What Side Are We On? A Call to Arms to the Asian American Community

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INTRODUCTION

Unless Asian Americans learn to think and speak out as a group, we will continue to be caught in the middle, misunderstood and pummeled by both sides.

— Judy Ching-Chia Wong

It was December 2014 and the Black Lives Matter movement was in full swing following the protests and social unrest in Ferguson, Missouri. A

DOI: http://dx.doi.org/10.15779/Z38KP0G
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† J.D., Berkeley Law Class of 2016. I would particularly like to thank my parents, Hoyt Zia and Leigh-Ann Miyasato, for their constant wisdom and guidance, for teaching me about social justice from an early age, and for shaping me into the person that I am today. I would particularly like to thank Ian Haney López, in whose Critical Race Theory class I first developed this paper, and who constantly challenged me to move beyond my comfort zone. Michael Omi, Taeku Lee, and Shaun Ossei-Owusu provided invaluable insight and support as I started researching and writing this paper, and entire sections of this Note are the result of their suggestions. I would also like to thank Charles Lawrence, Mari Matsuda, Eric Yamamoto, Aaron Alter, and Bill Lann Lee for their edits, both micro and macro, and more importantly their encouragement and interest in my work. My editors, Christian Adriatico and Jonathan Ma, were indispensable in providing constructive criticism and feedback, and for truly whipping this article into shape. Finally, I would like to thank my friends Joan Li and Daniel Chen for their feedback and comments, which prompted me to submit this piece. Thanks to all of these people, this Note has come a long way.

number of Berkeley Law students had formed a loose group called Boalt With Ferguson. The group had been participating in the peaceful protests, both at the law school and in the city of Berkeley. I was there the day we took over the freeway and the cops closed off the bridge, an incident that made national news.2

I was determined to be involved with Boalt With Ferguson because, as an Asian American woman, I had a personal commitment to the movement. It was important to me to participate in an issue about race that I felt—and still feel—very strongly about. As the Co-President of the Asian Pacific American Law Students Association (APALSA), I also hoped to build relationships and coalitions with the other affinity groups at the law school to demonstrate to the Berkeley Law community that Asian Americans are partners and allies in all social justice issues.

Unfortunately, I soon realized that my vision of coalition building was slightly unrealistic. One of the members of Boalt With Ferguson proposed that we hold a die-in at the law school.3 I enthusiastically signaled my support and the solidarity of the Asian American community at Boalt. As planning got underway, however, the details of the die-in changed: instead of having everyone lie down, as originally planned, the organizers (an informal group of mainly African American and Latino students) decided that it would be best to have only Black and Brown people lie down, with everyone else standing in a circle around them. The organizers’ rationale was that having Black and Brown people lie down would represent the many people, predominantly Black and Brown, who have been injured or killed as a result of police brutality.

I asked one of the organizers for clarification: “Where, exactly, do you want the Asian Americans to go?” Were we supposed to lie down with the Black and Brown people, or stand with the White people?

She replied, “Although we recognize that Asians are POC (people of color), it would be best if you could stand in solidarity.”

Her words felt like a punch to the gut. Despite her disclaimer that Asians are people of color, it felt like she was implying the opposite. To me, it seemed like she was really saying, “Yes, I’m going to pay lip service to the idea that Asians are people of color, but they’re closer to White than they are to Black. They’re honorary Whites. They should not be lying down with the Brown and Black people.”

In retrospect, perhaps this response should not have been such a

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surprise to me. This was not the first time the Asian American community had been excluded from other events for people of color on campus. For example, when the Federalist Society brought Bay Buchanan to give a talk entitled, “Immigration: A Flood of Lawlessness,” several of the affinity groups organized a protest and instructed all members to wear black. These affinity groups did not inform or invite APALSA to participate. Or the day after Michael Brown was killed, La Raza and the Law Students of African Descent (LSAD) instructed their members to again wear black, and also invited members of the Criminal Law Journal (a journal which has mostly white members) to join them. Again, APALSA did not receive an invitation.

