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# Asian Americans and the Dismantling of Affirmative Action in California

SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION BY ANDREA GUERRERO. UNIVERSITY OF CALIFORNIA PRESS, 2002. Pp. 247

Review by Harvey Gee<sup>†</sup>

## INTRODUCTION

In 1995, the University of California Board of Regents voted in Resolutions SP-1 and SP-2 to end the use of race as a criterion for student admissions.<sup>1</sup> The next year, Californians passed the California Civil Rights Initiative<sup>2</sup> ("CCRI"), which was referred to as Proposition 209 on the ballot. CCRI was the first statewide ban of all racial, ethnic, and gender-based preferences in state employment, education, and contracting in the history of affirmative action.<sup>3</sup> CCRI has withstood constitutional challenge, for the U.S. Supreme Court denied writ of certiorari to *Coalition of Economic Equity v. Wilson*<sup>4</sup> and left in place the Ninth Circuit Court of Appeal's decision to uphold CCRI.

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1. See Bryan K. Fair, *A Chance to Act Affirmatively*, in *A LARGER MEMORY: A HISTORY OF OUR DIVERSITY, WITH VOICES* 343 (Ronald Takaki ed., 1998).

2. CAL. CONST. art. I, § 31 (1996).

3. See *id.* Cf. Wendy K. Tam & Bruce E. Cain, *Asian Americans as the Median Voters: An Exploration of Attitudes and Voting Patterns on Ballot Initiatives*, in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS* 141 (Gordon H. Chang ed., 2001) (suggesting that many believe "the true impact of the proposition, the abolition of affirmative action was carefully veiled and that the civil rights wording was improper"); Frank H. Wu, *New Paradigms of Civil Rights: A Review Essay*, 66 *GEO. WASH. L. REV.* 698, 718 (1998) (book review) ("Proposition 209, styled as the 'California Civil Rights Initiative,' meant to eliminate affirmative action, is interpreted by many racial minorities as sanctioning regular racial discrimination. To avoid a declaration of its unconstitutionality, ironically, its proponents claimed in court that it was not focused on race.").

4. 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

In *Silence at Boalt Hall: The Dismantling of Affirmative Action* (“*Silence at Boalt Hall*”),<sup>5</sup> University of California at Berkeley (“UC Berkeley”) Boalt Hall School of Law alumnus Andrea Guerrero chronicles the 30 year-old story of how students, faculty, and administrators at Boalt Hall have struggled with the politics of race in higher education and the curtailment of minority enrollment at Boalt Hall after the end of affirmative action in its admissions policy. Throughout *Silence at Boalt Hall*, Guerrero emphasizes three prevalent themes: (1) the end of affirmative action at Boalt Hall has had devastating effects; (2) the traditional notions of “merit” on which law school admissions decisions are largely based need to be reexamined or revamped; and (3) affirmative action programs should be supported because they give students from traditionally underrepresented communities a chance to obtain access to education and equal opportunities.<sup>6</sup>

Guerrero is uniquely qualified to write this chronicle. She is a member of the last class of students admitted to Boalt Hall during the existence of its affirmative action policies, and thus witnessed the events first-hand.<sup>7</sup> In *Silence at Boalt Hall*, Guerrero explores the origins of the effort to abolish affirmative action, which culminated in the passage of CCRI and ultimately resulted in the Board of Regents’ decision to end affirmative action at Boalt Hall.<sup>8</sup> Moreover, she examines, in painstaking-detail, the various strategies used by the supporters and opponents of affirmative action in higher education to raise support for their divergent causes.<sup>9</sup>

The release of *Silence at Boalt Hall* is timely. Even though the University of California stopped using its affirmative action programs seven years ago, recent federal appellate court cases have rekindled the affirmative action debate.<sup>10</sup> In May 2002, the Sixth Circuit upheld University of Michigan’s affirmative action policy in *Grutter v. Bollinger*, and the Supreme Court has granted writ of certiorari.<sup>11</sup> *Grutter v. Bollinger*

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5. ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002).

6. See, e.g., *id.* at 105 (discussing the effect at Boalt Hall after eliminating affirmative action); *id.* at 38 (discussing the malleability of “merit”); *id.* at 179-83 (discussing the important role of affirmative action in furthering racial progress and in closing the opportunity gap between minorities and whites).

7. *Id.* at xi.

