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## Asian Americans: Identity and the Stance on Affirmative Action

Kelsey Inouye

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# Asian Americans: Identity and the Stance on Affirmative Action

Kelsey Inouye<sup>†</sup>

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## INTRODUCTION

Doubt in the integrity of affirmative action is not new. Affirmative action has been challenged in the Supreme Court several times since the 1970s, starting with the 1974 case *Regents of the University of California v. Bakke*. As attacks on racial preference in university admissions have grown over the past ten years, Asian Americans increasingly appear at the center of the debate. For example, in 2014 the California legislature attempted to reinstate affirmative action within the state by introducing Senate Constitutional Amendment 5 (SCA-5), which proposed to repeal Proposition 209's ban on consideration of race in school admissions. The bill, however, was unexpectedly stalled when members of the Asian American community, most notably Chinese Americans, emerged in strong

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<sup>†</sup> J.D. 2015 William Richardson School of Law at the University of Hawaii. This piece was written for Professor Charles R. Lawrence III's course on constitutional law and critical race theory in the fall of 2014. I would like to thank Professor Lawrence for his guidance and support, and the editors of the Asian American Law Journal—particularly Sarah Kwon and Mona Fang—for working with me on this piece.

opposition. They argued that affirmative action is “racist” and unfair to Asian Americans who allegedly must often outscore their white and minority peers to secure a spot at the same universities. SCA-5 thus reopened the affirmative action debate in California, resulting in a series of op-eds, many of them published by university papers.<sup>1</sup> These op-eds spurred numerous anonymous, brutal, and honest comments by students and community members claiming that SCA-5 was meant to racially discriminate against Asian applicants.<sup>2</sup> Yet overwhelming evidence suggests that the protestors, while outspoken, represent only a fraction of an Asian American community that largely supports affirmative action in university admissions.<sup>3</sup> These discussions reflect both the evolution of the Court’s interpretation of affirmative action and the ways in which those interpretive changes affect affirmative action in political and social contexts, resulting in the positioning of Asian Americans as both victims and members of the “model minority.”

This Note explores how the multiple, sometimes conflicting, positions towards affirmative action within the Asian American community are the result of both the community’s inherent diversity and the historical context in which the Asian American identity evolved. Part I describes the social and historical contexts of Asian immigration to the United States. Specifically, Part I explores how those circumstances both shaped the Asian American minority group and contributed to current Asian American stereotypes. Part II discusses the history and various understandings of affirmative action, drawing on commentary by legal and social theorists. Part III explores how these meanings of affirmative action have changed by examining key Supreme Court decisions regarding affirmative action. Part III also discusses the amicus briefs filed in the latest affirmative action

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1. A search of past articles on affirmative action in *The Daily Californian*, *The Daily Bruin*, *The Stanford Daily*, and *The UCSD Guardian* reveals that affirmative action has been a hot topic of discussion over the past ten years at key universities in California. For example, *The Daily Californian*, a newspaper out of the University of California at Berkeley, featured an article in February of 2014 in which the senior editorial board called for a return to affirmative action, pointing to decreases in minority enrollment at Berkeley since 1996 when Proposition 209 banned affirmative action at California public institutions. Senior Editorial Board, *Reverse California’s ban on affirmative action*. *The Daily Californian* (Feb. 6, 2014), <http://www.dailycal.org/2014/02/06/reverse-california-ban-affirmative-action/>.

2. See, e.g., Kristen Takata, *UC Students Lobby for Return of Affirmative Action*. *THE DAILY BRUIN* (Apr. 8, 2014), <http://dailybruin.com/2014/04/08/uc-students-lobby-for-return-of-affirmative-action/>; Senior Editorial Board, *Reverse California’s ban on affirmative action*. *THE DAILY CALIFORNIAN* (Feb. 6, 2014), <http://www.dailycal.org/2014/02/06/reverse-california-ban-affirmative-action/>.

3. Results from the National Asian American indicated that that 69% of Asian Americans support affirmative action in higher education. Karthick Ramakrishnan, *California Needs to Look Again at Asian Stance on Affirmative Action*, *LA TIMES* 2 (Sept. 25, 2014), <http://www.latimes.com/opinion/commentary/la-oe-0925-ramakrishnan-affirmative-action-asians-20140925-story.html>.

case, *Fisher v. University of Texas at Austin*,<sup>4</sup> to further investigate the differing arguments raised by Asian American groups both supporting and opposing affirmative action. Finally, Part IV surveys various legal theories underlying changing opinions on affirmative action. In particular, Part IV discusses the social and cultural factors specific to Asian Americans that furthered the multiplicity of perspectives within the community and make affirmative action an issue of special importance for them.

## I. THE ASIAN AMERICAN IDENTITY: HISTORICAL AND SOCIAL CONTEXTS

Today, Asian Americans are identified in social and popular culture as the “model minority,” bombarded by stereotypes of superior academic achievement and tiger moms<sup>5</sup> that portray Asian Americans as the one minority to have “made it” in America. On the surface, the “model minority” appears to be a positive label. The stereotype, however, also masks racism and inequality, which serve to both separate Asian Americans from other minority groups in ways that often lead to conflict and draw attention away from the many Asian ethnicities that continue to live in poverty.<sup>6</sup> This Part describes the history behind the development of “Asian American” as a group, and the rise of the model minority myth.

### A. History of Asian Immigration to America

When Asian immigrants first started arriving in the United States, no one knew how to categorize them. In 1854, the California Supreme Court found that the Chinese fell under either “Indian” or “non-white” categories for the purposes of a statute<sup>7</sup> that prevented blacks, mulattos, and Indians from testifying against whites.<sup>8</sup> When “Chinese” did become a formally recognized race, it was used to classify Asians of other ethnic backgrounds as well.<sup>9</sup> Distinctions between Asian ethnicities were not made until later; for example, the U.S. Census Bureau only began tracking Asians and Pacific Islanders in 1980.<sup>10</sup>

Asian immigrants began arriving in the second half of the nineteenth century and served as cheap labor until Asian immigration was stemmed via exclusion law.<sup>11</sup> The first federal Chinese Exclusion Act was executed

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4. 133 S. Ct. 2411 (2013).

5. See *infra* Part I.A-I.B.

6. See Kevin Shawn Hsu, *Empowerment, Discrimination, and the Façade of Leadership: Asian American Political Elites' Failed Assimilationist Strategy*, 14 ASIAN AM. L.J. 85, 98 (2007).

7. *People v. Hall*, 4 Cal. 399, 400 (1854) (citing Section 14 of the Criminal Act (1850) (regulating California criminal proceedings)).

8. Robert S. Chang, *The Invention of Asian Americans*, 3 UC IRVINE L. REV. 947, 952–53 (2013) (referring to *People v. Hall*).

9. *Id.* at 954–55.

10. *Id.* at 955.