All of these events made me feel like the other students of color did not view Asian Americans as allies, let alone as people of color. After discussing the situation with my co-president, my executive board, and other leaders in the Asian American community, I composed an email response to the die-in organizer. My email addressed our discomfort with having all Asian Americans stand with the White community. I tried to point out the types of discrimination that Asian Americans face. I emphasized that they were implicitly feeding into the model minority myth by excluding us from lying down—as if they were essentially lumping Asian Americans with the White people.

Eventually, the organizer relented somewhat by saying that we could have a couple of Asian Americans lie down, as long as only a few of us laid down and we didn’t outnumber the Black and Brown bodies. Although

4. According to the Merriam Webster dictionary, the term “affinity group” means “a group of people having a common interest or goal or acting together for a specific purpose.” Affinity Group, MERRIAM-WEBSTER ONLINE DICTIONARY (Feb. 28, 2016), http://beta.merriam-webster.com/dictionary/affinity%20group. Here, I use the term “affinity group” to refer to the student groups at Berkeley Law that are composed of diverse students, particularly students of color. For example, the La Raza Law Student Association is the affinity group for Latino/Latina students, while the Law Students of African Descent (LSAD), is the affinity group for Black students.

5. For those unfamiliar, the “model minority” myth is the false premise, popularized by the media and politicians, that Asian Americans are successful, particularly in education. As the model minority, Asian Americans are held up as examples of American values, immigrants who have achieved the American dream. Additionally, as the model minority, Asian Americans are often used to unfairly underscore the underachievement of other minority groups: “The model minority stereotype is constitutive of colorblind ideology in the sense that Asian Americans’ ‘success’ is used to deny the existence of institutional racism and to ‘prove’ that U.S. society is reasonably fair and open for racial minority groups to move up the social ladder.” Yuko Kawai, Stereotyping Asian Americans: The Dialectic of the Model Minority and the Yellow Peril, HOWARD J. COMM. 114 (2005). However, the “model minority” is a myth because Asian Americans, particularly underrepresented groups like Filipinos, Vietnamese, Hmong, etc., still suffer from inequality in income, a lack of achievement in corporate hierarchies (also known as the “bamboo ceiling”), and underrepresentation in higher levels of administration. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 474–81 (1989). See also STACY J. LEE, UNRAVELING THE “MODEL MINORITY” STEREOTYPE (2009).

6. The paragraph from the email in question stated, in full: “If you feel so strongly about demonstrating, then please join in! We just asked that not all Asian American join in, because it is possible that APALSA members could out number the black/brown members of the demonstrators because there may be more of you than us. (I appreciate you bring up that point about the crowd size in
this was a kind of compromise, it still didn’t feel like one. The whole episode was disheartening. I had never experienced this type of outright exclusion, not even when I was co-president of my Asian American organization in college. It forced me to reflect: why did my fellow students of color view us as closer to White than to Black?

I realized that a number of forces were at play, and that I viewed the episode through my own subjective lens. Because I grew up in an Asian American activist family, I have always viewed Asian Americans as a group firmly entrenched and allied with the civil rights movement. My parents met while working on the Korematsu coram nobis case with Dale Minami; my aunt was the primary spokesperson for the Asian American movement following the murder of Vincent Chin. As a child, my parents taught me about Yuri Kochiyama’s work with Malcolm X, and Grace Lee Boggs’s efforts in the Black civil rights movement. They educated me about the importance of affirmative action, and regaled me with stories about their own experiences as protesters. My mother’s protest experiences when she was a student herself at Berkeley Law seem even more meaningful now that I am here, following in her footsteps. I’ve been yours email) I think it would be fair if a handful of APALSA members joined, but because in reality the death toll for black and brown vastly out number that of Asian Americans, can we keep the number small?” Email from Berkeley Law Die-in Organizer, to Emily Zia, author (Dec. 9, 2014).