8. *Id.* at 1-109.

9. *Id.* at 110-61.

10. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), cert. granted, 123 S. Ct. 617 (Dec. 2, 2002) (These cases are two reverse discrimination cases that challenge the affirmative action policies of the University of Michigan and its law school, which were designed to promote diversity within the student body.). See also Bog Egelko, *Supreme Court to Review “Three-Strikes” Law*, S.F. CHRON., Oct. 6, 2002, at A6 (reporting that “nationally, the most closely watched case [was] . . . a challenge[] to race-based affirmative action at the University of Michigan”).

11. 288 F.3d 732, cert. granted, 123 S. Ct. 617.

is significant because the last time the Supreme Court considered race-conscious admissions policies was in *Regents of the University of California v. Bakke*.<sup>12</sup>

This review offers a brief descriptive overview of Guerrero's *Silence at Boalt Hall*. It then treats the book as a starting point for expanding the conversation about affirmative action, and in the process, raises independent but related issues concerning Asian Americans<sup>13</sup> and affirmative action. The issues raised are: (1) how does the inclusion of Asian Americans in the debate over affirmative action inform the affirmative action dialogue and (2) how can the experiences of Asian Americans contribute to the discussion about civil rights and the jurisprudence of race? Just as affirmative action is at a crossroads, so are Asian Americans. Asian Americans must decide which path to take in addressing racial inequities and improving race relations. This review will question the traditional assumptions of both liberals and conservatives with respect to the goals and means of civil rights programs and, in particular, affirmative action.

### I. THE FALLOUT FROM THE END OF AFFIRMATIVE ACTION

The media accounts regarding the elimination of affirmative action at Boalt Hall and the subsequent drop in the enrollment of minority students have been, for the most part, accurate.<sup>14</sup> Guerrero, however, forcefully suggests that most people still do not fully understand the racial politicking that occurred "behind the scenes" in the campaign to end Boalt Hall's special admission programs designed to open the doors of education to students from underrepresented communities and guarantee racial diversity in the classroom. Thus, *Silence at Boalt Hall* attempts to fill this gap with the narratives and voices of Boalt Hall students, faculty, and administration.

Initially, Guerrero's account of the demise of affirmative action at Boalt Hall is straightforward. As an enthusiastic supporter of affirmative action, Guerrero seems to place a great deal of the blame on the University of California itself. In particular, she concentrates on the Board of Regents' decisions, inaction, and failure to provide alternatives in the

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12. 438 U.S. 265 (1978) (upholding the use of such policies on very narrow grounds); see also Michael A. Fletcher, *Law School Can Consider Race in Admission*, *Court Rules*, S. F. CHRON., May 15, 2002, at A3 (The *Grutter* decision "deepen[ed] the split among federal appeals courts across the country on race-conscious college admissions. The Ninth Circuit U.S. Court of Appeals in San Francisco . . . has upheld the University of Washington Law school's use of race in admission—a policy that no longer is in effect—but other courts of appeal have rejected similar policies at the University of Georgia and the University of Texas.").

13. The term "Asian American" includes all individuals of East Asian, Southeast Asian, South Asians, or Pacific Islander ancestry.

14. See generally Amy Wallace, *UC Law School May Have Only 1 Black*, L.A. TIMES, June 27, 1997, at A1; Kacy Collons Keys, Comment, *Privileged Classes*, THE RECORDER, May 28, 1997, at 4.

recruitment of minority students.<sup>15</sup> Unlike other tracts about affirmative action, Guerrero's methodology attempts to ground a theoretical debate in reality.<sup>16</sup> She accomplishes this by applying a broad and deeply detailed analytical framework. Ultimately, Guerrero concludes that the results of "race-blind" policies have been far from race-neutral, and the application of such policies has not ensured that a highly competitive university would admit a talented and racially diverse student body that would enrich classroom discussion and debate.<sup>17</sup> In Guerrero's view, the admission of more minority law students and students from underrepresented communities would lead to diversity in the legal profession, and thus better serve society.<sup>18</sup> As a result, a great deal of Guerrero's book is devoted to the stories of those who have benefited from affirmative action and those who have suffered from its removal.<sup>19</sup>

In examining the path that ended Boalt Hall's affirmative action program and the effects that followed the end of the program in 1995, Guerrero focuses especially on the dearth of racial minorities in the class that entered Boalt Hall in August 1997, which attracted immense national media attention.<sup>20</sup> She states that:

