Bias Against Asians Found in Admissions to UCLA; U.S. Says Whites Were Favored For Math, WASH. POST, Oct. 2, 1990, at A5. The 1988 Civil Rights Commission study of Asian Americans may have counted highly paid foreign Japanese multinational corporate executives as Japanese Americans, distorting the average income figures. See U.S. COMM. ON CIVIL RIGHTS, THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION 86 (1988) [hereinafter ECONOMIC STATUS]; JAY JIA HSIA, ASIAN AMERICANS IN HIGHER EDUCATION AND AT WORK 191–92 (1988). Cf. HING, supra note 5, at 111 (describing large numbers of Japanese foreign nationals present as nonimmigrants).
colleague why "niggers" could not be more like Asians.95 Then, years later, when he chaired the Congressional hearings on the Iran-contra scandal, Senator Inouye’s office received telegrams and phone calls denouncing him as a "Jap" out to destroy the United States.96

3. Critiques of the Image

Over the years, the model minority image has been subject to excellent critiques of its exaggerations, and of its inaccuracies of history and demographics.97 These factual criticisms fall into several categories and are summarized from other sources; they are related to but independent from the legal criticisms presented below.98

First, the model minority myth ignores Asian-American history. From the Chinese Exclusion Act of 1882 until immigration reform in 1965, Asian immigration was restricted by highly limited racial quotas. As a result, Asian immigrants have tended to be quite qualified before they arrive,99 forming a pattern of "brain drain" from their native lands. Since 1965, this trend has continued. In 1980, for example, 35.9 percent of foreign-born Asians in the United States had completed four or more years of college, compared to 16.2 percent of the native-born citizen population.100 Their subsequent successes represent the nature of U.S. immigration policy and their own socioeconomic backgrounds,

97 The statistics are subject to much dispute. See Economic Status, supra note 94, at 118–31 (statement of dissenting members).
98 For statistics concerning Asian Americans, I have consulted three works. A thorough early work, unfortunately outdated in some respects, is HSIA, supra note 94. Two more recent publications that are useful are Statistical Record of Asian Americans 7–14 (Susan B. Gall & Timothy L. Gall eds., 1993) [hereinafter Statistical Record] (collecting data), and Herbert R. Barringer et al., Asians And Pacific Islanders In The United States (1993) (analyzing data). See also Chew, supra note 5, at 24–32.
99 See Takaki, supra note 5, at 417.
100 See Alejandro Portes & Ruben G. Rumbaut, Immigrant America: A Portrait 60–70 (1990). The Asian immigrants compared favorably to their former compatriots as well as to their new neighbors. Id. These differences are perpetuated in first-generation American children, as parental schooling and father’s occupation "are the most important individual factors accounting for educational differences across [racial and ethnic] groups." Id. at 65–66. See also Hing, supra note 5, at 79–111.
as much as their successes may validate American ideals of individual self-achievement or meritocracy.

Second, the model minority myth ignores African-American history. African Americans have had an experience different in kind and not only in degree—in chattel slavery, Jim Crow, and institutional racism—that continues to this day.101

Third, the model minority myth fails to take into account Asian-American educational attainment, which can result in a “glass ceiling” effect. Controlling for educational levels (and immigrant status), white Americans have a higher income than Asian Americans.102 By reinforcing the idea that Asian Americans have technical skills but not “people skills,” the model minority myth helps to keep the glass ceiling firmly in place.103

Fourth, the model minority myth depends on the use of overall family income figures. Such figures mask the fact that, on the average, more members contribute to family income among Asian Americans than among whites.104

Fifth, the model minority myth blurs and glosses over markedly different patterns among Asian ethnic groups. It enshrines the insult, “they all look alike,” implying that “they all are alike.” Statistically, the socioeconomic positions of Vietnamese and other Southeast Asian

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101 See, e.g., A COMMON DESTINY, supra note 75, at 89-90, 144-46 (data presenting housing segregation differences); HACKER, supra note 78. Cf. Sam Howe Verhoevek, Strolling, Cuomo Talks About Slavery to Asians, N.Y. TIMES, June 2, 1990, at A31.

Native Americans, Mexican Americans and others to whom Asian Americans may be compared have had their own unique experiences as groups and as individuals in this country.

102 See Amado Cabezas & Gary Kawauchi, Empirical Evidence for Asian American Income Inequality: The Human Capital Model and Labor Market Segmentation, in REFLECTIONS ON SHATTERED WINDOWS, supra note 6, at 144; Chew, supra note 5, at 46-55. ECONOMIC STATUS, supra note 94, at 72-75. Even the 1988 Civil Rights Commission Report, which generally concluded that Asian Americans did not suffer from discrimination in the workplace, still noted that Asian men may be denied access to top corporate positions. Id. See also Hsia, supra note 94, at 50, 188-192; Takaki, supra note 5, at 475; STATISTICAL RECORD, supra note 98, at 485-522; Barringer, supra note 98, at 265-67 (conclusions based on analysis of numerous studies showing that controlling for education and nativity, whites earned more than Asian Americans); see generally Harriet Orcutt Duleep & Seth Sanders, Discrimination at the Top: American Born Asian and White Men, 4 ASIAN AMERICANS AND THE LAW 344 (Charles McClain ed., 1994).


104 See Takaki, supra note 5, at 475; Hsia, supra note 94, at 167-68, 180; Diane Crispell, Family Ties Are a Boon for Asian-Americans, WALL ST. J., Sept. 28, 1992, at B1; Asian Americans Earn Less in General Than Whites, WALL ST. J., Oct. 18, 1992, at. It also masks geographic differences due to the concentration of Asian Americans in high-income high-cost states such as New York, California, and Hawaii.
refugee groups resemble the position of African Americans, rather than that of whites.  

Sixth, the model minority myth whitewashes the discrimination faced by Asian Americans. As an Asian-American leader remarked about discrimination, "people don’t believe it." There can be no appreciable racism against Asian Americans, because as the model minority myth posits, they all are well-off or have the ability to overcome discrimination. Thus, given that the group is supposedly so successful, Asian-American failure becomes an individual’s own fault. Worse, the model minority myth contributes to discrimination because it suggests that all Asian Americans have competed unfairly to become too well off. One of the very causes of discrimination becomes a means of denying its prevalence.  

These critiques of the model minority image have themselves been subject to criticism. One author has argued that efforts to debunk the model minority image "say more about the exigencies of the American ethnic ideology than about the state of the Asian-American community," as "liberal and radical Asians . . . hastened to defy the image . . . and expose it as just another means of majority oppression." While the image "does a disservice by promoting facile comparisons between Asians and other ethnic groups . . . [u]nfortunately, the self-conscious downplaying of Asian-American success threatens to obscure those lessons its history does hold for other minorities."  

Yet the model minority myth itself reflects an ideology of race. The criticisms of the model minority myth are as much about its political content as about advancing an alternative political agenda. These criticisms can as easily be made and have been made from a "color-blind" viewpoint, to the effect that the model minority myth suggests that all racial references are inherently flawed and should be abandoned. Although that viewpoint is simple and displays formal sym-

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105 Barringer, supra note 98, at 316, 319–21 (reporting conclusions); see Hing, supra note 5, at 135–38 (describing Vietnamese immigrant socioeconomic status), 171–74 (diversity issues within Asian-American communities).  
108 Id. at 17 (italics added).  
109 I hasten to add that one can object to the set-up of Asian Americans against affirmative action without subscribing to any notions of political correctness or agreeing with any of the analysis herein.
metry, that viewpoint does not adequately address the construction of the model minority myth and its use for political purposes.

III. THE MINORITY IMAGE AND CRITICAL RACE THEORY

Proponents of the model minority myth sound like the Frank Sinatra character in the movie, "The Manchurian Candidate." After having been "brainwashed" by the Chinese Red Army as a prisoner during the Korean War, he can only repeatedly refer to his commanding officer as "the finest human being I have ever known."

The ease with which the model minority myth has been manufactured and manipulated presents an ideal test case for critical race theory. In this section, arguments from critical race theory are used to show that Asian Americans, and the model minority myth, do not fit within traditional legal understandings of race.


112 I have used the terms "stereotype" and "classification" interchangeably, but the former may be thought to refer to the cultural construction of a race, and the latter to a legal construction of a race.
A. A Rejection of Bipolar Essentialism

In the past few years, American society, the media, and the academy have come to understand that there are profound demographic changes underway in the United States. During this time, the law has lagged behind, failing to respond to these changes. Perhaps the most important reason for introducing the model minority image to legal analysis is the relatively simple purpose of demonstrating that a bipolar essentialist approach is inappropriate. As a paradigm, it is incoherent, not only factually but also legally. In part, it is the grip of bipolar essentialism that has rendered moribund the debate over affirmative action. Whether or not a decision-maker favors excluding Asian Americans from affirmative action, or including them within it—one of many issues raised by Asian Americans—it is imperative to be informed about Asian Americans and other non-white, non-black racial groups.

Bipolarity is an organizational scheme both imposed by and reflected in the law. Bipolarity has been associated with essentialism in the conception of race. Race is conceptualized as breaking down into two all-encompassing and mutually exclusive categories, black and white. Race is further conceptualized as a biological fact, relatively immutable, always visible in skin color, and a defining facet of a person. These trends toward bipolarity and essentialism manifest them-


114 This point is hardly new, but it remains relatively novel within the law. Asian Americans, for example, have repeatedly voiced their concerns about being “left out.” See, e.g., LEAP ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE & UCLA ASIAN AMERICAN STUDIES CENTER, THE STATE OF ASIAN AMERICA: A PUBLIC POLICY REPORT; POLICY ISSUES TO THE YEAR 2020 (1993) [hereinafter YEAR 2020] (especially see articles by Shirley Hune, An Overview of Asian Pacific American Futures: Shifting Paradigms, at 1; Michael Omi, Out of the Melting Pot and Into the Fire: Race Relations Policy, at 199); L.A. Chung, Asian Americans Seek Understanding: They Feel Left Out of Race Debate, S.F. CHRON., June 8, 1992, at A1. See Chew, supra note 5, at 66–70; Chang, supra note 5, at 1265–67; Neil Gotanda, “Other Non-Whites” In American Legal History: A Review of Justice At War, 85 COLUM. L. REV. 1186 (1985) [hereinafter Gotanda, Non-Whites].