7. One of the most infamous cases in American history, Korematsu v. United States, upheld Executive Order 9066, President Roosevelt’s order authorizing the internment of over 100,000 Japanese Americans during World War II. 323 U.S. 214 (1944). Decades later, it was revealed that the government had knowingly lied to the Supreme Court about the military necessity of interning the Japanese, which was the basis of the majority opinion. As a result of this new evidence, a group of young Asian American attorneys (including my mother, Leigh-Ann Miyasato) filed a writ of coram nobis, which is “an extraordinary writ which operates to correct fundamental errors or to prevent manifest injustice in criminal proceedings.” Eric Yamamoto, Korematsu Revisited: Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accomodation of National Security Concerns and Civil Liberties, 26 SANTA CLARA L. REV. 1, 2 n.6 (1986). In 1983, Judge Marilyn Hall Patel of the U.S. District Court of the Northern District of California granted the writ of coram nobis, vacating Fred Korematsu’s original conviction and acknowledging that a “manifest injustice has been done.” Korematsu v. United States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

8. In 1982 in Detroit, two White men, autoworkers Ronald Ebens and Michael Nitz, murdered a Chinese-American man named Vincent Chin with a baseball bat because they thought he was Japanese (at the time, American auto makers had been losing business to the Japanese auto industry). The two men plead guilty to manslaughter and were sentenced to three years of probation and fined $3,780 each. This hate crime arguably marked the beginning of a pan-ethnic Asian American movement, leading to a new era of political awareness and advocacy for Asian Americans. My aunt, Helen Zia, worked as a labor organizer in Detroit at the time, and became one of the leaders of the Asian American movement. See Takagi, supra note 5, at 481–82. See also Who Killed Vincent Chin? (1987); Judy Lei, Hyphen APA Heritage Month Profiles: Helen Zia, HYPHEN MAGAZINE (2011).

fortunate to grow up surrounded by role models who have experienced and are aware of the subtleties of race and race relations in America.

However, I’ve also begun to realize that my lived experience is very different from the experiences of many of my Asian American peers. I know Asian Americans who don’t believe in affirmative action, who vote Republican, who are socially conservative, and who have told me that they identify with White people more than any other ethnic group, including their own.

Something is going on here. I’ve begun to understand why other communities of color do not automatically assume we are partners and allies: Asian Americans, as a group, are not unified. And exclusion from movements like the Berkeley Law die-in will continue unless we make a decision. What side are we on?

Asian Americans are at a crossroads; we have been at a crossroads for quite some time. Twenty-five years ago, Mari Matsuda gave her seminal “We Will Not Be Used” speech at the Asian Law Caucus, exhorting the Asian American community to avoid being used as the “racial bourgeoisie,” the “racial middle” who serve as a buffer between Whites and Blacks. As the racial bourgeoisie, Asian Americans run the risk of “reinforcing white supremacy if the middle deludes itself into thinking it can be just like white if it tries hard enough.” Claire Jean Kim took Matsuda’s idea and created her influential theory of racial triangulation on this notion, arguing that Asian Americans form a triangle with Whites and Blacks on an x- and y-axes of superiority and foreignness. This idea of racial triangulation—and being the “racial middle”—informs this entire Note, and I discuss this in-depth in a later Section.

Despite this position as the racial bourgeoisie, Matsuda argued that if Asian Americans so choose, we could dismantle white supremacy by rejecting our status as the middle and instead form alliances with Black and Brown communities. Since Matsuda gave this speech in 1990, not much has changed—Asian Americans continue to occupy this liminal, in-between status, and twenty-five years later we are still faced with this choice.

With the continuance of the model minority myth and the ever-present debate on affirmative action, Asian Americans as a group are in danger of becoming fractured into two separate ideological and political camps: liberal and conservative; minority allies and honorary Whites; multi-generational American citizens and newer immigrants. This danger has crystallized most recently in the March 2014 debate over Senate
Constitutional Amendment 5 (SCA5) and its defeat by Chinese American anti-affirmative action groups—a controversy that I delve into in a later section—to find examples of Asian Americans who have very different views than my own. SCA5 attempted to bring affirmative action back to California public schools, but Chinese American anti-affirmative action groups defeated SCA5, despite the fact that 69% of Asian American registered voters in California support affirmative action, with only 13% opposed.\footnote{14}

This Note is split into four Parts. In Part I, I examine the complicated history of Asian Americans and affirmative action, with a focus on the University of California system, as well as the development of the law from 
_Bakke_ to the current lawsuits against Harvard and the University of North Carolina.\footnote{15} In Part II, I discuss the SCA5 debacle, the role that Asian Americans played in defeating the amendment, and the growing divide in the Asian American community over affirmative action. In Part III, I analyze the split in the Asian American community through the concept of racial triangulation, and discuss its future ramifications. In Part IV, I call on the Asian American community to band together in solidarity—to avoid becoming a racial bourgeoisie by increasing the education and awareness of our fellow Asian Americans.