For the first time in thirty years, the law school had admitted students without reference to their race, resulting in the admission of only 55 underrepresented minority students, down from 162 the previous year. Of these 55 students, only 7 – all Latinos – had chosen to enroll. Not since 1968, the first year of affirmative action, had only 7 newly admitted underrepresented minority students matriculated to Boalt.<sup>21</sup>

Guerrero also suggests that the Boalt Hall administration seemed indifferent to the situation, exhibited a lackluster response, and did very little to alleviate the problem while the liberal law professors who supported affirmative action voiced their concerns.<sup>22</sup> This inaction created the message that minorities were not welcome at Boalt Hall, which Guerrero explains led some potential applicants to forgo applying to Boalt Hall altogether and influenced accepted applicants to matriculate elsewhere.<sup>23</sup>

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15. See, e.g., GUERRERO, *supra* note 5, at 67-107.

16. See *id.* at xiii.

17. See *id.* at 162-201.

18. *Id.* at 179-80.

19. *Id.* at 110-70. Guerrero discusses the experiences and successes of affirmative action admittees during law school, especially how they defied and overcame early predictions about their expected low performance based on weak admission index numbers (combined LSAT score and undergraduate grades).

20. *Id.* at 110-61.

21. See *id.* at 110.

22. *Id.* at 34-128.

23. *Id.* at 106-09.

Guerrero next explores the Boalt Hall students' collective grass roots action to create an aggressive campaign to recruit minority students.<sup>24</sup> Remarkably, the fruit of the students' labor seemed to pay off, and "[i]n the fall of 1998, Boalt Hall enrolled 34 underrepresented minority students in the first-year class, a marked increase from the 15 students (including 8 who had deferred admission) who enrolled in 1997."<sup>25</sup> Nevertheless, this was much lower than the 52 students who enrolled in 1996, the year prior to the end of affirmative action at Boalt.<sup>26</sup>

Similar to most recent books written about affirmative action,<sup>27</sup> Guerrero discusses and then criticizes the traditional definitions of "merit" and "academic excellence" as determinable by grades and standardized test scores.<sup>28</sup> In the chapter entitled *Pursuing Excellence*, Guerrero argues: "[a]s conceptualized by neoconservatives, merit was evaluated by traditional criteria that had consistently awarded seats to white students and tenure to white faculty."<sup>29</sup> After trumpeting the obligatory liberal sentiments, she then proceeds to criticize the historical reliance on "merit" by the University of California:

The more merit that students and faculty had, the more excellent was the university. Merit, in their view, was the ultimate arbiter of opportunity and the measure of a university. This conceptualization, however, ignored embedded preferences for whites and accorded admission and hiring criteria on underserved objectivity.<sup>30</sup>

Demonstrating that race relations have never been a strictly black/white matter, Guerrero anchors her discussion of merit on the Asian American admissions controversy.<sup>31</sup> She argues that merit cannot be an objective criterion.<sup>32</sup> Guerrero substantiates her assertion through the manipulation of the admissions criteria to restrict the number of Asian American undergraduates at the University of California based on concerns of "overrepresentation."<sup>33</sup> According to Guerrero, Asian American undergraduates at U.C. Berkeley have suffered from the manipulation of standards since the mid-1980s.<sup>34</sup> She explains that "Asian Americans

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24. *Id.* at 120-46.

25. *Id.* at 150.

26. *Id.*

27. See, e.g., GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* (2000); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); COLORLINES: *AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* (John David Skrentny ed., 2001).

28. GUERRERO, *supra* note 5, at 34.

29. *Id.*

30. *Id.*

31. *Id.* at 38-46.

32. *Id.* at 38-39.