11. Hsu, *supra* note 6, at 89 (citing “1870 California law barring immigration of Chinese,

in 1882, at a time when “Chinese” was defined as “any person of Chinese ancestry [serving as] a form of bloodline categorization.”<sup>12</sup> The persistent characterization of other Asian ethnicities as “Chinese” continued until the 1907 Gentlemen’s Agreement specifically restricted immigration from Japan, recognizing those of Japanese ancestry.<sup>13</sup> Years later, the 1924 Immigration Act barred immigration of “aliens ineligible for citizenship,” referring to immigrants from Asian countries including China, Japan, the Philippines, Thailand, Korea, and Singapore.<sup>14</sup> These exclusionary acts positioned Asian immigrants as foreign and alien. States were able to prevent Asians from owning real property and attaining citizenship, and could implement policies to segregate education and restrict interracial marriage.<sup>15</sup> Further, because of the limited period in which Asians were allowed to enter the United States, much of the Asian community was, and still is, concentrated in a few states—specifically California, Hawaii, New York, Illinois, and Texas.<sup>16</sup>

Following World War II, Congress repealed the laws barring Asian immigration. Inspired by the technology boom, Congress passed the Immigration and Nationality Act of 1965, which reopened Asian immigration, encouraging immigrants with higher education to aid in the demand for technical workers in the United States.<sup>17</sup> Under the Act, a 20,000-person limit was placed on each Eastern country, and 20 % of that quota was reserved for “professionals,” resulting in an “upsurge in highly-educated and wealthy Asian immigrants.”<sup>18</sup> The Act also included a category devoted to “immigrants able to invest \$40,000 in a business in the United States.”<sup>19</sup> From 1972 and 1988, Asian immigration “included about 200,000 with science backgrounds or training, especially scientists, engineers, physicians and other health practitioners.”<sup>20</sup> In short, by targeting Asian immigrants with professional skills and higher education, U.S. policy effectively produced a minority that generally had great earning capacity from the outset. This historical factor contributes to current stereotypes about Asian Americans as high achieving and gifted in the

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Japanese, and “Mongolian” women, ch. 230, 1870 Cal. Stat. 330, 330–32”); *see also* Deborah Woo, *The Glass Ceiling and Asian Americans*, U.S. DEPT. OF LABOR 11 (July 1994), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1130&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1130&context=key_workplace).

12. Chang, *supra* note 8, at 953–54.

13. *Id.*

14. *Id.* at 954–55 (quoting *Ozawa v. United States*, 260 U.S. 178 (1922)).

15. *Id.* at 955.

16. Woo, *supra* note 11, at 14 (“In 1990, about 66 percent of Asian Pacific Americans resided in the five states of California, New York, Hawaii, Texas, and Illinois.”). *See also* Hsu, *supra* note 6, at 99–100.

17. Hsu, *supra* note 6, at 89–90.

18. *Id.*

19. *Id.* at 90.

20. Woo, *supra* note 11, at 16.

sciences.<sup>21</sup> In these ways, immigration policy sculpted a racial minority of Asian immigrants, represented by many Asian ethnicities, with very particular skills.

### *B. History of Asian American Social Movements*

While the genesis of “Asian American” as a category stems in part from U.S. immigration policy, it was also influenced by the shared experience of discrimination against Asian immigrants as “foreigners” and “aliens.” These labels aided in pushing the various Asian ethnicities into a common group, and fostered a sense of solidarity among Asian immigrants with other American minorities who had also experienced discrimination. In fact many Asian Americans were inspired by the Civil Rights era and the Black Power movement, and underwent their own short period of civil rights activism.<sup>22</sup> For example, in 1968 UCLA held an “Are You Yellow?” conference in which students discussed activism and decided to select a group label.<sup>23</sup> Terms including “Yellow” and “Oriental” were considered, but members of the conference eventually settled on “Asian American” as the most appropriate term.<sup>24</sup> This conference marked an important time in the development of “Asian American” as a racial category that was not just thrust upon Asian immigrants, but was chosen by them. Asian Americans adopted an identity of their own.

While the “Are You Yellow?” conference represented the beginning of Asian American agency and group identity, another label was created that continues to stereotype many Asian Americans today: the “model minority” myth. In many ways, the “model minority” title was created at the very start of Asian immigration by the nature of the United States immigration laws, which were intended to attract educated and technically skilled workers to boost the U.S. economy.<sup>25</sup> William Petersen officially coined the term “model minority” in 1966 to refer to Japanese immigrants who overcame racism to achieve success, serving as a model or example for other minorities like blacks and Hispanics.<sup>26</sup> In other words, the “model minority” represents the minority group that successfully assimilated into American culture and no longer seems to suffer from economic and social

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21. *Id.* (“This shift from a rule of exclusion to limited access for middle-class professional populations effectuated the new role for Asian Americans in the United States.”).

22. *See* Chang, *supra* note 8, at 958–59 (“The yellow power movement has been motivated largely by the problem of self-identity in Asian Americans.”); *id.* at 985.

23. *See id.*

24. *Id.* at 957 (citing YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* 32–33 (1992)).

25. *See* Hsu, *supra* note 6, at 90. (“As a result of this intentional limitation and manipulation of the demographics and opportunities of the Asian American population, it can be said that Asian Americans are a “model minority” insofar as the legal, political, and economic policies of the United States have “modeled” the minority community to fit a designed role.”).

26. William Petersen, *Success Story, Japanese American Style*, *N.Y. TIMES MAG.*, Jan. 6, 1966, at 20.

barriers. Comparing other minority groups still suffering from racial barriers to the model minority implies that the problem does not lie within the social structure, but with the minority groups who failed to progress and assimilate.

While today's society has continued to isolate Asian Americans as the model minority, painting them as ambitious and high-achieving, the "model minority" label is problematic because it is not true—not all Asian Americans are successful.<sup>27</sup> For example, Chinese Americans, who are currently presented as the face of the model minority myth, have a median income of over \$60,000 per year, which is above the national rate.<sup>28</sup> At the same time, Chinese Americans have a poverty rate of 13.5%, which also exceeds the national average.<sup>29</sup> This demonstrates that there are significant differences in economic stratification even within the same ethnic group, and indicates that the successful Asian Americans who appear as examples of the model minority represent only a fraction of the group. Further, there are many ethnicities identified as "Asian American" that remain underrepresented in higher education and continue to face racial discrimination and poverty at rates much higher than the national averages.<sup>30</sup> In particular, Hmong, Laotians, Vietnamese, and Filipinos are arguably harmed most by the umbrella term "model minority," which presupposes that all Asian Americans have the resources for success and therefore do not deserve additional help. Thus, with respect to affirmative action, the model minority stereotype is problematic because it assumes that all Asian Americans are alike.

## II. MEANING(S) OF AFFIRMATIVE ACTION

Affirmative action grew out of the Civil Rights era as a compromise in response to the Black Power movement, which demanded self-determination and "full participation in the decision-making process affecting the lives of Black people."<sup>31</sup> Affirmative action granted minorities places in employment and at schools. In particular, affirmative action promised previously oppressed groups access to higher education, and in turn, greater access to positions of influence. In other words, affirmative action was largely meant to compensate or make reparations for past and

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27. See Carolyn Chen, *Asians: Too Smart for Their Own Good?*, N.Y. TIMES (Dec. 19, 2012), [http://www.nytimes.com/2012/12/20/opinion/asians-too-smart-for-their-own-good.html?\\_r=1&pagewanted=print&](http://www.nytimes.com/2012/12/20/opinion/asians-too-smart-for-their-own-good.html?_r=1&pagewanted=print&).