115 Cf. Farber, supra note 78.

selves as white against black, majority against minority, or American against foreign. Racial groups are conceived of as white, black, honorary whites, or constructive blacks.

Under some circumstances, Asian Americans have been granted the status of honorary whites. In anomalous instances, whites may accept Asian Americans as white, despite de jure discrimination. Official school segregation, for example, could be ignored to permit specific Asian Americans to attend a white institution. Nevertheless, there do not appear to be many, if any at all, court cases characterizing Asian Americans as whites, where that characterization favors the individual thus identified.

Asian Americans have been considered constructive blacks under many circumstances. Where they are omitted from the legislation or


118 See GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* (1994). The book is based on Okihiro's important and transitional series of lectures on Asian-American history. The second lecture/chapter is devoted to the query, *Is Yellow Black or White? Id.* at 31–63. For a recent example of bipolarity in a best-selling work on racial issues, *see*, e.g., HAKER, *supra* note 78, at 10–12. The title of Hacker's work expresses the bipolar model, but he repeatedly recognizes that Asians and Latinos may be thrust into the role of the preferred minority group. See id. at 122, 138, 151. An explicitly white perspective on the civil rights movement is presented in Tom Wolfe, *Radical Chic & Mau-Mauing the Flak Catchers* 105–07 (1970) ("When anybody other than black people went in for mau-mauing, however, they ran into problems, because the white man had a different set of fear reflexes for each race he was dealing with.").

precedent that subjugates blacks, whites may determine that there is no doubt that the law covers Asian Americans. In a school segregation case that reached the Supreme Court a quarter-century before *Brown v. Board of Education*, the court wrote, "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached . . . where the issue is as between white pupils and the pupils of the yellow races." With anti-miscegenation statutes, the line drawn divided whites and non-whites, but did not distinguish among non-white racial groups. These statutes only protected the "purity" of the white race; therefore, even facially they were in no sense race-neutral. Asian Americans have been treated by the courts as "non-white" even if they are literally "white" in their complexions.

In affirmative action cases, Asian Americans, along with other non-black minority groups, are relegated to the status of footnotes. They are assumed to be as blacks are. Thus, Asian-American legal status is contingent on African-American legal status. Only in its most recent decision on the subject have some members of the Supreme Court begun to move tentatively toward a more comprehensive view of race. The uncertainty underlying this shift is indicated by the failure to identify any other racial groups by name.

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The exclusion of Indian and black testimony in legal proceedings also applied to Chinese, because under the law, they were equated with Indians and blacks. *People v. Hall*, 4 Cal. 399, 403-04 (1854). See McClain, *supra* note 27, at 548-50. Cf. *Lopez*, *supra* note 111, at 45.

121 See, e.g., *Loving v. Virginia*, 388 U.S. 1, 6-7 (1967).

122 The state of Virginia argued that its anti-miscegenation statute was race neutral because it applied to both whites and blacks. *See id.* at 7-8.

123 *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that Japanese individual not "free white person" entitled to become citizen, even if he satisfied skin color test for determining status as a white person).

124 In constitutional decisions guaranteeing the rights of racial minorities, Asian Americans are protected to the extent that they are similar to African Americans. A complete change has occurred in our understanding of 42 U.S.C. § 1981. According to Charles McClain's legal history of the legislation, it was in large passed to protect Chinese immigrants. McClain, *supra* note 27, at 530-31. The Supreme Court's understanding at this point, however, is that the legislation was passed to protect freed black slaves—and that claims by others to protection are subject to close evaluation. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 612-13 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616-18 (1987).


126 See *infra* note 159.
Even on its own terms, race has never been a black and white matter. There have always been as many shades of black and brown as there have been individuals who identified themselves, or were identified by others, by that concept. There have always been Native Americans, Chicanos, and Asian immigrants. In an earlier era, the various white ethnic groups were considered to be distinct races.127

Moreover, it is fast becoming useless to consider race as dividing neatly into black and white. The numbers of Asian Americans alone belie the black-white paradigm. Within the much more modest general growth of the population, the Asian-American population increased by almost four hundred percent between 1970 and 1990, reaching more than seven million, which is slightly less than three percent of the overall population; the Latino population increased similarly.128 The high rate of intermarriage for Asian Americans, primarily with whites, though to a limited extent with blacks,129 and the large numbers of adopted Asian and Amerasian children of Caucasian parents add further complexities.130 Asian Americans pose a paradox. They are inassimilable, but they appear to assimilate. Assimilation, cause and effect of miscegenation, must be praised and condemned simultaneously.


129 See Statistical Record, supra note 98, at 144 (outmarriage rates); Barringer, supra note 98, at 145 (outmarriage rates); Barbara Kantrowitz, et. al., The Ultimate Assimilation, NEWSWEEK, Nov. 24, 1986, at 80; Diane Crispell, Interracial Children Pose Challenge for Classifiers, WALL ST. J., Jan. 27, 1993, at B1; see also Gabrielle Sandor, The “Other” Americans, AM. DEMOGRAPHICS, June 1994, at 36. On Asian-black intermarriage in the South, see Loewen, supra note 9, at 135–48; Cohen, supra note 9, at 149–72. Cf. Lopez, supra note 111, at 10; Abigail Van Buren, Booklet Tells All About Dealing With Anger, CHI. TRIB., June 24, 1991, at C9 (reader inquiring, “I am a white American female. My husband is Chinese, born in Vietnam. He has a permanent resident visa. My question: What nationality does that make our children? Someone told me that they are white American, but to me that means that they are ignoring their Oriental heritage. My daughter says she is half-Chinese and half-American. Please straighten this out, as we never know how to fill out the forms when this question is asked.”). There are localized forms of intermarriage; for example, eighty percent of early Asian-Indian immigrant men married Mexican women. Hing, supra note 5, at 71.

130 See Jeff Leibowitz, Parents Look to Asia to Adopt Children, N.Y. TIMES, Sept. 11, 1994, § 13LI, at 1; Bruce Porter, I Met My Daughter at the Wuhn Foundling Hospital, N.Y. TIMES MAGAZINE, Apr. 11, 1993, at 24. As with intermarriage, there are localized distortions in adoption; for example, between 1959 and 1965, forty percent of Korean immigrants “were girls under the age of 4, who were adopted by families moved by the huge numbers of orphans left after the Korean War.” Hing, supra note 5, at 68. By October 1991, almost 20,000 Amerasian children had immigrated. Id. at 128.
The indeterminism affects more than merely the individuals who are of multiple ancestries; it calls into question the bipolar classificatory scheme as a whole.

B. An Embrace of Complexity

The artifice of the model minority myth serves as an excellent example of the cultural construction of race.131 The model minority myth, if accepted uncritically by courts, becomes part of the legal construction of race. The law should not take the model minority myth as a given because it can be, and has been, deployed with political purposes. Its existence can be attributed primarily to the goal of deriding African Americans and other racial minorities. Arguably, the perception of Asian Americans as a racial group, as distinct from separate ethnic groups, i.e., Chinese Americans, Japanese Americans, Korean Americans, Vietnamese Americans, etc., would be impossible without the model minority myth.

The bipolar and essentialist position seduces with an appearance of order and rationality. In conventional equal protection analysis, a formal treatment of race focuses on how well the classification fits.132 It may be thought to ask, “Is the stereotype true or false?” It accepts the classificatory scheme and the stereotypes within it. It elevates empirical analysis above critical analysis.133 It does not recognize, however, that in the analysis “race” is both an independent and a dependent variable in a sociological sense.134 The resulting problems are acute where, as with the model minority myth and many other stereotypes, there is some “truth” to the stereotype.

131 See generally OMI & WINANT, supra note 111, at 53–76; Okihiro, supra note 118, at 137–47. See also Ikemoto, supra note 93, at 1590–93; Lopez, supra note 111; TAKAGI, supra note 76, at 12–16. Cf. Robinson, supra note 78, at 84.
132 See Jacobus tenBroek & Joseph Tussman, The Equal Protection of the Laws, 37 CAL. L. REV., 341 (1949). This model is updated in an analysis of the Japanese-American internment from a more rigorously formal perspective, but with even less historical context, in Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 UCLA L. REV. 447 (1989). This is not to slight the tenBroek approach, which was a powerful means of envisioning racial justice in its time.
134 Cf. OMI & WINANT, supra note 111, at 21 (describing ethnicity model as treating ethnic group norms as an independent variable); HING, supra note 5, at 147–50 (criticizing uncritical use of “culture” as an explanation for Asian-American success).
The limits of the paradigm become apparent in the affirmative action debate. Both sides become trapped in the idea of negative and positive stereotypes.

For opponents of affirmative action, the formal assumptions ostensibly remain the same as those that would be used against straightforward discrimination: there are racial classifications that might be characterized as positive and others that are characterized as negative, but all lead to the same set of harmful effects. In the strongest form of the statement, all racial classifications are suspect and unconstitutional.\textsuperscript{135}

For proponents of affirmative action, a more complex continuum is posited: there are racial classifications that are positive or at least benign, and they can be distinguished from those that are negative or malignant, and the former, on the balance, are beneficial even though they may have unintended side effects. In the strongest form, positive racial classifications may be constitutional but negative racial classifications are unconstitutional.\textsuperscript{136}

Omitted is the possibility that a positive stereotype can be a negative.\textsuperscript{137} Indeed, a racial stereotype may in some sense have very little to do with the race that is stereotyped. The model minority image presents just such a contradictory dual nature.\textsuperscript{138} The image can be de-
ployed as desired. It is irrelevant that most Asian Americans do not consent to the myth, for their endorsement is neither sought nor necessary.\textsuperscript{139}

Since equal protection doctrine has evolved along a bipolar and essentialist understanding of racial identity and racial categorization, it is poorly adapted to analyze Asian Americans and their place within affirmative action. If one had to design a racial stereotype/classification that could survive strict scrutiny, it would be difficult to do better than the model minority myth.\textsuperscript{140} With all its ambiguity, the model minority myth must be critiqued closely and carefully. To take it merely as an argument for expunging "race" is facile. Of all racial stereotypes, it especially cannot be dismissed under the rubric of color-blindness, because it is a form of race-consciousness that has been leveraged to promote race-unconsciousness.\textsuperscript{141} It is a racial stereotype that passes as color-blindness, and to see it, to set it in relief, to ask whether it is being abused, cannot be done through the analytical perspective of color-blindness.\textsuperscript{142} Color-blindness in law would permit the model minority myth to operate unchallenged in society. Color-blindness, accompanied by the notion of meritocracy, obscures the fetishism of the latter concept;\textsuperscript{143} the model minority myth as a construct is invaluable for showing how the concept of merit can be manipulated. As race literally is not only black and white, racial stereotypes are figuratively not only positive and negative.