I would like to add that this Note focuses on East Asians, particularly Chinese Americans, because the SCA5 controversy involved mainly Chinese American groups. I recognize that by focusing on Chinese Americans in particular, I am ignoring or only briefly mentioning many important sub-groups of the pan-ethnic Asian American identity—I am, unfortunately, constrained by time and space.

Although this is not the first Note to discuss Asian Americans and affirmative action, or Asian Americans and racial triangulation, this is the first Note to analyze the SCA5 controversy through the lens of racial triangulation, and to suggest next steps for the Asian American community following the SCA5 debacle.

It is time for Asian Americans to choose our side. If we do not, we risk getting “pummeled by both sides.” We must band together to tell America that we will not be used. We must stand with our Black and Brown brothers and sisters.


I. THE COMPLICATED HISTORY OF ASIAN AMERICANS AND AFFIRMATIVE ACTION

When university administrators have secret quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we can’t let in all those Asian over-achievers AND maintain affirmative action for other minority groups. We can’t do both because that will mean either that our universities lose their predominantly white character, or that we have to fund more and better universities. To either of those prospects, I say, ‘why not?’ And I condemn the voices from our own community that are translating legitimate anger at ceilings on Asian admissions into unthinking opposition to affirmative action floors needed to fight racism.

— Mari Matsuda, “We Will Not Be Used”

In this part, I provide a quick history of affirmative action in California from Bakke to Proposition 209 and beyond. Next, I discuss Asian Americans’ complex relationship with affirmative action, and the two differing concepts that dominate the debate over Asian Americans and affirmative action: (1) equality of outcomes and (2) equality of individual opportunity.

A. A Quick History of Affirmative Action in California

Asian Americans have occupied a complex position in the affirmative action debate for quite some time, but it was not always so. Colleges and universities first started to actively seek to admit African Americans as early as 1835. President Kennedy first used the term “affirmative action” in an executive order in 1961. In 1965, following the enactment of the Civil Rights Act of 1964, President Lyndon B. Johnson enacted the first federal “affirmative action” program in Executive Order 11246. The Order “required federal contractors to increase the number of minority employees as an ‘affirmative step’ toward remedying years of exclusion for minority workers in those firms,” and included Asian Americans in this program.

Universities and colleges began implementing their own affirmative action programs soon thereafter. For example, Berkeley Law (formerly Boalt Hall) began its own informal, non-quota affirmative action program for admissions in 1968, which also included Asian Americans. As a result

18. Id.
20. ANDREA GUERRERO, SILENCE AT BOALT HALL (2002). See also Brief for the Members of
of affirmative action programs like these, the enrollment of African American and Latinos in higher education made “promising gains” over the 1970s and 1980s. Between 1976 and 1982, Hispanic enrollment grew 32%, White enrollment grew 5%, and Black enrollment grew by 1.3% in universities and colleges nationwide.\(^\text{21}\) The enrollment of Asian Americans rose even more quickly, by 62%.\(^\text{22}\) At the UC Berkeley undergraduate campus, Asian American enrollment rose from 5.2% of the student body in 1966 to 20% in 1980.\(^\text{23}\) In the years following the famous case *Regents of the University of California v. Bakke* in 1978, these gains for African American and Hispanic enrollment abruptly came to a halt and led to a sweeping retreatment of affirmative action programs.\(^\text{24}\)

In *Bakke*, Allan Bakke, a disgruntled white male applicant to UC Davis Medical School, sued the UC institution after being denied admission twice.\(^\text{25}\) Bakke claimed that the university discriminated against him on the basis of race because the UC Davis Medical School reserved sixteen spaces for students of color, including Asian Americans.\(^\text{26}\) He argued that the admissions plan unfairly favored applicants of color over applicants who were White.\(^\text{27}\) In a carefully worded plurality opinion written by Justice Powell, the Supreme Court found that while UC Davis’s admissions program was unconstitutional due to its use of strict quotas, affirmative action in admissions generally was acceptable as long as the program evaluated race or ethnic background as a “plus” in a particular applicant’s file, while at the same time making sure that race “does not insulate the individual from comparison with all other candidates for available seats.”\(^\text{28}\) The Court’s holding required UC Davis to offer admission to Allan Bakke.