33. *Id.*

34. *Id.*

pursued higher education in substantially higher numbers, particularly in California, where the Asian Americans population was concentrated, [and therefore] threaten[ed] the stronghold that white students had historically maintained at the top undergraduate universities."<sup>35</sup> In response, Guerrero writes that the University of California changed its admissions policies and imposed a minimum verbal test score of 400 (out of a possible score of 800) on the Scholastic Aptitude Test (SAT).<sup>36</sup>

Here, the University of California's admission standards were manipulated to exclude Asian Americans due to a concern about their "overrepresentation" in the student body. Notably, the issue of Asian American overrepresentation in the student body has often been used as a proxy for bias against Asian Americans by universities, and it escapes Guerrero's attention. In effect, such criticism reveals how universities can design admissions policies that function to set aside the achievements of Asian Americans simply because there are "too many of them."<sup>37</sup> Guerrero states that:

Previously no minimum verbal score had been required, and applicants to Berkeley gained admission with high cumulative math *and* verbal scores. Recently emigrated Asian students tended to score low on the verbal section of the SAT but scored high in the math section, yielding a competitive cumulative score that won them admission. Because Asians made up 80 percent of the immigrant student population, the imposition of a minimum verbal score disproportionately affected Asian applicants.<sup>38</sup>

To Guerrero's chagrin, affirmative action opponents, who have included Asian Americans, continue to embrace the traditional notion of merit. For example, John Yoo, an Asian American professor at Boalt Hall, has expressed that, while lack of diversity is a problem, getting the "best students" who have the highest grades and Law School Admissions Test (LSAT) scores is of more importance to Boalt Hall.<sup>39</sup> According to Guerrero:

[Professor John Yoo] felt that excellence and diversity were a trade-off and believed that excellence should not be compromised by policies instituted to achieve diversity . . . he did not agree that Berkeley should be representative of the population of California. In his view, less prestigious campuses and law schools could meet the needs of a diverse population.<sup>40</sup>

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35. *Id.* at 39.

36. *Id.*

37. See Karen Avenso, *Asian Americans Question Latin Quotas: Many Say the System Works Against Them*, BOSTON GLOBE, Oct. 14, 1996, at B1 (reporting on angry Asian American parents who felt their children were being discriminated against because of their ethnicity and scholastic achievement).

38. GUERRERO, *supra* note 5, at 39.

39. *Id.* at 123.

40. *Id.*

Guerrero remains skeptical of the University of California's position regarding the "overrepresentation" of Asian Americans within the University of California. First, she refutes the University of California's explanation by referring to statements made by former University of California President David Gardner in an interview with the *San Diego Union Tribune*.<sup>41</sup> Gardner stated that there were proportionately more Asians at the University of California than in the general population of the state of California, and suggested that Asians had been admitted at the expense of "truly" underrepresented minorities, characterizing the issue as a zero-sum-game where the admission of Asians led to the rejection of African American and Latino applicants.<sup>42</sup> Guerrero, however, contends that "in tying Asian admission to affirmative action, President Gardner confused the issue."<sup>43</sup> Instead, Guerrero argues throughout her book that Asian Americans and whites together should shoulder the burden of affirmative action, and that no single racial group be singled out.<sup>44</sup> Consistent with this theory, Guerrero writes:

At the law school, with the exception of underrepresented students such as Filipinos, who had more difficulty gaining entrance to the university, Asian Americans were no longer considered under an affirmative action program . . . the admission of Asian Americans did not affect the admission of the minority students who, due to the competitiveness of Berkeley, were unable to gain admission with test scores and grades that were relatively lower than those of other applicants. Asian Americans instead competed directly with white students and it was these students, not underrepresented minorities, who were threatened.<sup>45</sup>

Guerrero also explores the multi-faceted ways in which the issue of Asian Americans and affirmative action has received national media attention, and how affirmative action opponents and neoconservatives have seized upon Asian Americans as a wedge group to argue for the

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41. *Id.* at 39.

42. *Id.* But see Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996) (arguing that the zero-sum game characterization of affirmative action is inaccurate). Professor Chang states that "[t]his is 'divide and conquer' at its best or worst . . . Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for white students. Though negative action against Asian Americans, whiteness becomes a diversity by category meriting a 'plus' in many admissions processes, demonstrating how the merit and fairness rationales are a smoke screen for what is really being protected —white entitlement.")

43. GUERRERO, *supra* note 5, at 40.

44. *See id.* at 37-46.