\section*{C. The Importance of Context}

Recognizing that racism is not always susceptible to reason, Charles Lawrence has proposed an innovative approach to equal protection analysis: the cultural meaning test.\textsuperscript{144} "This test would evaluate govern-

\begin{itemize}
  \item \textsuperscript{139}To challenge the model minority image is to challenge control over one's self-image. In a roundabout way, a critique of the model minority myth serves as a reply to the claim that one has rejected one's culture. Rather, it is that one has rejected someone else's conception of one's own culture. Cf Hing, \textit{supra} note 5, at 185–86 (discussing "control" as a theme in shaping Asian-American community).
  \item \textsuperscript{140}With respect to Asian Americans, skepticism of "strict scrutiny" is warranted. The case that introduced "strict scrutiny" was a rare instance where a racially discriminatory law, aimed at Japanese Americans and concededly not "benign," passed the test. Korematsu v. United States, 323 U.S. 214 (1944).
  \item \textsuperscript{141}See \textit{supra} text accompanying notes 111–18.
  \item \textsuperscript{143}See Duncan Kennedy, \textit{Frontier of Legal Thought III: A Cultural Pluralist Case For Affirmative Action in Legal Academia}, 1990 DUKE L.J. 705, 732–34.
  \item \textsuperscript{144}Lawrence, \textit{Unconscious Racism}, \textit{supra} note 137, at 322 ("Americans share a common
mental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The cultural meaning approach uses an interpretation of history and current understandings of legislative action, drawing on social science methodologies, to tease out conscious, half-conscious, and unconscious forms of discrimination, in a more nuanced manner than disproportionate impact theory. It permits inferences of intent where hidden meanings are not only likely but are the norm.

A few examples demonstrate its application. On the one hand, raising public transportation rates would affect the poor more than the rich, and African Americans would likely be more heavily represented among the former, making the action difficult to sustain under a disparate impact test. The action would pass the cultural meaning test, however, because "there is no history of using bus or train fares as a way to designate nonwhites as inferior, and most importantly, we do not think of fare increases in racial terms." On the other hand, building a wall to separate neighborhoods could not be defended with an ostensibly neutral pretense (i.e., traffic control), because physical separation has a history and continued force as a means of designating nonwhites as inferior.

The cultural meaning test is supported by and applies well to the Asian-American example. The Korematsu internment case was presented by the Court as not even being about race, even though the internment applied solely to Japanese Americans as a racial group. In disregard of the obvious, the majority opinion states: "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we were at war with the Japanese Empire." Since the "strict scrutiny" test has been applied so frequently

historical and cultural heritage in which racism has played and still plays a dominant role. . . . At the same time, most of us are unaware of our racism."). Cf. Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 559 (analyzing implications of case where an unmarried African-American woman was discharged from a Girls Club when she became pregnant).

145 Lawrence, Unconscious Racism, supra note 137, at 356.
146 Id. at 364-65.
147 Id. at 357–58. Some cases remain difficult. According to Lawrence, the use of civil service exams for hiring, as in Washington v. Davis, 426 U.S. 229 (1976), had a race-neutral origin. See Lawrence, Unconscious Racism, supra note 137, at 369–76. Deeper consideration is necessary, because historically African Americans have been excluded from police forces, often because of the impression that they lacked language and communication skills. Id. at 370. Furthermore, "our culture has taught us to believe that blacks that fail the test have done so because they are black." Id. at 373. The use of the test, therefore, should be struck down. Id. at 375.
148 Korematsu v. United States, 323 U.S. 214, 225 (1944) (emphasis added). The military had justified the internment on the basis of race, under the assumption that Japanese Americans would be disloyal even if they were American citizens, because they were Japanese by race. In
in later cases which have indisputably been about race, this peculiar feature of the opinion has been neglected. The opinion remains "good law." In formal terms, even a race-based law can be superficially characterized as race-neutral. Whether there is a racial basis depends on how deeply one looks. That is where the cultural meaning test comes into play.

The cultural meaning test is necessary to an understanding of the model minority myth. It gives the benefit of the doubt to the individuals propagating the myth, avoiding any need to characterize them as "racist," while still protecting individuals thus stereotyped against the effects of the myth. It also indicates that rejection of the model minority myth as a stereotype is not merely pique. An approach that is formal but uninformed might take the model minority myth at face value as a positive racial stereotype, even if it were used to rationalize unjust actions that might be considered constitutional only if context were stripped away. Context restored, sensitivity to the model minority myth can prevent its acceptance as a positive when in actuality it is a negative. In absence of a cultural meaning test, a "ceiling" for Asian Americans that serves as a "floor" for whites in college admissions, if bolstered by the model minority myth, might pass the current constitutional test for affirmative action. Under the diversity variation on proportionate representation, an affirmative action program for whites at the federal level might well pass the mid-level scrutiny established in *Metro Broadcasting* with sufficient data (such as a demonstration of the model minority myth). The *Metro Broadcasting* Court held that "benign" racial classifications should be held to mid-level scrutiny, and should be sustained where they further important governmental objectives. In the only somewhat hypothetical college admissions case, the important governmental objective would be to ensure that whites were not underrepresented as against Asian Americans. The program could be relatively mild, awarding only a few "plus" points in an evaluation to white candidates who expressed "white" viewpoints. Analyzed under a purely formal approach to equal protection, whites and "white" viewpoints are as diverse as any other.

149 Indeed, *Korematsu* itself could be decided with the same outcome under the test articulated in *Metro Broadcasting*, with a demonstration of the necessary "nexus" between race (Japanese-American) and viewpoint (political loyalty to Japan).
In response, with the cultural meaning test, an Asian-American plaintiff could challenge affirmative action for whites by demonstrating that the governmental action is part of a pattern of exaggeration and fear of Asian-American success. There was likely a lack of participation by Asian Americans in the political process which led to affirmative action for whites, in addition to the substantive distinction that could be demonstrated in the conditions of whites as a group and non-whites as groups. The very necessity of considering context should serve to ameliorate the reluctance to make "controversial sociological judgments."

In his proposal of a cultural meaning test, Lawrence acknowledges that "[w]here there is less agreement about the allegedly discriminatory governmental action, the application of the cultural meaning test will, of course, be more difficult." The next section is intended to contribute to an understanding of affirmative action and Asian Americans, in order to facilitate use of the cultural meaning test.

IV. The Model Minority Myth as a Means of Attacking Affirmative Action: An "Especially Curious" Case

The inclusion of Orientals [in the affirmative action program] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.


The model minority myth cuts to the heart of the problem presented by affirmative action. Unless the model minority myth, or
Asian Americans, can be explained, the principles that have been used to divide negative and positive racial classifications are incomplete and problematic. In a pragmatic approach,\(^{155}\) Asian Americans can be used to test the various theories of affirmative action.

The presence of Asian Americans was recognized early by a few, such as Justice Douglas, who stated in the largely forgotten DeFunis case which preceded Bakke, “there is no Western state which can claim that it has always treated Japanese and Chinese in a fair and even-handed manner.”\(^{156}\) Justice Douglas foresaw that Asian Americans would be able to claim that but for discrimination, they would be able to achieve overrepresentation in some areas.\(^{157}\) Justice Douglas, in an idiosyncratic opinion, weighed that history of past discrimination as strong argument against affirmative action, based on a slippery slope rationale of too many groups competing for benefits.\(^{158}\)

\(^{155}\) On the meaning of “pragmatic,” see MINOW, supra note 111, at 182–84, 380–81; Chang, supra note 5, at 1321–25; see generally PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991) (collection of essays by legal scholars and philosophers discussing pragmatist jurisprudence). Cf Brooks & Newborn, supra note 111, at 791 (defining interactive approach to law as “harken[ing] back to Holmes’s criticism of the legal formalism promoted by Christopher Columbus Langdell. . .”).


\(^{157}\) See id. at 338–39.

\(^{158}\) In an aside, Justice Douglas again argues that the internment cases were decided correctly. Id. at 339 n.20.
Since Justice Douglas made this remark, however, the major judicial decisions\(^{159}\) and leading articles\(^{160}\) in the area have not given extensive consideration to non-black racial minority groups. A review of the case law reveals a few decisions that briefly discuss Asian Americans in relationship to affirmative action programs.

The case in which Asian Americans have been involved most actively also raises the issue recognized by Derrick Bell in an early article describing the divergence in interests in school desegregation litigation, between civil rights attorneys dedicated to formal goals and their African-American clients who sought substantive results.\(^{161}\) During the remedial stage of desegregation litigation involving the San Francisco Fire Department, a group led by Asian-American counsel and

\(^{159}\) Justice Stevens has contrasted the treatment of African Americans with the treatment of Mexican Americans and Native Americans. "Quite obviously, the history of discrimination against black citizens cannot justify a grant of privilege" to those groups. See Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting). Writing for the majority in *City of Richmond v. J.A. Croson Co.*, Justice O'Connor stated that "[t]here is absolutely no evidence of past discrimination" against any of the non-black racial minority groups included in the affirmative action program under review. 488 U.S. 469, 506 (1989) (emphasis in original). The "non-responsive" response by the dissent was that the list of benefitting minority groups was copied from a federal affirmative action program. See id. at 550 n.11 (Marshall, J. dissenting).