28. Hsu, *supra* note 6, at 98.

29. *Id.*

30. Bryan T. Ikegami, *An Urgent Opportunity: Unifying the Asian American Stance on Affirmative Action*, 17 ASIAN PAC. AM. L.J. 82, 94 (2012) ("38.1% of Vietnamese students, 49.6% of Laotian students, 53.3% of Cambodian students, and 59.6% of Hmong students obtained less than a high school education in 2000.")

31. CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 16 (1997).

current discrimination by giving subordinated minorities a means to enter “the gates of opportunity.”<sup>32</sup> In practice, however, affirmative action was limited, shaped by “political goals . . . often different from those of [the] activists” who fought for affirmative action in the first place.<sup>33</sup> The minority students most commonly admitted under affirmative action programs were those deemed most likely to conform with the “dominant campus culture.”<sup>34</sup> This culture was largely shaped by students from middle and upper class families rather than families truly limited in racial and socioeconomic capital.<sup>35</sup>

Critical race scholars Charles Lawrence and Mari Matsuda describe this application of affirmative action as problematic because it shifts the purpose of affirmative action from “a vehicle for community power to a mechanism for co-optation.”<sup>36</sup> This in turn gives rise to “the phenomenon of the affirmative action beneficiary who turns against the very people who opened the door for him.”<sup>37</sup> Matsuda and Lawrence argue that the “deep meaning” of affirmative action “recognizes that the only remedy for racial subordination based on the systematic establishment of structures, institutions, and ideologies is the systematic disestablishment of those structures, institutions, and ideologies.”<sup>38</sup> They point to student and community activism as representing and fighting for this type of affirmative action.<sup>39</sup>

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32. In his 1965 Commencement Address at Howard University, President Lyndon Johnson spoke about affirmative action, stating:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, “You are free to compete with all others,” and still justly believe that you have been completely fair. Thus it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

President Lyndon B. Johnson, Commencement Address at Howard University (Jun. 4, 1965) [hereinafter Johnson Speech].

33. LAWRENCE & MATSUDA, *supra* note 31, at 25.

34. *Id.*

35. *Id.*

36. *Id.* at 25–26.

37. *Id.* For example, Ward Connerly is a part-black Californian businessman, University of California regent, and a key figure in the fight against affirmative action. Connerly founded the American Civil Rights Institute, a nonprofit organization committed to “mov[ing] beyond race and, specifically, racial and gender preferences. *About Mr. Ward Connerly*, AM. CIV. RTS. INST., <http://acri.org/about-ward-connerly/> (last visited Dec. 7, 2014). Connerly is best known for being the driving force behind California’s Proposition 209, which effectively banned affirmative action in 1996. Katherine Spillar, *Ward Connerly Using Deceptive ‘Civil Rights’ Initiatives to Ban Affirmative Action*, MS. MAG. (2008), <http://www.msmagazine.com/winter2008/WardConnerlyPart1.asp>. This mission is consistent with the colorblind doctrine described in PICS, and serves as an example of how colorblindness can shape attitudes about affirmative action and race. Since then, he has led the charge against racial and gender preferences by supporting other anti-affirmative action bills in several other states including Missouri, Colorado, Arizona, and Nebraska.

38. LAWRENCE & MATSUDA, *supra* note 31, at 27.

39. *Id.* at 28 (“They demanded the admission of students and the hiring of faculty who identified with their excluded communities—not just people who shared their skin color or language, but individuals who would represent and give voice to the oppressed . . . This deep version of affirmative action recognizes that racist institutions remain racist as long as they serve the exploiters of oppressed

Legal theorists have developed additional ways of framing the original purpose of affirmative action and describing the negative consequences of subverting that purpose. For example, Duncan Kennedy argues that affirmative action is about political representation of communities.<sup>40</sup> By stifling their stories, society excludes certain communities from the production of knowledge and thus limits the power of those communities. Changes in institutional thought—and ultimately power—begin in universities, as they represent the epitome of knowledge.<sup>41</sup>

In contrast, the current re-framing of affirmative action as a means of diversity does not take into account whether minority students are likely to contribute to literature of their individual communities, or whether they will enhance the “political representation” of underrepresented groups. Kennedy argues that diversity has become a superficial measure that focuses on the number of students enrolled from each minority background rather than the quality of each student’s participation in the narrative.<sup>42</sup>

Thus, the original purpose of affirmative action has been understood in different ways. Congress saw affirmative action as compensating for racism by giving underrepresented minorities the preferential treatment required to access higher education and employment, while also appeasing protestors. Universities used affirmative action to comply with the law in creating student bodies. Their selection processes are superficially diverse, however, and do not necessarily account for all socioeconomic backgrounds by selecting students that would conform to mainstream campus environments. Others viewed affirmative action as a means of getting minority voices into places of power in order to reform the institutions and ideologies that upheld a narrative of white supremacy. These various interpretations have evolved as affirmative action began making its way through the court system in the 1970s.

### III. THE SUPREME COURT CASES AND THE CHANGING MEANING OF AFFIRMATIVE ACTION

Affirmative action jurisprudence transformed the original meaning(s) of affirmative action by emphasizing colorblindness and focusing on diversity. Over the past few decades, affirmative action has been heavily litigated in the United States. The outcomes of those cases—*Bakke*, *Grutter*, *Gratz*, *Parents Involved in Community Schools*, and *Fisher*—reflect a shift away from the original meaning(s) of affirmative action<sup>43</sup> and

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communities. It recognizes that those who are privileged by race and gender cannot judge who is best qualified to engage in the struggle against that privilege.”)

40. Duncan Kennedy, *A Cultural Pluralist Approach to Affirmative Action in Legal Academia*, 1990 DUKE L. J. 705, 713 (1990).

41. *Id.* at 728.

42. *Id.* at 731.

43. See Johnson Speech, *supra* note 32. In this speech, President Johnson originally spoke of

have in turn shaped current attitudes toward racial preference in school admissions within the Asian American community and society as a whole.

#### A. *Affirmative Action Jurisprudence*

The Supreme Court decided the first major affirmative action case in 1978. In *Regents of the University of California v. Bakke*,<sup>44</sup> the plaintiff sued the University of California at Davis Medical School, alleging that his rejection violated the Equal Protection Clause.<sup>45</sup> Specifically, the plaintiff contested the UC Davis policy of allotting 16 of 100 spots in the class for disadvantaged minorities,<sup>46</sup> arguing that his qualifications exceeded those of students admitted based on their minority status.<sup>47</sup> The *Bakke* Court stated that any racial classification is considered suspect and thus must be reviewed under strict scrutiny.<sup>48</sup> To survive strict scrutiny review, the Court required universities to show both that racial diversity satisfies a compelling state interest and the means of achieving diversity is narrowly tailored to meet that interest.

In applying this standard, the *Bakke* Court held that the Medical School's special admissions process of reserving sixteen of the one hundred places for minority applicants and comparing minority applicants only to one another was unconstitutional.<sup>49</sup> The Court reasoned that such quota systems violated the Fourteenth Amendment's Equal Protection Clause because "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>50</sup> That said, the Court recognized diversity as a "constitutionally permissible" compelling state interest and acknowledged that universities have the right to set their own goals and educational settings—a type of academic freedom protected by the First Amendment.<sup>51</sup> The Court also made clear that while "remediating past societal discrimination was *not* . . . a compelling interest" as "[s]ocietal

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affirmative action as a "moral and policy response" to the damage caused by centuries of slavery. *See also* William M. Chace, *Affirmative Inaction*, THE AM. SCHOLAR (2011), <https://theamericanscholar.org/affirmative-inaction/#.VIFriGTF82I>.

44. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

45. *Id.* at 270.

46. *Id.* at 279.

47. *Id.* at 277.

48. *Id.* at 279.

49. *Id.* at 289. ("To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.")

50. *Id.* at 289–90.

51. *Id.* at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.")

discrimination was ‘too amorphous’,” race may be considered “in order to remedy specifically identified past discriminatory acts that were in violation of the law.”<sup>52</sup> In other words, schools could not use affirmative action just because certain minorities were generally discriminated against in the past. Instead, only specific incidents of illegal discrimination against an individual could be recognized—a virtually impossible standard to meet. Thus, *Bakke* both validated the principle of diversity in higher education while narrowing the scope of affirmative action. This reframing shifted affirmative action’s original focus on remedying past discrimination to creating diversity in higher education, thus changing the original purpose of affirmative action programs. Further, emphasizing race as a “suspect classification” in admissions allowed universities to cease consideration of race in application processes,<sup>53</sup> despite the fact that the Court did not abolish affirmative action.

*Bakke* also had specific consequences for Asian Americans. While many Asian Americans benefitted from affirmative action programs in the 1960s and 1970s, the *Bakke* Court “questioned the inclusion of Asian Americans in affirmative action policies,” as Asian Americans were able to attain merit-based admissions into prestigious universities and therefore did not need affirmative action—a sentiment fueled by the model minority myth.<sup>54</sup> The Court’s dicta gave universities permission to eliminate Asian Americans from their affirmative action programs, suggesting that Asians were in fact overrepresented in higher education and no longer suffered from racism.<sup>55</sup> This message not only legitimized the marginalization of Asian Americans as a model minority, but also publicly positioned Asians as different—while still a minority, they had “succeeded” and therefore no longer qualified for extra help. The decision effectively told Asian Americans that they did not need nor deserve the benefit of racial preferences.

Twenty-five years later, in 2003, two key decisions emerged from the Supreme Court: *Grutter v. Bollinger*<sup>56</sup> and *Gratz v. Bollinger*.<sup>57</sup> In *Grutter*,

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52. LAWRENCE & MATSUDA, *supra* note 31, at 51 (emphasis added).

53. Instead, universities could provide access to minorities without actually addressing racism. *See id.* at 53 (“The majority had not confronted America’s continuing racism, nor had they answered the critical question of the meaning of the Equal Protection Clause: Does the Constitution require a neutral stance that will maintain existing inequities of opportunity, or does it require an active and fundamental reconstruction of a world shaped by race, gender, and class privilege?”).

54. Sharon S. Lee, *Over-Represented and De-Minoritized: The Racialization of Asian Americans in Higher Education*, 2 UCLA J. OF EDUC. & INFORMATION STUD. 5 (2006). *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 n.45 (“For example, the University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.”).

55. *See id.*

56. 539 U.S. 306 (2003).

57. 539 U.S. 244 (2003).

the plaintiff challenged the constitutionality of University of Michigan Law School's admissions process.<sup>58</sup> The Law School's admissions program survived the Court's strict scrutiny by showing that the program was narrowly tailored: the program used race merely as a "plus" factor in a holistic review of each student application in order to enroll a "critical mass" of minority students.<sup>59</sup> The Law School also demonstrated that diversity is a compelling interest by providing research on the importance of diversity in preparing for a legal career.<sup>60</sup>

In *Gratz*, the plaintiff challenged the University of Michigan's undergraduate admissions process.<sup>61</sup> Unlike in *Grutter*, the Court found the undergraduate admissions program unconstitutional because the school failed to show that the use of race in admissions was narrowly tailored "to achieve the interest in educational diversity that respondents claim justifies their program."<sup>62</sup> The *Gratz* Court reasoned that while diversity is a compelling state interest, the University's practice of awarding twenty points out of one hundred to minority applicants based on race is not narrowly tailored.<sup>63</sup> Under *Bakke*, race can be used as a "plus" for an applicant. Each prospective student, however, must be evaluated on an individual basis and [in *Gratz*] automatic awarding of points virtually makes "the factor of race . . . decisive."<sup>64</sup> Thus, *Grutter* and *Gratz* built upon *Bakke* by reemphasizing the importance of individualized review in narrow tailoring while still deferring to the University in upholding diversity as a compelling state interest.

*Parents Involved in Community Schools v. Seattle School District No. 1*<sup>65</sup> ("PICS") is another key affirmative action decision. While *PICS* is not a higher education decision, it played an important role in the shift toward colorblindness—a doctrine that arguably undermines affirmative action. Chief Justice Roberts's famous statement sums up the colorblindness doctrine: "The way to stop discrimination on the basis of race is to stop

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58. *Grutter*, 539 U.S. at 311.

59. *Id.* at 309. In *Grutter*, "critical mass" means "meaningful numbers" or "meaningful representation," rather than a strict "number, percentage, or range of numbers or percentages." *Grutter*, 539 U.S. at 318. But for "critical mass" to be meaningful, there must be enough to prevent minority students from feeling "isolated or like spokespersons for their race." *Id.* at 319; *Fisher*, 645 F. Supp. 2d at 593. Similarly, there must be enough so that a "variety of viewpoints" are represented among minority students, causing "racial stereotypes [to] lose their force because nonminority students learn there is no [single] 'minority viewpoint.'" *Grutter*, 539 U.S. at 320. With these guiding principles, the University has the discretion to determine whether a "critical mass" of minority students has been reached.

60. *Id.* at 308 ("The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession.").

61. *Gratz*, 539 U.S. at 249.

62. *Id.* at 270.

63. *Id.* at 268.

64. *Id.* (quoting *Bakke*, 438 U.S., at 317).

65. 551 U.S. 701 (2007).

discriminating on the basis of race.”<sup>66</sup> In other words, by acknowledging race, we perpetuate racism. This doctrine is problematic, however, because ignoring race also ignores the structural ways in which racism remains embedded in society. Affirmative action was intended to repair the damage done by racism by securing more places for minority students in higher education to create greater diversity in places of power.<sup>67</sup> Colorblindness assumes that racism is no longer a problem and therefore undermines affirmative action programs. In *PICS*, the Chief Justice explicitly adopted the colorblindness doctrine that emerged in *Grutter* and *Gratz*, which continues to shape subsequent affirmative action cases.