45. *Id.* at 40. Guerrero reports on the spokesperson for the Asian Americans Students Association who argued that "[t]he Special Admissions program has been pivotal in increasing Asian representation in the legal profession, particularly for Filipino students, who were the fastest-growing minority group in America but only numbered eight in American law schools, two of whom were at Boalt." *Id.* at 21.

abolishment of affirmative action.<sup>46</sup> For example, Guerrero states that:

As neoconservatives viewed the issue at Berkeley, the problem was not that Asian enrollment was limited vis-à-vis white enrollment, but that Asian *and* white enrollment was limited vis-à-vis African American, Latino, and to a lesser extent Naive American enrollment. To neoconservatives, the bottom line was clear: the consequence of affirmative action was that better-qualified whites and Asians were losing to blacks and Latinos in the zero-sum game of admissions. In Asian Americans, neoconservatives had found their "model minority," who gained admission to the university without the aid of affirmative action and proved that the playing field was even. Thus, in the eyes of neoconservatives, the continued use of "preferential policies" for underrepresented minority students was nothing short of discrimination against whites and Asians.<sup>47</sup>

This was an outcome that seemed to be at odds with the logic of affirmative action because, in effect, maintaining affirmative action for African Americans and Latinos while seeking proportional representation of whites would require limiting the admission of Asian Americans. But in Guerrero's view, adherence to a strict definition of academic aptitude, as determined by high school GPA and SAT scores, and the selection of students only from this pool, would result in an overwhelmingly white and Asian American student population.<sup>48</sup>

In a critical section of the book, Guerrero argues that there is a heavy reliance on the Law School Admissions Test (LSAT), which causes the admission decisions to continually and disproportionately affect minority students.<sup>49</sup> She supports her assertion with empirical and anecdotal findings and several studies that suggest standardized tests, such as the LSAT, may be culturally biased.<sup>50</sup> Guerrero ultimately concludes that grades and tests scores should not be the sole "objective" criteria on which admissions decisions should be based.<sup>51</sup> For the most part, Guerrero's critique of the LSAT is agreeable because the LSAT may indeed be an inaccurate predictor of success in law school and may be culturally biased.<sup>52</sup>

Furthermore, Guerrero provides examples of how there can be an increased pressure on the minority test taker, and how that pressure can

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46. *Id.* at 41-42.

47. *Id.* at 41.

48. *See id.* at 199-200.

49. *Id.* at 152.

50. *Id.* at 172-75.

51. *Id.*

52. *See* William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 24 (2000); William C. Kidder, *Situating Asian Pacific American in the Law School Affirmative Action Debate: Empirical Facts About Thernstom's Rhetorical Acts*, 7 ASIAN L.J. 29, 42 (2000) [hereinafter Kidder II].

prevent the achievement of a high score.<sup>53</sup> Guerrero also mentions how the notion of psychological burden may also encompass a general test-taking anxiety related to racial identity or culture.<sup>54</sup> However, Guerrero fails to mention that such anxiety may extend to gender, socioeconomic factors, and personal insecurity concerning one's ability. In addition, noticeably missing from *Silence at Boalt Hall* is any discussion about academic support programs for students admitted through affirmative action programs.

Ultimately, Guerrero does not delve into the more complex aspects of the affirmative action debate. Throughout *Silence at Boalt Hall*, Guerrero presents the events only as a product of individual action, such that racism is situated in the personal views of the students and politicians involved. But viewing questions of race in the contemporary affirmative action debate within such a limited context is inadequate. Guerrero, therefore, fails to show how these events are significant within a broader scope of affirmative action.

## II. DETAILING THE SHORTCOMINGS OF *SILENCE AT BOALT HALL*

*Silence at Boalt Hall* is valuable for its insight into the end of affirmative action at UC Berkeley's premier law school. However, *Silence at Boalt Hall* would have been more complete if Guerrero had included a detailed analysis regarding minority admissions at other public law schools in California, such as the University of California at Los Angeles, the University of California Hastings, and the University of California at Davis. An alternative, albeit more expansive, treatment would have compared the affirmative action programs once offered at the public law schools in California with the affirmative action programs that still exist at private law schools in California, such as the University of San Francisco, Santa Clara University, Stanford University, and Pepperdine University.

Guerrero also does not make a strong enough argument for affirmative action. Guerrero creates a vision of racial justice that liberals might find appealing, but conservatives and neoconservatives would deem unconvincing. A particular weakness is found in Guerrero's interpretation of race as a proxy for diversity of opinion.<sup>55</sup> According to Professor Miranda Oshige McGowan, in her essay entitled, *Diversity of What?*, the diversity rationale for affirmative action is skewed since racial and ethnic diversity do not necessarily translate into expressive diversity in educational settings.<sup>56</sup> Specifically, Professor McGowan asserts the

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53. See GUERRERO, *supra* note 5, at 172-75.