Later, in *Metro Broadcasting, Inc. v. FCC*, Justice O'Connor stated, in what may be interpreted as a reference to Asian Americans (or whites), "[m]embers of any racial or ethnic group, whether now preferred [by the affirmative action program], may find themselves politically out of fashion and subject to disadvantageous but 'benign' discrimination." 497 U.S. 547, 615 (1990) (O'Connor, J., dissenting).


purporting to represent Asian Americans sought to intervene to challenge the consent decree which instituted affirmative action. An Asian-American firefighters' group opposed the effort, apparently out of concern that it would upset the consent decree to the detriment of all racial minority groups. The court rejected the motion to intervene. 162 The dispute between the groups turned on the appropriate course of action for the Asian-American community, as well as the authority to make the decisions and represent the community interests. The legal issue is hardly unique to Asian Americans, but the factual basis for resolving it likely varies among racial groups and localities.

Other than that singular exception, most cases gloss over any issues unique to Asian Americans. 163 A recent Third Circuit decision relied on *Croson* in requiring statistical evidence supporting a claim of discrimination to justify an affirmative action program, and found that there was insufficient evidence with respect to Asian Americans. 164 A Ninth Circuit decision relied on *Croson* in finding sufficient statistical evidence to support an affirmative action program, which included Asian Americans (as the group most discriminated against and also numerically largest). 165 A Fifth Circuit decision excluded Asian Ameri-

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163 See *Officers for Justice v. Civil Service Comm'n of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979) (affirmative action plan for San Francisco Police Department included Asian Americans with no discussion of them, other than a provision for recruiting Chinese-speaking officers, though they need not be racial minorities).

164 *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Phila.*, 6 F.3d 990, 1007-08 (3d Cir. 1993) (reversing summary judgment against affirmative action program for African Americans but affirming summary judgment against affirmative action for other racial minorities including Asian Americans, noting that defendant city could reenact a program "based on more concrete evidence of discrimination"). *Cf. Arrow Office Supply Co. v. City of Detroit*, 826 F. Supp. 1072, 1080 (E.D. Mich. 1993) (striking down Detroit set-aside program, and noting that there was no showing of discrimination against non-black racial minorities including Asian Americans, "although the long history of societal discrimination against them in this country cannot be gainsaid").

165 See *Associated Gen. Contractors of Cal.*, Inc. v. S.F., 748 F. Supp. 1443, 1456 (N.D. Cal. 1990) (upholding San Francisco set-aside program, including provisions for Asian Americans, on the basis of statistical showing), *aff'd* 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). *Cf. Concrete Works of Colorado, Inc. v. City & County of Denver*, 825 F. Supp. 821, 843 (D. Colo. 1993) (granting summary judgment upholding affirmative action program and concluding that statistics for Asian Americans and Native Americans were less persuasive but still sufficient, and "we would be engaging in a circular argument: discrimination against these groups may not be remedied because discrimination, among other things, has kept their numbers so
cans from the plaintiff class in a case that led to a consent decree imposing affirmative action requirements, on the basis that Asian Americans (and women) "could not show that they were discriminated against."\(^{166}\)

An example confirming the virtual absence of Asian Americans, among others, from affirmative action analysis, is a housing discrimination class action suit where African-American plaintiffs represented all racial minorities. The district court found that the defendant had discriminated against African Americans and "East Indians, Afghans, Iranians, Indians, Pakistanis, Hispanics, and Asians generally." The district court inexplicably entered a consent decree that provided relief only for African Americans and not for any of the other racial minority groups found to have suffered discrimination. Without extensive discussion, the Ninth Circuit reversed and remanded so that non-black racial minorities could be joined.\(^{167}\) Thus, Asian Americans rarely appear in the affirmative action context, except, as seen below, when they are part of a collateral attack on the programs.\(^{168}\)

The following section considers whether a wide range of public policy choices concerning Asian Americans and affirmative action are constitutional under leading theories of equal protection accepted by courts and articulated by academics. As a case study, this section uses the treatment of Asian Americans in the college admissions process in the Eighties.\(^{169}\) It concentrates on defining the limits of constitutional-

\(^{166}\) Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994). Interestingly, after their exclusion, Asian Americans implicitly were not part of the "third parties" that might be adversely affected. Id. at 1114-15.

\(^{167}\) Shimkus v. The Gersten Companies, Inc., 816 F.2d 1318 (9th Cir. 1987). In another case, a civil rights group objected to the renewal of a radio station's license, alleging that the station had discriminated in hiring against Asian Americans and subsequently instituted a sham affirmative action program. The F.C.C. granted the renewal of the license. The D.C. Circuit affirmed. Bilingual Bicultural Coalition on Mass Media v. FCC, 595 F.2d 621 (D.C. 1978). Judge Spottswood Robinson dissented, noting that the F.C.C.'s original argument was that the representation of Asian Americans was irrelevant because they were not the "predominant minority" in the area. Id. at 647 (Robinson, J., dissenting). Judge Robinson asserted, "I see no reason whatever for countenancing purposeful discrimination merely because it is aimed at only one small group." Id.

\(^{168}\) See supra notes 189-214 and accompanying text.

\(^{169}\) See generally Takagi, supra note 76; Hsia, supra note 94; Hsia, supra note 154; Tsuang, supra note 154. See also Jeffrey Au, Asian American College Admissions—Legal, Empirical, and Philosophical Questions for the 1980s and Beyond, in Reflections on Shattered Windows, supra note 6, at 51. One of the prominent early articles is John Bunzel & Jeffrey Au, Diversity or Discrimination? Asian Americans in College, Pub. Interest 49 (Spring 1987). One of the most influential articles was Linda Mathews, When Being Best Isn't Good Enough: Why Yat-Pang Au
ity in the event particular scenarios should recur. This section argues that opponents of affirmative action have seized upon a justification for affirmative action that has neither been accepted by the courts nor would be accepted by these temporary proponents elsewhere, namely proportionate representation or diversity. Under the line of reasoning of opponents of affirmative action, non-whites are put to a choice: either there must be affirmative action for whites or there cannot be affirmative action for African Americans. This illusory choice would effectively eliminate affirmative action.

A disclaimer is in order. Among the difficulties of discussing affirmative action is distinguishing between options that fall into the categories of constitutionally mandated or impermissible, and other options that whatever their benefits and costs from a public policy perspective, are neither constitutionally required nor forbidden. While the details are not discussed here, there are a variety of alternatives to either the outright exclusion or wholesale inclusion of Asian Americans within affirmative action programs that may be constitutional as well as desirable. Asian Americans, for example, could be disaggregated into ethnic groups; their treatment could vary by the type of program; or a formula using race blended with means testing of some sort might be developed. None of these options is considered here.


170 This Article by no means attempts to duplicate the empirical and historical work of earlier authors.

171 The model minority myth and the arguments advanced against affirmative action, regretfully, are supported by some Asian Americans. They arrive at their position of “merit-only” because they accept the false premise that affirmative action for other racial minority groups must disadvantage Asian Americans disproportionately. Their position is self-interested, in part motivated by the belief that Asian Americans will compete successfully against everyone else. If they succeed, their self-interest will get the better of them and all Asian Americans, because it is politically untenable that whites, to say nothing of other racial minorities, would permit Asian Americans to achieve significant overrepresentation at prestigious educational institutions and in economically advantageous occupations. Their viewpoint is acknowledged to avoid any misperception that the discussions of the model minority image and the attacks on affirmative action single out whites.

A. Permissible Rationales for Excluding Asian Americans from Affirmative Action

It would be acceptable to exclude Asian Americans from affirmative action under all of the leading theories. However, to say that such exclusion would be acceptable does not necessarily mean that it would be preferable.

1. Backward-Looking Models

Initially, under a backward looking, or compensatory, model of affirmative action, it would be legitimate to exclude Asian Americans because they have not suffered enslavement, Jim Crow laws, or other forms of *de jure* and *de facto* segregation and oppression. To the extent that they can claim to have faced discrimination, they cannot contend seriously that their experience approaches that of African Americans. The compensatory rationale makes it difficult to justify affirmative action, as it is presently practiced, for any racial group other than African Americans. The presence of Asian Americans and other non-black groups complicates the compensatory model in several ways. It suggests that it is appropriate to engage in a comparison of suffering. It implicitly sets up racial minority groups to compete with one another for limited reparations, with an emphasis on the exceptionalism of African Americans.

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172 Cf. Chew, *supra* note 5, at 90–93. We raise some of the same questions, but reach different answers.


174 On the impossibility of working from past discrimination generally, see Abrams, *supra* note 111, at 92.

2. Forward-Looking Models

Likewise, under a forward looking, or distributive model\textsuperscript{176} of affirmative action, it would be legitimate to exclude Asian Americans. Regardless of past discrimination, Asian Americans by most measures are achieving socio-economic upward mobility. Their educational and economic performance more or less approximates that of whites. Even if Asian Americans can demonstrate that their educational and economic achievement is not at parity with whites, they still cannot show that their status approaches that of African Americans. The presence of Asian Americans and other non-black groups also complicates the distributive model. It suggests that there are a limited amount of benefits to be paid out under a zero-sum distribution.\textsuperscript{177} The result, again, is that racial minority groups are placed into conflict. Additionally, the abuse of the model minority myth suggests caution in accepting a "role model" rationale for affirmative action.\textsuperscript{178}

3. Proportionate Representation or Diversity Models

Alternatively, under proportionate representation, or the diversity model of affirmative action,\textsuperscript{179} it would be especially appropriate to

\textsuperscript{176} Justice Stevens has articulated the most consistent forward-looking, or distributive model, of affirmative action, resulting in the least consistent voting pattern on affirmative action programs. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring). Justice Stevens triumphed with the Metro Broadcasting, Inc. v. FCC, decision, which "reject[ed] the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." 497 U.S. at 601 (1990) (Stevens, J., concurring).

\textsuperscript{177} Justice Stevens has been concerned with the problem of dividing up benefits among the included groups. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 538-39 (1980) (Stevens, J., dissenting).

\textsuperscript{178} See generally Austin, supra note 144, at 549-76 (negative role model rule used to terminate employment of unmarried and pregnant African-American women); Richard Delgado, Affirmative Action as Majoritarian Device: Or, Do You Really Want to Be a Role Model?, 89 MICH. L. REV. 1222 (1991).