*Fisher v. University of Texas at Austin*,<sup>68</sup> the most recent higher education affirmative action case to reach the Supreme Court, further narrowed the extent to which race may be considered in school admissions. In *Fisher*, plaintiff Abigail Fisher sued University of Texas at Austin, alleging that the University’s affirmative action admissions policy violated the Equal Protection Clause.<sup>69</sup> The District Court granted summary judgment in favor of the University and the Fifth Circuit affirmed, holding that under *Grutter*, courts must grant deference to the University in terms of narrowly tailoring its affirmative action admissions plan.<sup>70</sup> On certiorari, the Supreme Court reversed and remanded the Fifth Circuit judgment, finding that the Fifth Circuit failed to apply the strict scrutiny analysis required under *Grutter* and *Bakke*.<sup>71</sup> The *Fisher* Court again emphasized that although courts may defer to the University’s judgment that diversity is “essential to its educational mission” and that diversity is a compelling state interest, the University must still establish that narrowly tailored means were used to achieve diversity.<sup>72</sup> The Court thus effectively limited the role of affirmative action in the higher education setting by adopting a “colorblind” approach in undergraduate admissions, making it more difficult for schools to meet the strict scrutiny standard.<sup>73</sup>

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66. *Id.* at 748.

67. *See* Part II *supra*.

68. 133 S. Ct. 2411 (2013).

69. *Id.* at 2412.

70. *Id.* at 2417.

71. *Id.* at 2415.

72. *Id.* at 2419–20 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)). The University receives no deference on narrow tailoring, which requires proof that racial categorization is necessary to achieve educational benefits associated with diversity. Under this analysis, the Supreme Court found that the Fifth Circuit failed to subject the University of Texas to the proper strict scrutiny analysis. The Fifth Circuit found that the University’s decision to use race as a factor in admissions was made in “good faith,” thereby deferring to the University regarding the narrow tailoring requirement, which goes against *Grutter*. In other words, the lower courts did not closely analyze the admissions process. Thus, the Supreme Court vacated the Fifth Circuit judgment and remanded the case to be reviewed under the proper strict scrutiny analysis, deciding whether the University provided evidence that its admissions process is narrowly tailored. *Id.* at 2415.

73. Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1811 (2004).

*B. The Fisher Amicus Briefs: Asian American Concerns and the Conflicting Perspectives on Affirmative Action*

A number of Asian American groups filed amicus briefs during *Fisher* at the Fifth Circuit and Supreme Court levels. These groups included the Pacific Legal Foundation, the Asian American Legal Foundation (AALF), and the Asian American Legal Defense and Education Fund (AALDEF). All groups—except the groups included in the brief filed by the Asian American Legal Defense and Education Fund—argued that affirmative action was unconstitutional. While Asian Americans also filed amicus briefs in *Bakke*, *Grutter*, *Gratz*, and *PICS*, *Fisher* seems to have garnered the most attention and likely reflects the growing investment of Asian Americans in the affirmative action debate.

At first glance, there appears to be a simple split among Asian Americans, but a closer analysis reveals a number of complexities that influence how and why Asian Americans position themselves in various ways. Yet, despite the differences in opinion, all sides share the same objective—the protection of Asian American civil rights.

*1. Arguments against affirmative action*

In *Fisher*, the Asian American Legal Foundation (AALF) filed an amicus brief in favor of the plaintiff that criticized the university's affirmative action plan. The AALF is a San Francisco-based nonprofit organization that supports Asian American rights and argues against racial preferences.<sup>74</sup> The organization grew out of the Chinese American Democratic Club (CADC) and was established in 1993 with the specific purpose of pursuing a lawsuit against the San Francisco Unified School District.<sup>75</sup> Thus, the AALF bases its origins in California's Chinese American history<sup>76</sup> and was founded to combat racial preferences.<sup>77</sup> Further, out of the twenty-eight Asian American organizations that filed briefs in *Gratz*, the AALF was the only group to file a brief opposing the University of Michigan admissions policy, indicating that the AALF was among the first Asian American groups to criticize racial preferences.<sup>78</sup>

In its Fifth Circuit brief in *Fisher*, the AALF argued that the University of Texas's (UT) admissions system was unconstitutional for two

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74. *Why Racial Preferences are Wrong*, ASIAN AM. LEGAL FOUND. (2008), <http://www.asianamericanlegal.com/index.php/why-racial-preferences-are-wrong> (“The United States Constitution protects individuals, not groups.”).

75. Caitlin M. Liu, *Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Policy*, 5 ASIAN AM. L. J. 341, 343 (1998).

76. *Our Historical Mission*, ASIAN AM. LEGAL FOUND. (2008), <http://www.asianamericanlegal.com/index.php/our-historical-mission>.

77. Terry Baynes, *Asian-American Rift Over Supreme Court Affirmative Action Case*, REUTERS (Aug. 14, 2014), <http://www.reuters.com/article/2012/08/14/us-supreme-court-fisher-idUSBRE87D10V20120814>.

78. *Id.*

reasons. First, Asian Americans generally score higher on the SAT than white students, and UT does not offer racial preference to Asian Americans despite representing a smaller percentage of students than Hispanics, who do receive racial preference.<sup>79</sup> This means that UT requires “Asians to work harder and achieve more than any other group, favored or disfavored,”<sup>80</sup> because they must compete with each other for a small number of spaces—a few of which go to less qualified students due to affirmative action. The AALF, in other words, argued that UT’s racial preferences put unwarranted pressure primarily on Chinese Americans.<sup>81</sup>

Second, the AALF argued that the Fifth Circuit failed to review UT’s admission plan under strict scrutiny as required under *Grutter*. UT already had a race-neutral alternative, the Top Ten Percent Law, a program that guarantees admissions to UT for students graduating in the top 10 % of their high school classes.<sup>82</sup> Because this program applies to all Texas high schools, it draws in a number of minority students from predominantly black and Hispanic schools.<sup>83</sup> The AALF contends that UT’s affirmative action program is unnecessary and thus not “narrowly tailored” because the Top Ten Percent Law program already enrolls minority students using race-neutral means.<sup>84</sup>

Following the Fifth Circuit decision, the AALF filed another amicus brief at the Supreme Court level. The AALF this time relied on *Ho v. San Francisco Unified School District*<sup>85</sup> to support its argument that racial preference hurts Asian American applicants. In *Ho*, the San Francisco

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79. Brief for the Asian American Legal Foundation as Amicus Curiae Supporting Reversal at 7, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (2011) (No. 09-50822), 2009 WL 6028012. The AALF argues that UT really is trying to achieve a student body reflective of the population of Texas. *Id.* at 8 (“In 2008, the university’s student body was composed of roughly 20% Hispanics and 19% Asians while those groups respectively represented 36% and 3.4% of the Texas population. Only if the university’s aim is racial balancing are Hispanics underrepresented and Asians overrepresented.”) [hereinafter AALF Amicus Brief Supporting Reversal].

80. *Id.* at 3.

81. Of particular interest in this conversation is precisely *who* is opposed to affirmative action. As discussed, Chinese Americans have emerged as the most vocal ethnic group condemning racial preferences. However, not *all* Chinese Americans are against affirmative action. A San Francisco-based organization called Chinese for Affirmative Action, founded in 1969, played an instrumental role in securing Chinese American rights. It later expanded to include advocacy for other Asian and Pacific groups and supported racial preferences and grassroots mobilization. Chinese Americans experienced the “original” racial discrimination and yellow peril paranoia, as they were among the first Asian immigrants to arrive in substantial numbers during the nineteenth century. Yet, as a whole, the Chinese Americans are portrayed as being at the forefront of the push against affirmative action, even within the Asian American community. *History*, CHINESE FOR AFFIRMATIVE ACTION, <http://www.caasf.org/about-us/history/> (last visited Dec. 1, 2014).