The *Bakke* Court also held that states have a compelling interest in promoting diversity in a university admissions program.\(^\text{29}\) Justice Powell pointed to Harvard’s flexible admissions program as the ideal for other schools to follow, particularly because Harvard’s plan was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the

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22. Id. at 21.
23. Id.
24. Id. at 78.
27. Bakke, 438 U.S. at 275.
28. Id. at 317.
29. Id. at 315.
same weight.**

Following the *Bakke* decision, the University of California system and schools across the country made sure to create admissions programs that helped prioritize applicants of color without establishing strict quotas. However, to some Asian Americans it appeared that instead of an admissions *quota*, it appeared that there was an admissions *ceiling*.

Asian Americans challenged admissions policies at various colleges around the nation, including Brown, Harvard, Princeton, Stanford, and UCLA, to varying degrees of success. Stanford conducted a “formal investigation by a standing committee of the academic senate,” and found that although there did not appear to be any explicit discrimination, there may have been “latent bias” that caused much lower admissions rates for Asians than for Whites. **31** Princeton held a series of informal conversations between students, faculty, and administrators. **32** In response to student pressure, Harvard released a statement that claimed “differences between white and Asian admit rates disappeared after controlling for extracurricular activities and alumni status.” **33** Brown created an investigative group sponsored by its Committee on Minority Affairs, which found a divergence between the admissions rates of Asians and Whites, and made seven recommendations for improvements. **34**

The most public and protracted battle over Asian Americans and admissions took place at UC Berkeley. In 1984, an Asian American professor named Ling-chi Wang noticed the enrollment of Asians at Berkeley dropped by 21% over the previous year. **35** This precipitous drop, combined with racially coded language from his colleagues about Asian Americans (e.g., “They should not be here at all [because they are deficient in English]; just because they are good in math and science doesn’t mean they make good undergraduate students.”), alarmed Professor Wang. **36** Professor Wang shared his concerns with the Asian American community in the Bay Area, and they formed the Asian American Task Force on University Admissions (AATF). AATF’s two major concerns were: (1) that admissions rates for Asians were lower than that of Whites; and (2) that “enrollments of Asian Americans had not risen in proportion to increases in the number of Asian American applicants.” **37**

Over the next seven years, the debate over Asian Americans at UC Berkeley raged on. Constant media coverage and several internal investigations and reports were written. Berkeley became a flash point for

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30. *Id.* at 316–17.
31. TAKAGI, *supra* note 21, at 140.
32. *Id.* at 42.
33. *Id.* at 70.
34. *Id.* at 66.
35. *Id.* at 25.
36. *Id.*
37. *Id.* at 23.
not only Asian Americans, but neoconservatives looking to attack affirmative action as well. This growing distrust culminated in 1989, when the Office of Civil Rights of the Department of Education responded to Asian American and neoconservative complaints by undertaking a federal investigation into whether UC Berkeley’s admissions program discriminated against White applicants. The investigation’s findings were set out in the Karabel report, which called on UC Berkeley to overhaul its admissions policy. The Karabel report ended the system of guaranteed admission for UC-eligible minorities and introduced new categories for review, such as socioeconomic status and reentry status.

The admissions policy pursuant to the Karabel report remained in place until 1995. It was replaced with SP-1, a race-neutral policy adopted in anticipation of Proposition 209, which eliminated affirmative action in California in 1996. After Prop 209 became law, the UC system’s acceptance rate for Blacks and Latinos dropped sharply: acceptance rates for Blacks fell from 57% in 1997 to 35% in 2003, while acceptance rates for Latinos fell from 64% to 45% in the same time period. Even after the UC rescinded and replaced SP-1 with a new “Comprehensive Review,” which focused on a student’s record of accomplishments and talents in the “context of opportunities and challenges they may have faced,” the acceptance rates for Blacks and Latinos remained low. According to the most recent statistics available, Fall 2013, the acceptance rates for Blacks and Latinos have decreased even further to 34% for Blacks and 44% for Latinos.