\textsuperscript{179} See generally Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). See also Foster, supra
exclude Asian Americans from a range of affirmative action programs, in the interest of maintaining a prescribed racial balance, usually equal to the representation of each race in the general population. The presence of Asian Americans and also Latinos raises an unusual set of problems for the cause of diversity.\textsuperscript{180} Asian Americans and Latinos, like American Jews, are often viewed as threatening to diversity, due to the fear that there will be "too many of them." Asian Americans and Latinos can exhibit no diversity among themselves; as they are inassimilable, so are they all the same. However, the very existence of internal cultural, political, individual, ethnic, and religious diversity, and the existence of differences based on language, economic status, and varying levels of assimilation, expose the disjunction between racial unity and viewpoint diversity.\textsuperscript{181}

B. \textit{Impermissible Rationales for Excluding Asian Americans from Affirmative Action}

1. Difficulties of Judging Invidious Intent

Notwithstanding the rationales for excluding Asian Americans from affirmative action that would pass constitutional standards, there

note 173, at 131–38. "Diversity," of course, was "a sword against" Asian Americans "seeking admissions [to universities]." Tsuang, \textit{supra} note 154, at 672. "Diversity" was used as a justification to increase immigration allotments primarily for Europeans, in particular the Irish, against the general trends of substantial Asian and Hispanic immigration. \textit{See} HING, \textit{supra} note 5, at 7; Andrew Hacker, "Diversity" and Its Dangers, N.Y. REV. OF BOOKS, Oct. 1993, at 21.


\textsuperscript{180} A strange problem would arise if Asian Americans were excluded from affirmative action under one of the other justifications, or if there were not also an understanding of the disproportionate impact approach to discrimination. The fact that it would be constitutional under one of the other justifications would not immunize it from review for disproportionate impact, assuming, as is possible, that there is some form of disproportionate impact. \textit{See} Martin v. Wilks, 490 U.S. 755 (1989); David Chang, \textit{Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?}, 91 COLUM. L. REV. 790, 791–92 (1991) (discussing inconsistencies that arise with rejection of disproportionate impact theory for regular discrimination claims coupled with rejection of affirmative action).

\textsuperscript{181} \textit{See} Foster, \textit{supra} note 173, at 138–42; Randall Kennedy, \textit{Racial Critiques}, \textit{supra} note 116.
is a range of rationales for their exclusion that should fail constitutional standards. Each of the constitutional reasons is shadowed by a suspect counterpart. The backward-looking justification could be rejected on a mistaken assumption that Asian Americans have never faced discrimination, or that they all are recent arrivals to this country. The forward-looking justification could be rejected due to acceptance of the "model minority" myth, a belief that Asian Americans are not only doing well, but too well. The proportionate representation or diversity justification could be rejected out of the notion that Asian Americans are an "overwhelming horde."

The most extreme outcomes would be simply outright discrimination, where a failure to include Asian Americans in affirmative action was accompanied by negative treatment against them. In some instances, Asian Americans have been excluded from public benefits and services that are poverty-based rather than race-based. In legal terms, the potential for intentional discrimination is not especially interesting, because legislative action can be upheld where there are a mix of legislative purposes, constitutional and unconstitutional. In practice, it is difficult to prove that solely unconstitutional purposes motivated enactment of specific legislation, and in theory, invidious intent directed at Asian Americans through the law, such as by actively discriminating against Asian Americans by holding them to a higher standard than whites, is unconstitutional under well-established precedent.

What is more interesting, however, is the difficulty of distinguishing between permissible and impermissible intents. One of the earliest discussions of affirmative action for Asian Americans remains one

With Asian Americans, ethnic identity may correlate with political conservatism rather than political liberalism (as conventionally defined), a point I hope to develop in a later article. See Hing, supra note 5, at 171–74.

182 See Richard A. Posner, Duncan Kennedy on Affirmative Action, 1990 DUKE L.J. 1157, 1157 (arguing that the economic success of Asian Americans demonstrates that they are not oppressed and therefore should be excluded from affirmative action). Cf. Daniel Seligman, Moving Toward Milton, Twitching with the Times, Opium Without Gloves, Deterrence Without Terror, Yellow Power, and Other Matters; Working Smarter, FORTUNE, May 17, 1982, at 64 (identifying "Orientals" as "these obviously nondisadvantaged folks" who should be excluded from affirmative action).

183 See Takaki, supra note 5, at 478. In one reported case, an Asian-American woman was included and then excluded from affirmative action, and apparently also discriminated against in a straightforward sense. See Fang-Hui Liao v. Dean, 658 F. Supp. 1554 (N.D. Al. 1987), rev'd 867 F.2d 1366 (11th Cir. 1989), cert. denied 494 U.S. 1078 (1989). The case is stronger than a claim for violation of an affirmative action program voluntarily adopted, as the district court construed it. The plaintiff alleged regular discrimination in her complaint, and the facts provided in the opinion bear out that possibility, despite the fact that the district court found it unnecessary to rely on those grounds, leaving no basis for the plaintiff's case after the reversal on the affirmative action issue. Fang-Hui Liao, 658 F. Supp. at 1555, 1557; 867 F.2d at 1370.
of the most extensive. In an article in the neo-liberal public policy magazine, *The Washington Monthly*, a pseudonymous author accepted the model minority myth, and, furthermore, argued that like American Jews, Asian Americans were beginning to exert too much political influence. The author, on the balance, provided a fair account of discrimination against Asian Americans, and as importantly, the less privileged status of some Asian Americans. The author, in conclusion, almost sounds like a critical race theorist:

> Categories like “Asian Americans,” “elderly” and even “black” don’t necessarily distinguish between those who need to be dealt in, from those who already have been; they are a shorthand that substitutes for, and sometimes obscures, a more subtle understanding of human need. Those with the most need, of course, almost never have meaningful clout on their own . . . When Asian Americans were powerless, few of us worried about their plight. Now that they are engineers and businessmen, politicians are eager to help. Our goal should be to find out who are today’s equivalents of the Chinese who laid the railroads and how we can help them.

If the author were a legislator, and the article a piece of legislative history, it would be no better than a guess to predict which way a court would rule. If Asian Americans were excluded from affirmative action, they could challenge the decision; or if Asian Americans were included, a white claimant could challenge the program.

2. Difficulties of Judging Benign Intent

The linkage of discrimination against Asian Americans with affirmative action for African Americans is interesting and offers rich material for analysis. It is here that the example of the model minority myth may contribute most directly to the jurisprudence on race. The

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185 *Id.* at 24.
186 *Id.* at 22 (distinguishing discrimination against Chinese from discrimination against Irish).
187 *Id.* at 26.
issue is whether affirmative action for African Americans requires, causes, justifies, or excuses outright discrimination against Asian Americans. The issue arose concerning college admissions in the Eighties, and continues to be controversial, especially in California and elsewhere on the West Coast.

In the 1980s, with U.S.-Japan trade issues becoming more pressing, the model minority myth entered its unfavorable phase. Asian-American families and civil rights organizations noticed what appeared to be a trend of declining opportunities to attend elite colleges. The number of qualified Asian-American students applying to the selective institutions was increasing, but the number of Asian-American students admitted to them had reached a plateau. As their concerns about "ceilings," or maximum quotas, attracted attention, Asian-American students seeking acceptance to the Ivy League and top public colleges became the darlings of the New Right. The charges of discrimination were considered serious enough to warrant official Justice Department inquiry.

The model minority myth made a reappearance amidst the controversy. Some officials explained that the problem was that Asian Americans in the aggregate were too interested in technical or pre-medical majors, and individually were not well-rounded enough. The explanation turned out to be meritless. Asian Americans had fallen from grace: by expressing concerns about possible discrimination, they betrayed the model minority myth. Asian Americans remained useful, however, because their claim had taken an (ideological) turn.

Rhetorically, the primary defensive maneuver to a claim of discrimination against Asian Americans became an offensive against affirmative action. The shift is exemplified by the Congressional testimony presented by William Bradford Reynolds, Assistant Attorney General for Civil Rights under the Reagan administration:

Charges that certain universities—Berkeley, U.C.L.A., Harvard, Stanford, Princeton, Brown, and others—are maintain-

189 TAKAGI, supra note 76, at 103–39.
190 Id. at 64–66; HSIA, supra note 94, at 94.
191 Tsuang, supra note 154, at 663–65.
192 Officials seemed surprised at Asian-American activism. They invoked the positive aspect of the model minority myth, suggesting that they thought highly of Asian Americans, and there were so many of them on campuses, there could not possibly be discrimination against them. See Gervasi, supra note 169; Linda Mathews, supra note 169; TAKAGI, supra note 76, at 71 (quoting Berkeley official). They used a blame-the-victim tactic, suggesting that a few rejected applicants were trying to rationalize their own academic shortfalls. See Gervasi, supra note 169; Linda Mathews, supra note 169.
ing quotas to limit the number of Asian-American admissions have been made with alarming frequency in recent years. . . . Of particular interest to the topic at hand is the fact that racial preferences generally do not operate in favor of Asian Americans. Indeed, quite the opposite is true—they are the most likely explanation of the alleged discrimination against Asian Americans. . . . Where admissions policies are skewed by a mandate to achieve some sort of proportional representation by race . . . then, inevitably, there will be pressure to squeeze out Asian Americans in order to make room for other minorities (or for whites). . . . In other words, the phenomenon of a 'ceiling' on Asian-American admissions is the inevitable result of the 'floor' that has been built for a variety of other, favored groups. . . . This has been the Department of Justice's objection all along to racial preferences, and the fact that the victims now are not white but members of other minority groups merely dramatizes the moral bankruptcy of the whole enterprise. 193

Numerous other observers weighed in with similar statements: any problems with Asian-American admissions could be attributed to affirmative action for African Americans. 194 As one recent comprehensive statistical study of Asian Americans concluded, "[o]bviously, given their startling academic credentials, Asian Americans will be discriminated against if some sort of ethnic and/or racial equity is the goal of a university." 195


195 BARRINGER, supra note 98, at 169.
Paying attention to Asian-American concerns has become the latest example of anti-discrimination principles being used to legitimate racial discrimination. In introducing legislation addressing the issue in 1989, United States Representative Duncan Hunter stated that "I think it's important to show that the Republican Party is sensitive to discrimination, and that's what we're doing." In an address to the Heritage Foundation, U.S. Representative Dana Rohrbacher revealed that sensitivity to discrimination against Asian Americans meant attacking affirmative action: "So in a way, we want to help Asian Americans, but at the same time we're using it as a vehicle to correct what we consider to be a societal mistake on the part of the United States." Interestingly, Reynolds, Hunter, and Rohrbacher issued their pronouncements before the government investigations were concluded. Eventually, the dispute over college admissions in the eighties subsided without definitively resolving the issue of whether universities set maximum quotas on Asian Americans.