54. *Id.*

55. See *id.* at 182-99.

56. Miranda Oshige McGowan, *Diversity of What?*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 237, 241 (Robert Post & Michael Rogin eds., 1998).

dangers of relying on race and ethnicity as proxies for diversity of social experience and social affiliation because the proxies undermine the efficacy of affirmative action based on race or ethnicity.<sup>57</sup> Hence, Guerrero's arguments need to be reevaluated in light of Professor McGowan's findings that diversity does not necessarily nor easily translate into race. This is evident where Professor McGowan explains that if schools only relied on dominant social understandings of race and ethnicity, their affirmative action programs would be handicapped since the goal of diversity of viewpoints would not be achieved.<sup>58</sup> Instead, the schools should be aware that actual group identities and social affiliations of students and applicants do not always correlate to skin color.<sup>59</sup>

Furthermore, while Guerrero refers to Asian Americans and how they are affected by affirmative action in *Silence at Boalt Hall*, her analysis of where Asian Americans are situated in the affirmative action debate is ultimately weak and incomplete. In particular, Guerrero applies an allegiance to a "shared interest" theory of affirmative action.<sup>60</sup> This theory was recently critiqued by Professors Michael Omi and Dana Takagi, who argued that the political left, in their pro-affirmative action discourse, leaves Asian Americans out of the affirmative action debate.<sup>61</sup> Professors Omi and Takagi claim it is problematic that Asian Americans are considered part of a wider and "shared interest" coalition politics because it assumes that every racial group has experienced and continues to face the same kind of racism and discrimination in the legal market, politics, and in residential patterns.<sup>62</sup> A close examination of the status of Asian Americans in higher education, together with projections of their increased growth in population, will eviscerate the assumption that all racial minorities share the same nature of racism in the United States. A prime example of this theory can be seen in the student demonstrations over affirmative action at the University of California, protesting the Board of Regents' decision to pass SP-1 and SP-2, and the prior pro-affirmative action rallies.<sup>63</sup> According to Professors Omi and Takagi:

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57. *See id.* at 246.

58. *See id.*

59. *See id.*

60. *See* GUERRERO, *supra* note 5, at 123-50. Guerrero characterizes the efforts by student minority groups to recruit and retain minority applicants as a united struggle with a universal goal by all different minority groups. In so doing, she gives readers the false impression that (1) there is single perspective from a minority group; and (2) the interests of each individual group is aligned in support of affirmative action for the very same reasons. This is the "shared interest" theory. Relatedly, throughout *Silence at Boalt Hall*, there are examples of Guerrero's presumption that all minority students share a minority viewpoint, which differs from a non-minority viewpoint.

61. *See* Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in *RACE AND REPRESENTATIONS: AFFIRMATIVE ACTION 276* (Robert Post & Michael Rogin eds., 1998).

62. *See id.*

63. *See id.*

The charge “no University without diversity” is suggestive of a broad phalanx of diverse constituencies, including Asian Americans . . . while we are sympathetic to the politics of a “united front” of opposition to SP-1 and SP-2, we remain concerned that such politics presumes that Asian American interests are similar enough to other interests to make the coalition claims viable and rhetorically persuasive.<sup>64</sup>

When Guerrero subscribes to the “shared interest” theory in *Silence at Boalt Hall*, she commits a major error in assuming that the interests of Asian Americans are always aligned with those of white liberals, Latino, and African American supporters of affirmative action. This view is seen throughout Guerrero’s book, but it is particularly noticeable in Guerrero’s discussions about student advocacy for the continuation of affirmative action.<sup>65</sup> While Guerrero criticizes the Republicans for the deployment of the model minority myth to strengthen their arguments for the abolishment of race in the admissions process during the CCRI campaign, she conflates her arguments by placing Asian Americans along with the non-Latino/non-whites in the false and incomplete black/white binary of racial discourse.<sup>66</sup>

Guerrero’s “shared interest” theory ignores the essential portion of racial history in the West that has evolved from the early 19th century experience of Asians in negotiating the race line in America. Given the fact that Asian Americans are the only racial minority group facing a disproportionate impact from affirmative action together with whites, Asian Americans assume a pivotal role in steering the debate about affirmative action. And considering that few books have offered any legal analysis of Asian Americans and affirmative action, Guerrero’s *Silence at Boalt Hall* could have left a greater mark had Guerrero extended her analysis to how Asian Americans are affected by affirmative action. Thus, the inclusion of Asian Americans would have substantially informed the affirmative action debate by revealing the complexity and nuances of the issue.