82. See Rebecca Leung, *Is the ‘Top 10’ Plan Unfair?*, CBS NEWS (Oct. 15, 2004), <http://www.cbsnews.com/news/is-the-top-10-plan-unfair/>.

83. See *id.*

84. *Id.*

85. 147 F.3d 854 (9th Cir. 1998). Brief for the Asian American Legal Foundation as Amicus Curiae Supporting Petitioner, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2011 WL 5040038.

School District had identified nine racial groups and mandated that no single group could make up more than 45 % of one school, including the prestigious Lowell High School.<sup>86</sup> Under that program:

the burden of this system of quotas and caps fell heaviest on students identified as ‘Chinese,’ who were most likely to be ‘capped out’ at their neighborhood schools or at desirable magnet schools [and] even where preferences were not required to maintain the district’s racial quotas and caps, the district nevertheless adopted a policy of granting preferences to applicants classified as ‘Hispanic’ or ‘African American.’<sup>87</sup>

Parents of Chinese schoolchildren sued the school district, arguing that such quotas placed the greatest burden on Chinese students who were refused spots due to racial enrollment caps.<sup>88</sup> In settlement, the school district agreed to stop using race in school admissions.<sup>89</sup>

The AALF argued that the issues in *Ho* are similar to those in *Fisher*. Although *Ho* ended in settlement, the AALF posits that the favorable result stemmed from the court’s emphasis that the “school district’s goal of diversity did not justify its use of race, and . . . the school district would have to prove, under strict scrutiny, a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry.”<sup>90</sup> The AALF also feared that if UT’s admissions program is allowed to stand under an apparent good faith standard instead of strict scrutiny, the San Francisco Unified School District could once again try to use racial quotas, which would harm Asian American students.<sup>91</sup>

The AALF amicus briefs focus on the concern that discrimination against Asian Americans, specifically Chinese Americans, will require them to work harder than members of other races. The history of Chinese discrimination, particularly in education in California, provides insight into many Chinese Americans’ distrust of affirmative action. Having worked so hard to overcome legal and social barriers to acquire spots in prestigious schools for their children, many Chinese Americans view affirmative action as another quota program taking away coveted seats from qualified students.

## 2. Arguments in favor of affirmative action

The Asian American Legal Defense and Education Fund (AALDEF) also submitted an amicus brief during *Fisher*, this time supporting UT’s affirmative action program. The AALDEF collaborated with other Asian American groups, including the Asian American faculty and staff of the

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86. *Id.* at 10.

87. *Id.* (citing *Ho*, 147 F.3d at 858).

88. *Id.* at 1–2 (citing *Ho*, 147 F.3d at 864).

89. *Id.* at 2.

90. *Id.* at 11–12.

91. *Id.* at 12.

University of Texas. Founded in 1975, the AALDEF is a New York-based national organization that supports civil rights and works with Asian American communities throughout the U.S.<sup>92</sup> The AALDEF has a history of supporting affirmative action.<sup>93</sup>

In its Supreme Court amicus brief, the AALDEF argued in favor of UT's admissions program, asserting that the University's "individualized review" uses race as just one factor in admissions decisions and thus complies with *Grutter*.<sup>94</sup> The AALDEF contended that the UT's "individualized review" considers other factors often hidden by the generalized "Asian American" label.<sup>95</sup> The organization also asserted that Asian American applicants from lower socioeconomic backgrounds or from communities with "low educational attainment" would be hurt if UT's admissions program was discarded.<sup>96</sup> Further, the AALDEF argued that UT does not consider Asian Americans overrepresented and that the percentage of Asian Americans at UT is five times the percentage of Asian Americans in Texas, which indicates "no ceiling has been imposed."<sup>97</sup>

The AALDEF also distinguished negative action from affirmative action.<sup>98</sup> Negative action is "discrimination by a university to suppress enrollment of a particular racial group."<sup>99</sup> The AALDEF argued that there is no evidence that UT engages in negative action,<sup>100</sup> as all applicants "compete in a single pool": minority applicants compete with all applicants rather than with only other minorities.<sup>101</sup> Individualized review allows for

92. *About AALDEF*, ASIAN AM. LEGAL DEF. FUND (Nov. 8, 2014), <http://aaldef.org/about-us/>.

93. *Id.* Their past work includes projects on police brutality against Chinese and Vietnamese Americans, and representation of South Asians, Arabs, and Muslim victims of hate crimes after the September 11, 2001 terror attacks.<sup>93</sup> The organization has also partnered with the NAACP Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, NOW Legal Defense and Education, and the Council of New York Law Association to create the Public Interest Law Center in New York.

94. Brief for the Asian American Legal Defense and Education Fund & Asian/Asian American Faculty and Staff Association of the University of Texas at Austin, et al. as Amici Curiae in Supporting Respondents at 4, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308203 (arguing that UT's admissions program aids the school in creating "a unique cross-section of identities and experiences" that students from all racial and socioeconomic backgrounds benefit from—including Asian Americans").

95. *Id.* at 6–7.

96. *Id.*

97. *Id.* at 10.

98. *Id.* at 15.

99. *Id.* (citing William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 33, 60 (2000); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3–4 (1996)).

100. *See id.* at 14.

101. *Id.* at 16 ("To allege racial discrimination by comparing admissions for Asian Americans exclusively with other minorities—as Petitioner and her amici do—is to fall victim to a causation fallacy assuming 'a finite number of minorities that can be admitted [to a university and] that spots for certain minorities must come at the expense of other minorities.'" (quoting Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L.

consideration of each applicant's personal circumstances, which helps break down the "model minority" stereotype and might increase admissions opportunities for Southeast Asians and Pacific Islanders.<sup>102</sup> Finally, the AALDEF pointed to studies indicating that diversity leads "to positive learning and civic outcomes for Asian American students"<sup>103</sup> and "improve[s] intergroup relations and reduce[s] racial stereotyping,"<sup>104</sup> all of which enhance the educational experience.

#### IV. BREAKING DOWN THE BRIEFS: THEORY AND SOCIOHISTORICAL UNDERPINNINGS OF ASIAN AMERICAN ATTITUDES

The differing positions displayed in the AALF and AALDEF amicus briefs represent the typical division in Asian American opinion. Several factors contribute to how Asian American students feel about affirmative action. These factors include country of origin, length of time spent in the United States, and gender.<sup>105</sup> Additionally, a UC Berkeley study concluded that "APA [Asian Pacific American] students' opinions 'were the most conflicted' and 'complex' of all the racial/ethnic groups of students regarding the diversification of the student body and opposition to affirmative action."<sup>106</sup> In other words, compared to other racial groups, the split in Asian American opinion over affirmative action was much more defined within the APA community, as reflected in political groups like the AALF and AALDEF. This phenomenon is likely influenced at least in part by how affirmative action is understood: as promoting social diversity, as different admissions requirements for minorities, as minority scholarships, as reverse discrimination, reparation, or as opposite of meritocracy.<sup>107</sup> This section highlights six theories that shed light on how different segments of the Asian American community develop their perspectives on affirmative action. These theories are: (1) community-based versus face-value; (2) self interest; (3) Kleugal and Smith's structure of opportunity; (4) racial identity development; (5) Fordham and Ogbu's minority classifications; and (6) Lisa C. Ikemoto's master narrative.