Almost living up (down?) to a stereotype of their submissiveness, Asian Americans sought to resolve the college admissions controversy without resorting to litigation. It was only in 1994 that a Chinese-American group filed suit concerning the desegregation of the San Francisco

196 See generally Freeman, supra note 111.
197 See Takagi, supra note 76, at 133.

The inquiries were incomplete in part because the records were incomplete. This suggests that whatever may be said about affirmative action, the way it is practiced deserves greater attention. Some of these problems may stem from the compromised nature of the Powell opinion in Bakke, 438 U.S. at 269: "[A]s Justices Brennan, White, Marshall and Blackmun stressed... the ultimate result of Justice Powell's position was simply to prefer an 'approach [that] does not... make public the extent of the [racial or ethnic] preference and the precise workings of the system..." See Laurence H. Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?, 92 Harv. L. Rev. 864, 876 (1979) (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 380 (1978) (Brennan, White, Marshall & Blackmun, JJ.)); see also Takagi, supra note 76, at 127 (quoting Berkeley faculty member to the effect that the Powell approach is "a myth").
Public Schools. Their claim was based on the apparently undisputed fact that Chinese Americans were required to achieve a higher score than whites or any other group on an entrance exam for prestigious Lowell High School, the flagship of the public schools. The Lowell case may replay the college admissions controversy in the 1990s.

C. Affirmative Action for Whites

1. Asian Americans as Whites

The model minority myth has returned, alive and well. Its latest reincarnation is in the much-ballyhooed book, *The Bell Curve*, by Charles Murray and the late Richard Herrnstein. One of the book's purported findings is that, along a racial hierarchy of intelligence quotient scores, Asian Americans rank ahead of whites, who rank ahead of African Americans.

Amidst the ensuing controversy over the book's other findings, newspaper columnist William Safire reflected on Asian-American success, reminiscing about his association with Chinese-American architect I.M. Pei. Safire wrote, "[i]nstead of denouncing this study as roiling up feelings of black inferiority, it might be helpful to look in the other direction—toward the group that scores highest, the Asians."203

As Safire observed, whites do not feel inferior to Asians. Thus, it is easy to assign Asian Americans the role of nominal superior. Realistically, there is no threat that Asian Americans will actually achieve economic, political or cultural superiority.204

Set against this background, the model minority myth may be expected to continue as an argument against affirmative action, and

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201 The complaint pleads the abolition of affirmative action as the relief sought, but many supporters of the litigation have made it clear that they support programs for other disadvantaged minorities.

202 See CHARLES MURRAY & RICHARD J. HERRNSTEIN, *The Bell Curve: Intelligence and Class Structure in American Life* (1994). In the interest of intellectual honesty, I should state that I have not read the book in its entirety.


204 I owe this point to an earlier writer, but I cannot recall to whom.
affirmative action may be expected as an explanation for mistreatment of Asian Americans. They have become bound together, twin coded concepts: the “model minority image” and “reverse discrimination.”

The general arguments against affirmative action are different from the specific argument that affirmative action discriminates against Asian Americans. Under the prevailing case law, the courts have rejected the general argument that affirmative action is unconstitutional because it disadvantages the racial group of whites or some whites. It goes without saying that if a zero-sum situation is assumed, then non-beneficiaries of any affirmative action program are necessarily disadvantaged. The specific argument that Asian Americans are disadvantaged is less compelling than it appears to be. The argument is meaningless—a substitution of “Asian American” for “white”—unless Asian Americans are harmed disproportionately. Functionally, the injection of Asian Americans into the affirmative action debate transforms formally non-cognizable harm to the white majority into arguably cognizable harm against a colored minority. It completes the “divide and conquer” tactic by then turning affirmative action for African Americans into discrimination against Asian Americans. Adapting the model minority myth, the indirect object of attention can become, instead of a racial minority group (African Americans), an abstract but reified symbol, the legal programs that focus on that racial minority group (affirmative action and similar measures). As it has become less socially acceptable to openly compliment Asian Americans than to condemn African Americans, it has become more acceptable to come to the defense of Asian Americans as a means of covertly casting doubt on affirmative action. Asian Americans become a dummy stand-in.

Asian Americans become the “innocent victims” in place of whites. As “model minorities,” both facets of that title are important to the

205 See Farber, supra note 78, at 913-15 (discussing scope of affirmative action in practice). Cf. Sandalow, supra note 160, at 694-99; Hacker, supra note 78, at 135-36 (suggesting that any impact is negligible). I do not mean to discount these conceivable costs, which if they exist, apply to whites as well as to Asian Americans.

206 Daniels, the historian who characterized the Petersen article as “the most influential single article ever written about an Asian American group,” observed that “[w]hat was new in Petersen’s approach was the blanket denigration of other groups and of the efforts of social scientists and government to manage and organize social change.” Daniels, Asian America, supra note 6, at 317-18. As the model minority image itself has come under attack, it is deployed less against the former and more against the latter. Sometimes the model minority image is taken as demonstrating that society has done right by racial minorities. See, e.g., Brand, The New Whiz Kids, supra note 58 (“[t]he largely successful Asian-American experience is a challenging counterpoint to the charges that U.S. schools are . . . failing to help underclass blacks and Hispanics”).
martyrdom of Asian Americans—"model" hence "innocent," and "minority" hence "victim." In a popular understanding, Asian Americans are no longer "considered a minority." Altering the meaning of "minority," Asian Americans are elevated as a group, unlike the treatment of an individual African American who is not "considered a minority."

In contrast to the cases where Asian Americans are deemed too economically successful or numerically insignificant to be included in affirmative action, they assume special significance for an attack on affirmative action. It is a matter of choice to slide from the arguable impact of affirmative action on whites to its contestable impact on Asian Americans. That choice demonstrates Derrick Bell's interest convergence thesis: whites will accept civil rights for racial minorities when they stand to gain at least as much.

The move from whites as victims to Asian Americans as victims can become inconsistent internally, and revealing politically. A faculty member critical of affirmative action at the University of California at Berkeley, for example, wrote an essay for the university alumni magazine arguing that "average minority group students are simply not going to be competitive with Asians and whites at Berkeley." Thus, when it came to identifying the groups that would be affected by affirmative action, Asians were a non-minority and the argument led with Asians followed by whites. However, this professor then went on to conclude that whites "come to feel cheated, quite rightly," and that the institution could not maintain "its eminence... if race, sex, ethnicity—or any other factor—is allowed to substitute for achievement." As for recognizing the groups that would be properly considered victims of affirmative action, it was whites only, and Asian Americans ceased to exist. They are excluded from affirmative action, and in the
process rendered non-minorities. Or if they are considered minorities, their presence is properly a cause of white resentment.

In a recent case making this move from whites to Asian Americans, a federal district court terminated a consent decree governing the Charlotte, North Carolina police department. Instead of criticizing the affirmative action goals for employing African Americans on the basis that it would limit the number of whites, the court created a hypothetical Asian "who wants to be a policeman and is qualified." The Asian "would be precluded . . . if the available eighty percent non-black slots were filled by non-blacks of assorted racial composition . . . too bad for him under this decree." "Too bad for him" indeed—in 1990, Charlotte law enforcement employed exactly zero Asian Americans. The decision fails to consider that Asian Americans could be the "victims," not of affirmative action but of racial discrimination. The court does not consider any alternative that would accommodate Asian Americans. To analyze the court's reasoning, it is necessary to consider whether there is any aspect of affirmative action that especially disadvantages Asian Americans.

2. Possible Disproportionate Impacts

Although Asian Americans conceivably could be subject to disproportionate effects from affirmative action, none of the possibilities defeats the policy.

Asian Americans may be subject to a disproportionate impact because they have been the subject of discrimination, but they are treated as though they have not been. Asian Americans may be subject to a disproportionate impact because even when they are excluded from affirmative action programs, they are assumed by some to be included in them. Those who make the mistake may be white or African American. The mistake may lead to an assumption that Asian Americans are "less qualified in some respect that is identified purely by their race." Consequently, Asian Americans receive none of the

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213 Id.
214 STATISTICAL RECORD, supra note 98, at 319. At the time, there were more than 7000 Asian Americans in the area, representing almost 2% of the population. Id. at 615.
benefits but all of the burdens of being included in affirmative action. The supposed stigmatizing effects of affirmative action should not be given much credence. They can be attributed as much to the programs themselves as to the attacks on them, which insinuate that every member of any minority group has accomplished what she has only by special pleading. Empirical studies also show that no such stigmatizing effects exist.\footnote{For Asian Americans though, any stigma would be slightly different. Those who assumed that they were included might be hostile, out of a belief in the model minority myth and an accompanying conclusion that Asian Americans were taking advantage of the programs. Another form of stigma altogether arises from the symbolism of being excluded. To be excluded from affirmative action is to be excluded from American society: affirmative action programs purport to be for all minorities, and if Asian Americans are not a minority, then they are nothing. These two forms of disproportionate impact, if anything, form an argument that Asian Americans should be included in affirmative action.}

Asian Americans also might be thought of as disproportionately affected to the extent that their behavior differs from majority norms: they apply at prestigious colleges at greater rates, or accept offers of admission at greater rates, or present profiles as applicants that are different.\footnote{As a mathematical matter, any disproportionate impact would vary directly with the white to Asian ratio on the first two measures, and inversely with the white to Asian ratio on the last measure. The absolute size of the groups, i.e., the minority status of one group, would affect only absolute differences, and not the (dis)proportion.\footnote{Due to the ratio of the white population to the Asian-American population, unless Asian Americans were overqualified at rates that would overcome their minority status, the absolute impact of affirmative action would be much greater on whites even if the proportionate impact were significantly greater on Asian Americans. There also could be a legitimate inverse relationship between the ratio of white to Asian-American application rates, and the ratio of the rates at which they are offered admission. That would be the effect of more marginal students applying, which colleges stated was the problem}} This third claim is thoroughly ironic and transparently tactical,
because it implicates only proportionate representation theories of equal protection, which otherwise would be repudiated by opponents of affirmative action. This third claim does implicate, however, proportionate representation theories. Strictly applied, those would place maximum quotas on Asian Americans and American Jews, among others—as well as on whites in other situations. (Though it may seem Faustian, it would be a bargain, to trade white proportionate representation at colleges in return for non-white proportionate representation everywhere else.)