The rapidly developing discourse about Asian Americans illustrates that, in the rare places where Asian Americans appear in the affirmative action debate and analysis, the positioning of Asian Americans within the traditional black/white paradigm of race relations is troubling.<sup>67</sup> Since Asian Americans have never fit in the traditional understanding of race, the legal needs and problems of Asian American communities have received insufficient attention.<sup>68</sup> For instance, when most Americans hear the term

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64. *Id.*

65. See GUERRERO, *supra* note 5, at 67-161.

66. See *id.* at 76-109.

67. See Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. J. PUB. INT. L. 1, 5-6 (2001); Mari Matsuda, *Beyond and Not Beyond, Black and White: Deconstruction Has a Politics*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 393-96 (Francisco Valdes et al. eds., 2002) (discussing the limitations of a black/white binary of traditional race analysis in America and the possibilities for expansion).

68. See Gee, *supra* note 67, at 5-6.

affirmative action, remedial programs implemented for African Americans and Latinos to address past and present discrimination come to mind.<sup>69</sup> Rarely do Americans think of Asians and Asian Americans as being viable candidates for affirmative action. All too often, Asian Americans are not seen as being sufficiently disadvantaged or underrepresented to warrant the same consideration afforded to African Americans and Latinos.

Similarly, the limited success that Asian Americans have achieved is routinely used by opponents of affirmative action to argue that race-based remedial programs are unnecessary.<sup>70</sup> This virtual absence of Asian Americans from the affirmative action analysis is troubling and demonstrates the need for Asian American voices to be heard. The tendency to exclude Asian Americans from the affirmative action debate is also disingenuous. Perhaps it is reflective of the erroneous belief that Asian Americans did not or should not benefit from affirmative action. This skewed vision is exasperated by the inaccurate portrayal of the affirmative action debate by the media, which simplistically projects affirmative action as simply an issue of increasing opportunities for African Americans and Latinos and decreasing opportunities for whites.

Making the arguments to include Asian Americans in the affirmative action programs is no daunting task. Like African Americans and Latinos, Asian Americans are victims of both past and present discrimination.<sup>71</sup> Thus, Asian Americans easily meet the evidentiary standard required for showing "past discrimination" and should therefore qualify for remedial or preferential treatment.

Indeed, the history of institutionalized discrimination against Asian Americans in this country is well-documented, and anti-Asian animus continues to this day.<sup>72</sup> As a great deal of anti-Asian sentiment remains, it serves as a foundation for the lingering xenophobia often manifested in anti-Asian violence, glass ceilings in the workplace, and quotas on university campuses.<sup>73</sup> However, Asian Americans are being punished "not for their vices but for their virtues," as perpetuated by the "model minority" myth,<sup>74</sup> which has served as a detriment to the involvement of

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69. See Harvey Gee, *The Other Minority: Asian Americans and Affirmative Action*, ASIANWEEK, Mar. 7, 1997, at 5.

70. See *id.*

71. See generally RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1987); SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991).

72. See Gee, *supra* note 69.

73. See *id.*; TAKAKI, *supra* note 71; CHAN, *supra* note 71.

74. FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 40 (2002); see also Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 2 (2000) ("Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.").

Asian Americans in the affirmative action debate. Since the 1960s, the dominant image of Asian Americans within mainstream American society has been one of a monolithic racial group that has achieved economic, educational, and social success through hard work, perseverance, and without assistance from the government or racial preferences.<sup>75</sup> But the “model minority” myth is disingenuous, for it masks the reality that Asian Americans are still being discriminated against.

Behind the facade of Asian Americans as a successful minority group lies the fact that Asian Americans have been victims of past and present hostility and discrimination.<sup>76</sup> The ostensible “pat on the back for a job well done” co-exists with the glass ceilings and quotas. The reality of the Asian American quest toward racial equality reveals the existence of substantial discriminatory obstacles in the areas of employment and education. For instance, the glass ceiling has created barriers that have prevented Asian Americans from equal opportunity and professional advancement in both the private and public sector of the economy. Compared with whites, Asian Americans are overrepresented in lower-paying non-skilled positions.<sup>77</sup> Although Asian Americans may generally fare better than other minority groups, they still lag behind whites in opportunities for social upward mobility.