Legal scholar Bryan Ikegami argues that the split in Asian American beliefs on affirmative action stems from varying perspectives on the Asian American community. Ikegami distinguishes between the "community-

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391, 421 (2008)).

102. *Id.* at 25–26.

103. *Id.* at 38.

104. *See id.*

105. Pat K. Chew, *Asian Americans: The "Reticent" Minority and their Paradoxes*, 36 WM. & MARY L. REV. 1, 26 (1994).

106. Karen Kurotsuchi Inkelas, *Diversity's Missing Minority: Asian Pacific American Undergraduates' Attitudes Toward Affirmative Action*, 71 J. OF HIGHER EDUC. 601, 604 (2003) (citing THE DIVERSITY PROJECT 15, 27 (1991)).

107. *Id.*

based” and the “face-value” approach.<sup>108</sup> Asian Americans who adopt the community-based position support affirmative action by recognizing the diversity among Asian Americans and believing that all members of the community should receive rights and benefits.<sup>109</sup> This does not mean that literally all members will receive rights—that, unfortunately, is not realistic. Instead, all members of the Asian community should be able to have the *opportunity* to receive rights. Those who take the community-based position support racial preferences because they provide a greater chance for students of Southeast Asian backgrounds to gain admissions—not just the stereotypically successful Chinese, Japanese, and Koreans.

In contrast, those who prescribe to the face-value perspective focus on the “total gains of the group,” meaning that victories for some members of the community are victories for the community as a whole.<sup>110</sup> In other words, Chinese and Taiwanese Americans’ access to prestigious universities and influential positions is a success for the entire Asian American community, including those members who still struggle to complete a high school education and make rent. Under Ikegami’s theory, the AALF’s amicus briefs take the face-value position, while the AALDEF’s argument for diversity and criticism of the “model minority” embodies the community-based theory. Both groups aim to protect Asian American civil rights, but disagree on how to achieve that protection.<sup>111</sup>

A second sociological theory suggests that opinions toward affirmative action are based on self-interest, and whether one supports a policy depends on “how such policies affect their access to scarce resources or material interests.”<sup>112</sup> For example, researchers Linda Sax and Marisol Arredondo found that APA college freshmen “not attending their first-choice college were more likely to oppose affirmative action in admissions decisions.”<sup>113</sup> This suggests that these APA students perceived that affirmative action negatively affected their chances for admission to desired universities.<sup>114</sup>

In contrast, James Kluegel and Eliot Smith suggest that affirmative action views are “based on opposing perspectives of the structure of

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108. Ikegami, *supra* note 30, at 92.

109. *Id.* (“This approach recognizes the diversity within the Asian American community and strives to achieve a piece of the proverbial pie for everyone.”).

110. *Id.* (“The ‘face-value’ position, by contrast, concerns itself solely with the total gains of the group and ignores the presence of any subgroups [and] takes data at face value and judges the ‘winners’ and ‘losers’ based on high-level aggregation.”).

111. *See id.* at 93.

112. Inkelas, *supra* note 106, at 605 (citing HUBERT M. BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS (1967); Lawrence Bobo, *Whites’ Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY AND SOC. PSYCHOL. 1196 (1983)).

113. Linda J. Sax & Marisol Arredondo, *Student Attitudes Toward Affirmative Action in Higher Education: Findings From a National Study*, 40 RES. IN HIGHER. EDUC. 439 (1999).

114. *Id.*

opportunity in American society.”<sup>115</sup> Under this theory, white Americans often oppose affirmative action due to their investment in the “dominant ideology” in which hard work and merit are the keys to success, while black Americans see society as full of “structural obstacles,” making affirmative action necessary to help them overcome institutional barriers.<sup>116</sup> Similarly, Asian ethnic groups often believe education leads to economic success and opportunity, and thus are sympathetic to the dominant ideology that understands the United States as “opportunity-based.”<sup>117</sup> These underlying belief structures stemming from Asian culture could explain why some Asian Americans more inclined to support merit-based admissions over affirmative action.

In another theory that links attitude and cultural perspective, William Cross (1990) and Donald Atkinson, George Morten, and Derald Wing Sue (1989) posit that the context in which minority group members develop their identities determines what cultural values they adopt.<sup>118</sup> Under this theory, certain ethnic groups developed a racial identity in line with the dominant culture. For example, Chinese Americans, who have been in the United States for a number of generations, may have developed an identity that is supportive of dominant American narratives about meritocracy and the “model minority,” in turn leading them to support a colorblind approach to college admissions. In contrast, other Asian ethnicities that are still “new” to the country or experience poverty at greater rates, might be more inclined to embrace narratives that recognize racial exclusion and solidarity with other minority groups, as their ethnic identities are still developing.

In a similar theory, John Ogbu and Signithia Fordham classify minority groups into three types: autonomous, immigrant, and subordinate minorities.<sup>119</sup> Autonomous minorities are categorized as a numerical minority group—they are fewer in number than the dominant race.<sup>120</sup> Immigrant minorities are those who voluntarily entered the country in hopes of achieving economic or social success.<sup>121</sup> By contrast, subordinate minorities are those individuals involuntarily brought into the country via

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115. JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE (Peter H. Rossi et al. ed., 1986).

116. Inkelas, *supra* note 106, at 605–06.

117. *Id.* at 606 (citing INST. FOR THE STUDY OF SOC. CHANGE, THE DIVERSITY PROJECT: FINAL REPORT (1991)).

118. *Id.* at 606 (citing WILLIAM E. CROSS, JR., SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY (1991); Atkinson, D. R., Morten, G., & Sue, D. W. (1989). A minority identity development model. In *Counseling American minorities*, ed. D. R. Atkinson, G. Morten, & D. W. Sue. Dubuque, IA: W. C. Brown, pp. 35–52).

119. Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White,'* 18 THE URBAN REV. 176, 178 (1986).

120. *Id.*

121. *Id.*

“slavery or conquest.”<sup>122</sup> Under this analysis, Asian Americans would most likely fall within the autonomous and immigrant minority categories. As Fordham and Ogbu explain, if one is raised within the subordinate minority group, the values and worldviews of that group will likely determine how that individual feels about institutions and public policies. If Asian Americans are an autonomous immigrant minority that assimilated to U.S. culture, this theory posits that Asian Americans are likely to have adopted the mainstream narratives that support meritocracy, which affect how they feel about affirmative action programs.

Finally, we can explore the phenomenon of minority group identity via Lisa C. Ikemoto’s master narrative.<sup>123</sup> The “master narrative” refers to “white supremacy’s prescriptive, conflict-constructing power, which deploys exclusionary concepts of race and privilege in ways that maintain intergroup conflict.”<sup>124</sup> In *Traces of the Master Narrative*, Ikemoto uses the 1992 Los Angeles conflict between blacks and Korean Americans<sup>125</sup> to explore the master narrative of white supremacy, and how that narrative is constructed to create divisions in minority communities.<sup>126</sup>

In Ikemoto’s example, the master narrative paints black interests as antithetical to Korean interests by using stereotypes to create fear and competition between the two groups.<sup>127</sup> Ikemoto describes this phenomenon as groups fighting over an economic pie or creating a “breadline” of hierarchy in which minorities must participate in order to get a slice of the reward.<sup>128</sup> Rather than criticize the majority group that provides the “handouts,” minorities view each other as the competition, and Asian Americans are often viewed as at the top of that breadline because of their general success in assimilating into the dominant culture.<sup>129</sup> Thus, through assimilation, Asian Americans become part of the master narrative and aid in perpetuating racial hierarchy by expanding the gaps between white, Asian, and black. This relationship between blacks, Asians, and whites may also be understood as “triangulation,” in which “Asian Americans are invited to join Whites along a common horizontal plane, in opposition to

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122. *Id.*

123. Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581–82 (1993).