3. Whites as Asian Americans

What started as professed concern about affirmative action and its impact on Asian Americans ends as revealed concern about affirmative action and its impact on whites. The line of inquiry goes beyond whether Asian Americans are harmed disproportionately. The next rhetorical question posed is “if it is permissible to harm whites to help blacks, then it is permissible to harm Asian Americans to help whites, isn’t it?”

Like most rhetorical questions, the query itself is misleading. It contains hidden assumptions. Its crucial premise is that affirmative action for African Americans imposes costs on whites. As demonstrated above, affirmative action does not affect Asian Americans disproportionately; it should be equally true that it does not affect whites disproportionately. The more accurate statement is that affirmative action for African Americans, and for any other groups that are beneficiaries, imposes costs (if at all) on whites and Asian Americans, along with all other groups that are non-beneficiaries.

with Asian Americans. Extrapolating from a detail of the model minority myth, officials argued that “family pressure makes more marginal students apply.” HSIA, supra note 94, at 92. Yet it appears that Asian-American applicants had increasing average test scores when their admissions rates were declining. Id. at 97–101. The better the Asian-American applicant pool became, the worse off they were. Incidentally, if Asian Americans are disproportionately affected by affirmative action, then they would disproportionately take up its benefits if they were included without further distinctions being drawn.

This rhetorical question is implied in O'Connor’s dissent in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

Another implicit premise is that affirmative action acts on zero-sum situations. That assumption, which is subject to a host of criticisms, is not addressed here.

An advocate who has used Asian Americans to attack affirmative action, including an advocate who happens to be Asian American, may reply that her belief is that Asian Americans and everyone else should be treated as individuals and not as members of racial groups. The caveat swallows the argument, because using Asian Americans in the equation should be as persuasive as the argument using whites, and vice versa, neither more troubling than the other. The advocate seeks to use a reverse circular argument of sorts, employing a premise that she will reject immediately: for some purposes, there is a cognizable group of Asian Americans. There should not, however, be a cognizable group of Asian Americans, any more than there should be recognition of other racial minority groups. She echoes the Vanderbilt student who saw Asian Americans as a racial group that "prove[s] themselves as individuals." The advocate and the Vanderbilt student are cynical and hypocritical social constructionists, who create a racial group, Asian Americans, which then becomes exalted as a "model minority." This group, after having served its purpose, dissolves into individuals, and their recognition as a racial group is thenceforth strenuously denied. Race is recognized, but for a purpose.

Defined in non-racial terms, the group with which the advocate is concerned is comprised of individuals who would obtain some benefit, but for the existence of affirmative action. By the advocate's own reasoning, whites and Asian Americans should be treated without distinguishing between them. Any distinct impact of affirmative action on Asian Americans, separate from the impact on all non-beneficiaries, must be the result primarily of affirmative action for whites, not affirmative action for African Americans. The scenario develops as described below.

4. What's Wrong with this Picture?

A hypothetical college observes that there is a rise in Asian-American applicants, and furthermore observes that they are increasingly competitive. The college can treat Asian-American applicants and white applicants equally. Assuming that the college has affirmative action for African Americans, the result will be an overall decrease in the propor-

223 See supra note 80 and accompanying text.

224 See Randall Kennedy, Persuasion, supra note 151, at 1337-45 (discussing role of good faith and bad faith in discussions of affirmative action and advocating attention to issues of intention).

225 The reasoning is similar to that of the majority in Korematsu. See supra note 148.
tion of white students accepted, a proportion that may even decrease at a faster rate than the proportion of whites in the general population. As in other areas of racial balance, there is a "tipping point" beyond which whites will not tolerate a diminishing of their presence and influence. The college, accordingly, institutes a form of affirmative action for whites. Asian-American applicants must perform to the highest standard, while white applicants are held to an intermediate standard, with affirmative action for African Americans remaining unchanged.

The college takes away from Asian Americans to give to whites, but if challenged, makes the claim that it is taking away from Asian Americans to give to African Americans (or to maintain diversity, meaning fewer Asian Americans and more African Americans). This may be done with quotas, or with more subtle means such as preferences shown to legacies (children of alumni). Preferences for legacies are a form of affirmative action for whites, on the whole. Typically, they are not seen as offensive to meritocracy.

Assistant Attorney General Reynolds alluded to the phenomenon of affirmative action for whites parenthetically: "inevitably . . . there will be pressure to squeeze out Asian Americans in order to make room for other minorities (or for whites) . . ." Reynolds's speech, carefully crafted though it may have been, also was highly revealing. The insertion of "inevitab[ility]" is not inevitable. It is used to create the impression that it is natural, pre-ordained, not subject to further discussion, that Asian Americans must be disparately affected by affirmative action. Reynolds's reaction to this "inevitabl[e]" outcome is interesting: the objection is to only the former course of action, "mak[ing] room" for minorities, not the latter, "Lebensraum" for whites.

There are two responses to this reading of the facts. The response that the reading is descriptively wrong cannot be made consistent with the claim that affirmative action has a special effect on Asian Americans. The more aggressive and persuasive response is to agree that the reading is descriptively right but also normatively so, that affirma-

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226 See Foster, supra note 173, at 143.
227 See Tsuang, supra note 154, at 670–71; Foster, supra note 173, at 143; Jerome Karabel & David Karen, Go to Harvard, Give Your Kid a Break, N.Y. TIMES, Dec. 8, 1990, at A25. See also John Larew, Why are Drove of Unqualified, Unprepared Kids Getting into our Top Colleges? Because Their Dads are Alumni, WASH. MONTHLY, June 1991, at 10. Perhaps by the time significant numbers of Asian- American alumni (and other non-white alumni) seek to enroll their children in their alma maters, the preferences given to legacies will have been discontinued.
228 See generally Reynolds Testimony, supra note 193.
229 This has been the case historically for U.C.L.A. See Takagi, supra note 76, at 164–66.
tive action for whites is neither more nor less problematic than affirmative action for African Americans; it is only a matter of whose ox is gored.230

This more aggressive response to affirmative action for whites is heard with increasing frequency. In an early discussion of the program at issue in *Bakke*, one white ethnic author argued that whites should be included in affirmative action, because as he put it, "[w]e are certainly much worse off than Orientals."

Later, the push was for more than inclusion of whites in affirmative action; it was for inclusion of whites to the exclusion of Asian Americans. Officials at the University of California campuses at Berkeley and Los Angeles indicated, respectively, "if we keep getting extremely well-prepared Asians, and we are, we may get to the point when whites will become an affirmative action group," and as the campus "will endeavor to curb the decline of Caucasian students . . . [a] rising concern will come from Asian students and Asians in general as the number and proportion of Asian students entering at the freshmen level declines—however small the decline may be."233

This aggressive response deserves reasoned rebuttal.234 It may be tempting to dismiss the concept of affirmative action for whites as obviously racist, but it is not obviously racist, at least not to those whites who have proposed this course of action. The issue of affirmative action for whites, in the face of reputed Asian-American success, is not


232 See also Linda Mathews, *supra* note 169 (quoting "wary" official as saying, "You could make a case that it is whites who are underrepresented, but we very rarely get complaints from white parents or white students"). Cf. Hacker, *supra* note 78, at 152 (arguing that whites "cannot easily cavil when Asians with better records receive college places").

233 See Tsuang, *supra* note 154, at 676 n.117.

234 One writer has elaborated on the distinction between passing over an "innocent white victim" due to affirmative action, and invidious racial discrimination. The "innocent 'white victim' is passed over not because he is white, but because there is little or no reason to believe—based on his being white—that he suffers from the effects of past racial discrimination." David Chang, *supra* note 180, at 806 (emphasis original). With Asian Americans, the issue is whether they "suffer[] from the effects of past discrimination."
resolved by referring to any of the already extant theories of affirmative action. The answer cannot be the tautology that politically, affirmative action cannot benefit whites, because constitutionally, whites cannot be benefitted by affirmative action (even if that may be supported by doctrine as it rests at the moment). Such an answer alone is neither principled nor persuasive. It implicitly carries on with a bipolar and essentialist view of race.

There is only one theory of affirmative action that would support its use for whites, and that is a proportionate representation theory. A proportionate representation theory inherently must be applied consistently. If that were done, it would benefit African Americans much more than it would whites. There do not appear to be any advocates who would support the latter who also have supported the former. Regardless, avoiding white “underrepresentation” ensures white dominance.

Some of these problems with the affirmative action debate are attributable to a mistake by liberals. The proponents of affirmative action may be faulted for accepting a bipolar essentialism. As opponents of affirmative action have tried to define “majority” as meaning “white,” so proponents of affirmative action have made a countermove and tried to define “minority” as meaning “black.” For liberals to treat

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235 In Regents of Univ. of California v. Bakke, Justice Brennan considered the argument that white ethnic groups could be disaggregated to be included in affirmative action or they would be disproportionately and adversely affected by exclusion from affirmative action. 438 U.S. 265, 359 n.35 (1978) (Brennan, J., concurring in part and dissenting in part). Responding to the argument that, say, German Americans could ask for preferential treatment, he stated that the court would have a “principled basis” for refusing them that status. The University of California at Davis affirmative action program under review set out four classes; it “clearly distinguishes whites.” Id. To Justice Brennan, “even if the Davis program had a differential impact on German Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German Americans.” Id. Basically, Justice Brennan relies on the tautological answer: whites cannot be part of affirmative action, period. Cf. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

Extended to Asian Americans, Justice Brennan’s approach appears to require their inclusion in affirmative action, or it collapses. His principle seems to be that the Davis program specified four groups, one of them Asian Americans, and excluded whites. Bakke, 438 U.S. at 359 n.35. Under this approach, it is permissible to include Asian Americans. Under this approach, indeed, it is necessary to include them if there is a disproportionate impact on them if they are excluded. That result is reached because the principle preventing German Americans from seeking inclusion, or bringing a disproportionate impact claim, is that the Davis program “clearly distinguishes whites.” Id. Given the Bakke case, a subsequent decision to exclude Asian Americans may show sufficient invidious intent. See David Chang, supra note 171, at 806.