Furthermore, the racialization of Asian Americans as a “model minority” marks the social position of Asian Americans along the racially stratified hierarchy between blacks and whites. Civil Rights Activist Angelo Ancheta argues that the “model minority” myth is a disingenuous stereotype, for it plays a key role in establishing and sustaining a racial hierarchy that combines Asian American success with traditional conservative American values.<sup>78</sup> This racial hierarchy denies the reality of Asian American oppression while legitimizing the oppression of other racial minorities and poor whites.<sup>79</sup>

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75. See ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 158 (1998); see also Gee, *supra* note 69 (asserting that the model minority myth is disingenuous and masks the reality that Asian Americans face discrimination).

76. See Gee, *supra* note 70.

77. See *id.*

78. See ANCHETA, *supra* note 75, at 158-60.

79. See *id.*; Pat K. Chew, *Asian Americans: The “Reticient” Minority and Their Paradoxes*, 36 WM & MARY L. REV. 1, 24 (1994) (arguing that society’s perception that Asian Americans do not experience discrimination is fallacious); Richard Halstead, *Charges of Racism Hurlled in Dispute Between Unions*, S.R. BUS. J., at 1 (reporting that Asian American independent contractors complain of unions discriminating against them because of their belief in model minority myth, and that Asian Americans do not need economic assistance); Kenneth Lee, *Angry Yellow Men. Exploiting Asian Discontent*, NEW REPUBLIC, Sept. 9, 1996, at 11 (explaining that Asian Americans do benefit from and support affirmative action despite stereotypes of success); Chen-Lien Tien, *A View From Berkeley*, N.Y. TIMES, Mar. 31, 1996, at 4A (stating that some Asian Americans remain disturbed by the model minority stereotype because it places them in opposition to other minorities and generates a facade that ignores current discrimination).

## CONCLUSION

Following the passage of CCRI, SP-1, and SP-2, there was a sharp curtailment of racial diversity in university admissions.<sup>80</sup> In 1997, the enrollment of African Americans and Latinos at Boalt Hall dropped dramatically, from 20 percent to 5.6 percent in 1995.<sup>81</sup> Moreover, confirming the argument that the ban on affirmative action affects various groups of Asian Americans in differing degrees, Filipino students were not admitted to Boalt Hall in 1997 and 1999.<sup>82</sup> This change is notable since, on average, over a dozen Filipino students were admitted each year before affirmative action was abolished at Boalt Hall.<sup>83</sup> Thus, Asian Americans must continue to demonstrate their resistance to being used as a wedge group in the affirmative action debate. For, as Margaret Fung explains, "even though Asian Pacific Americans are not included in the . . . admission policy, they have a stake in the full inclusion of underrepresented minorities to level the playing field and achieve diversity."<sup>84</sup>

*Silence at Boalt Hall* is a highly readable book that I recommend to all who are interested and concerned about the future of race relations in this country. The research offered by Guerrero to support affirmative action, though incomplete, arrives at an optimal time to meet the important challenge of expanding the dialogue on improving race relations. Unlike other recent legal writings, Guerrero's *Silence at Boalt Hall* appeals to a general audience and succeeds in avoiding a heavy or strict legal analysis by offering personal anecdotes and pragmatic alternatives for guaranteeing equal opportunity to all. When treated as a work in progress, *Silence at Boalt Hall* makes an important contribution to the continuing struggle for racial justice.

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80. See Gee, *supra* note 69

81. See Kidder II, *supra* note 52.

82. See *id.*

83. See *id.* at 42-43. See generally HARRY H. L. KITANO & ROGER DANIELS, ASIAN AMERICANS: EMERGING MINORITIES 84-85 (1988) (examining the socioeconomic status of Filipino immigrants and Filipinos residing in California, and discussing their generally lower-than-median household incomes compared with whites and other minority groups).

84. Press Release, National Asian Pacific American Legal Consortium (NAPALC), Asian Pacific Americans Legal Organizations Supporters the Continuation of Diversity Programs (May 23, 2001), at [http://napalc.org/programs/affirmativeaction/pr/Gutter\\_5-23-01.htm](http://napalc.org/programs/affirmativeaction/pr/Gutter_5-23-01.htm) (last visited Mar. 21, 2003).