124. *Id.*

125. See Edward T. Chang, *Korean American Community Coalesces*, L.A. TIMES, Apr. 29, 2012, <http://articles.latimes.com/2012/apr/29/opinion/la-oe-chang-riots-koreatown-los-angeles-20120429>.

126. *Id.* at 1582–83.

127. *Id.* (“With respect to African Americans, the master narrative tells us that Asians are Koreans who are merchants and crime victims. The assumption that Asians are foreign intruders underlies this description. With respect to Asian Americans, the narrative tells us that African Americans are Blacks who are criminals who are poor. All of these identities replicate the dominant society’s understandings of blackness and Asianness.”).

128. *Id.* at 1586.

129. *Id.* at 1588.

Blacks and Latinas/os at the bottom point of the inverted triangle.”<sup>130</sup>

Regarding affirmative action, the master narrative posits that Asian Americans are smarter and work harder than any other racial group and the large increases in Asian enrollment at elite universities have led to overrepresentation. This means that racial preferences require Asian students to achieve even more in order to compete with their peers and gain admission into elite schools.<sup>131</sup> This anxiety makes many Asian Americans put self-interest first, making them fight for their rights to “fair” admissions systems that are merit-based and therefore offer them the best chances of success. This pressure may also explain why even within the Asian American group there is so much difference in opinion on affirmative action. Certain ethnic groups, like the Chinese and Koreans, have had great success in surviving American culture, sending many students to college at rates exceeding that of the general U.S. population.<sup>132</sup> Given their achievements, these groups find themselves on that “horizontal plane,” separating themselves economically and socially not only from other racial minorities, but also from other ethnic groups within the Asian American category. In this way, ethnic groups like the Laotians, Hmong, and Vietnamese may have more shared experience with black and Hispanic groups than with other ethnic groups within their own minority, which sheds light on the split in the Asian American community’s support of affirmative action.

Each of these theories can help us understand the conflicting opinions towards affirmative action among Asian Americans. Recognizing the context in which identities evolve is key in predicting how individuals will view racial preferences and social problems. What makes the Asian American identity and therefore political opinion so difficult is the complexity of the narrative in which Asians are brought up. They are referred to as the model minority but not as model *Americans*, emphasizing the role of “foreigner”<sup>133</sup>—an “othering” that positions Asian Americans as apart from the rest of the nation. For some, this narrative supports a worldview in which protecting Asian self-interest might make more sense than acting in solidarity with other American minorities. Research indicates that many Asian Americans feel threatened by both whites and other

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130. Robert S. Chang, *The Invention of Asian Americans*, 3 UC IRVINE L. REV. 947, 962 (2013).

131. See Kevin Kiley, *Asian-American Students Perceive Bias in University Admissions and Counselors Want Clarification*, INSIDE HIGHER EDUC. (Oct. 12, 2012), <https://www.insidehighered.com/news/2012/10/12/asian-american-students-perceive-bias-university-admissions-and-counselors-want>; see also Sasha W., *Against a “Culture of Success”: Asian Americans, Affirmative Action and Immigration*, HYPHEN MAGAZINE (Aug. 31, 2014), <http://www.hyphenmagazine.com/blog/archive/2014/08/against-culture-success-asian-americans-affirmative-action-and-immigration>.

132. Asian Americans: College Degree (June 18, 2012). The Pew Research Center, [http://www.pewsocialtrends.org/asianamericans-graphics/st\\_12-06-17\\_aa\\_higher-education-2/](http://www.pewsocialtrends.org/asianamericans-graphics/st_12-06-17_aa_higher-education-2/).

133. Chew, *supra* note 105, at 32–34.

minorities because Asians receive neither the benefits of being white nor the benefits of being a subordinate minority for the purpose of school admissions.<sup>134</sup> At the same time, the history of racism and marginalization faced by Asian Americans feeds a sense of solidarity with other groups, and evidence suggests that Asian Americans with a deeper knowledge of affirmative action's history are more likely to support it.<sup>135</sup>

Whatever the case, the positions that Asian Americans take on affirmative action—as illustrated in the *Fisher* amicus briefs—are the product of many complex factors, many of which stem from how Asian Americans frame their identities. Because the Asian American group is composed of many ethnicities that developed at different times and in different contexts within the United States, Asian Americans do not have a “monolithic” identity,<sup>136</sup> making conflicting opinions on how to best protect Asian American civil rights inevitable.

#### CONCLUSION

Identity is critical to the way members of the Asian American community respond to affirmative action, but how that identity is shaped depends upon a number of factors that vary from ethnicity to ethnicity, individual to individual. The major divide in Asian American opinion comes from the context in which each person's beliefs were formed. This split may be understood as a symptom of the master narrative and the degree to which individuals within the Asian American community allow themselves to be positioned within the master narrative. While Asian Americans used to be active participants in civil rights, the model minority myth coupled with Supreme Court decisions that reframed affirmative action and allowed universities to remove Asian Americans from racial preferences resulted in a discourse that discouraged Asian Americans from activism and isolated the community from other racial groups.

However, within the past few years, Asian American student groups at universities across the country have made small efforts to influence society's thoughts Asian American identity. For example, in 2013, the University of California at San Diego's Student Promoted Access Center for Education and Services Asian and Pacific Islander Student A Community Retention Program sponsored a workshop called “I Am Not Your Model Minority” to deconstruct stereotypes about Asian Americans. Also in 2013, the University of Nevada hosted a lecture called “Yellow Power vs. Model Minority: Asian American stereotypes, their legacies, and how they've been challenged.” Most recently, Harvard's Asian Pacific

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134. Karen Kurotsuchi Inkelas, *Caught in the Middle: Understanding Asian Pacific American Perspectives on Affirmative Action Through Blumer's Group Position Theory*, 44 J. OF C. STUDENT DEV. 625, 640 (2003).

135. *Id.*

136. Chew, *supra* note 105, at 25–27.

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American student body, inspired by last year's "I Too Am Harvard" campaign, launched their own dialogues on Asian American identity, drawing together the school's existing Asian American organizations and reviving others like the Asian American Women's Association.<sup>137</sup> These conversations reflect Asian American students' recent efforts to reclaim their identities and reposition themselves within the narrative. By drawing on Asian American history, Asian American students are opening the door to rediscover solidarity with other American minorities and to *choose* positions on public policy.

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137. Maia R. Silber, *Exploring Identity: The Asian American Experience at Harvard*, THE CRIMSON (Sept. 25, 2014, 1:15 PM), <http://www.thecrimson.com/article/2014/9/25/asian-american-experience/>.