236 Cf. Richard Delgado, Enormous Anomaly? Left-Right Parallels In Recent Writing About Race, 91 COLUM. L. REV. 1547 (1991) (discussing similarities among Derrick Bell, Stephen Carter, Shelby Steele and Patricia Williams); OMI & WINANT, supra note 111, at 152–57; TAKAGI, supra note 76, at 166–70, 185–90.

237 See generally Crenshaw, Retrenchment, supra note 117.
affirmative action as if it benefits all racial minorities may be political cowardice or political prudence, but such a tactic brings only a temporary respite. By doing so, they fail to address the tensions among racial minority groups—which should not be exaggerated or exacerbated by external forces, but which do exist—and they fail to advance and inform racial discourse. Missing an opportunity, liberals fail to recognize that the demand by some whites for affirmative action represents their dissatisfaction over fundamental inequalities in American society.

V. CONCLUSION

The better rebuttals to affirmative action for whites are offered by a traditional justification of affirmative action coupled with a more daring approach to racial justice; the former is procedural, the latter is substantive.

The traditional justification is that offered by John Hart Ely, and accepted by the Supreme Court in limited form: it is acceptable for the majority to disadvantage itself to benefit a minority, but it is not acceptable for the majority to disadvantage a minority, nor to disadvantage a minority in the course of benefiting another minority. With the latter prohibition, Ely had in mind the plausible concern that American Jews would be systematically disadvantaged by affirmative action. That concern is realized with Asian Americans.

238 See Hing, supra note 128, at 887–90; Ikemoto, supra note 93; Robinson, supra note 78. An ambiguous example is the problem of Asian-American lending institutions failing to comply with federal statutes and regulations requiring lending to “minority” communities. See Jennifer Thelen, Banking On Their Own Community; Asian Banks Penalized For Favoring Asian Borrowers Might Find Relief Under Revised Lending Regulations, S.F. Recorder, Jan. 6, 1994, at 1. The most significant problem is in the Voting Rights area, where advances by one minority group may adversely affect another minority group. See Farber, supra note 78, at 925–26. A full analysis of this particular problem is beyond the scope of this Article.

239 Cf. Farber, supra note 78.

240 See Matsuda, Reconstruction, supra note 111, at 1388–92 (discussing procedural and substantive justifications for linguistic tolerance). See also Tribe, supra note 199, at 1514–22.


242 See Daniel A. Farber & Philip P. Frickey, Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation, 79 Cal. L. Rev. 686 (1991) (arguing that the acceptance of the Ely test by the Supreme Court has been in a very limited form); Rosenfeld, Decoding Richmond, supra note 222, at 1773–77; Aleinikoff, supra note 142, at 1102–07. Rosenfeld and Aleinikoff analyze the flaws in Justice O’Connor’s and Justice Scalia’s use of the Ely test in Croson. The Ely approach is not wholly dependent on the Carolene Products footnote 4; a “discrete and insular” minority that was advantaged (or disadvantaged) could constitutionally pass legislation disadvantaging itself for the benefit of the majority (that it is doubtful that this would ever come to pass is an indication that the Ely approach is correct).

Under the Ely approach, it is constitutional for some groups to be treated better than the majority, but not for any groups to be treated worse than the majority. Whites and Asian Americans can mildly disadvantage themselves provided they are equally disadvantaged, for the important purposes of affirmative action. Whites cannot advantage themselves and disadvantage Asian Americans, no matter how important the purposes of affirmative action. In starkest form, it would be impermissible to simply deny Asian Americans admission to a college and reserve the resulting open slots for African Americans.

Although constitutional cases have assumed that “majority” and “white,” and “minority” and “black” are synonymous terms, respectively, those assumptions should not be treated as an absolute or universal truth. They have never been accurate universally, and increasingly are inaccurate demographically. At the intersections of race and gender, where white males are a minority, and women a majority, it becomes obvious that minority group status, strictly speaking, has never been the prerequisite for heightened scrutiny under equal protection analysis. In addition to seeing that the “majority” shifts (or should shift), it must be seen that “majority” is not necessarily “white,” and that “majority” does not necessarily mean a numerical majority. That brings full circle the Ely analysis: it is where a group is always, or almost always, in the minority, and is permanently disadvantaged by that status, that constitutional concerns arise.

The more daring approach to racial justice is to conceive of affirmative action as one part of a more powerful anti-subordination principle. An anti-subordination principle should be seen as a continuation of the civil rights movement, and of the original desegregation cases such as Brown v. Board of Education. An anti-subordination principle should be seen as a continuation of the civil rights movement, and of the original desegregation cases such as Brown v. Board of Education.

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246 This refinement may overcome the problem of minorities becoming majorities, so to speak. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989); Ely, *supra* note 241, at 739 n.58. It address the argument of the “flipped” *Carolene Products* footnote 4, that “it is members of the majority who are politically powerless and in need of judicial protection.” See *supra* note 222 and accompanying text.

247 Rosenfeld argues that “it is impossible to come to any principled conclusion regarding the constitutionality of affirmative action without (at least implicitly) subscribing to a particular conception of substantive equality.” Rosenfeld, *Decoding Richmond*, supra note 222, at 1754, 1741.

248 “In retrospect... it appears that the concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated.” Randall Kennedy, *Persuasion*, supra note 151, at 1335; Freeman, *supra* note 111; Brooks & Newborn, *supra* note 111, at 793–95 (describing Brown v. Board as culmination of NAACP Inc. fund strategy in attacking "separate
principle, carried out full force, should go far beyond legal analysis; it should compel legislative change and profound societal change.

In the limited and mundane realm of legal analysis, an anti-subordination principle would alter the results in specific cases. In evaluating discrimination claims, this principle would begin with a cultural meaning test, placing the burden on the defendant to demonstrate a legitimate purpose where there were disproportionate impacts.\(^{249}\) Obviously, the conditions faced by African Americans would be central concerns. To justify affirmative action, an anti-subordination principle would require a showing of past, present, or future discrimination. Proportionate representation or diversity rationales would be insufficient by themselves. The cultural meaning test could be blended with the type of statistical showing that appellate courts have required following \textit{Croson},\(^{250}\) leaving considerable flexibility consistent with federalism and local needs. The use of the cultural meaning test would permit whites to bring claims of racial discrimination, but prevent them from doing so where there was not at least the same factual basis already demanded of racial minorities.\(^{251}\)

In the specific area of Asian Americans and affirmative action, the Ely approach and the critical race theory approach de-couple the "model minority" and "reverse discrimination." The former approach requires that Asian Americans merely be considered, and the latter approach requires that Asian Americans be considered on their terms, rather than as honorary whites or constructive blacks.\(^{252}\) Depending on circumstances, Asian Americans might be included or excluded from programs that had a racial component. If they were excluded, however,

\footnotesize{\textit{but equal}). \textit{Cf.} Peller, supra note 111, at 844 ("the basic assumptions of contemporary race discourse . . . should be understood to reflect a particular ideology rather than the necessary and transcendent meaning of progress itself."); Matsuda, \textit{Reconstruction, supra} note 111, at 1398–1407.

\(^{249}\) The best description of an anti-subordination principle in practice is found in Matsuda, \textit{Reconstruction, supra} note 111, at 1368–69.

\(^{250}\) See \textit{supra} part III.C.

\(^{251}\) Thus, the approach is more consistent with the goals of original anti-discrimination case and more powerful than traditional equal protection analysis. This approach is more consistent because it limits "reverse discrimination" claims. Instead of demanding formal identity in treatment, and thus equating chattel slavery and affirmative action, this analysis looks to subjugation. This approach is more powerful because it posits that "reverse discrimination" is "discrimination." This approach recognizes that the former, as much as it is feared by whites, does not have the prevalence or the severity or the acceptability of the latter, and the latter may be the cause of the fear; but, if in certain situations the former is manifested, then it deserves the same response from the legal system. This addresses the common complaint of conservatives that civil rights law accomplishes an inversion of racial hierarchies.

\(^{252}\) \textit{Cf.} \textit{Civil Rights Issues, supra} note 98, at 197 (recommendations for policy changes to avoid discrimination against Asian Americans in college admissions).}
they would be treated no worse than the majority (that is, generally, no worse than whites). At Lowell High School in San Francisco, they would be admitted with the same test scores as whites; there would be no distinction drawn between Asian Americans and whites for institutional decision-making purposes. As a result of these changes in legal analysis, Asian Americans could no longer be used as the example that defeats affirmative action in political discourse. Affirmative action would be rid of its most vexing constitutional consideration if Asian Americans were considered more explicitly. Affirmative action could have minimum quotas for beneficiaries without having maximum quotas for any specified group—because whites and Asian Americans would compete to determine the allocation of the majority of spaces.

Taken together, the Ely approach and the critical race theory approach work well. The former looks to the decision-making by the dominant group, and the latter looks to the impact on the subordinate group. Each of the two approaches shows symmetry. The symmetry is between the legal analysis and the situation at issue, not between reified conceptions of racial groups. As in traditional equal protection analysis, the similarly situated are similarly treated. Improving on traditional equal protection analysis, the basis of similarity has shifted from white/black to shifting majority/permanently disadvantaged minority (not necessarily equated with white/black) or dominant/subjugated. It would be as ambitious as naive to suppose that these approaches could constitute new neutral principles, but perhaps they may be taken as evolving equitable principles.

Affirmative action, in the end, is only a means. Opposition to affirmative action is not necessarily support for racism, but it can be. The appropriate response to opponents of affirmative action is the query, real rather than rhetorical, of how they might propose to achieve racial justice by other means.