The most recent developments in affirmative action have mainly occurred in the judiciary, particularly in the Supreme Court’s decisions in Grutter v. Bollinger, Gratz v. Bollinger, and Fisher v. University of Texas. In Grutter and Gratz, the Supreme Court came to seemingly contradictory rulings. In Gratz, the Court struck down the University of Michigan’s undergraduate admissions program as impermissible due to its use of race, while at the same time upholding the University of Michigan Law School’s admissions program and its use of race in Grutter.

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38. Id. at 150.
39. Id.
40. Id. at 151.
42. Id. at 11.
43. Id. at 2.
44. Id. at 11. This is in comparison to a 45% acceptance rate for Whites, and a 55% acceptance rate for Asian Americans.
47. Fisher v. Univ. of Tex. at Austin (“Fisher I”), 133 S. Ct. 2411 (2013).
48. In Gratz, the Court found that the University of Michigan’s “predetermined points allocation”
In *Fisher v. University of Texas*, the Supreme Court initially did not rule on the constitutionality of the University of Texas’s use of race in admissions, and instead voided and remanded the Fifth Circuit’s ruling by requiring the lower court to apply the strict scrutiny standard outlined in *Grutter* and *Bakke*. After remand, the Fifth Circuit found that the University of Texas’s plan met the standard for strict scrutiny. Fisher appealed yet again, and the Supreme Court granted certiorari once more. The Court heard oral arguments on *Fisher II* on December 9, 2015, and will decide the case by the end of the 2015-16 term, likely in June 2016. Judicial experts predict there are three options on the table: “kill affirmative action nationwide as an experiment that can’t be made to work, kill just the way it is done at the Texas flagship university because it can’t be defended, or give the university one more chance to prove the need for its policy.”

Although conservative Justice Antonin Scalia’s untimely passing means there will be one less vote in Abigail Fisher’s favor (and one less vote for ending affirmative action), she may still prevail. Because Justice Kagan recused herself from deliberations in *Fisher I* and *Fisher II*, the Supreme Court will likely vote to end the University of Texas’s affirmative action plan 4-3, with the four remaining conservative justices voting in Fisher’s favor. Although Justice Kennedy has traditionally been the “swing vote,” he has not been particularly supportive of affirmative action.

Ninety-three *amicus curiae* briefs were filed in *Fisher II*. An overwhelming number of those briefs are in support of diversity and the University of Texas, including “scores of Fortune 100 companies and in admissions was unconstitutional because it automatically awarded an applicant 20 points for being an underrepresented minority. See 539 U.S. 306. In *Grutter*, the Court found that University of Michigan Law School’s admissions program was constitutional because it used race as one factor of many in the individual consideration of each applicant. See 539 U.S. 244.

49. *Fisher I*, 133 S.Ct. at 2421.

50. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 639 (5th Cir. 2014).


56. *Id.*

leading American businesses; a group of retired military leaders; the U.S. Solicitor General; 18 states; dozens of Texas legislators; numerous universities, colleges, and educational associations; and more than 800 social scientists.”

Joining these amici in support of affirmative action are dozens of Asian American organizations, such as the Asian American Legal Defense and Education Fund, Asian Americans Advancing Justice, and Berkeley Law’s own Asian Pacific American Law Students Association and Asian American Law Journal.

Yet at least two Asian American organizations, the Asian American Legal Foundation and the Asian American Coalition for Education (claiming to represent 117 Asian American organizations), submitted an amicus brief in favor of Abigail Fisher. In fact, on the day of oral arguments for Fisher II, protesters from the Asian American Coalition for Education held up signs outside of the Supreme Court in support of eliminating affirmative action. As these Fisher II opposing amicus briefs show, there is clearly a divide in the Asian American community over affirmative action.

In the meantime, as the law currently stands, Bakke still controls: universities are allowed to use race as a flexible factor in admissions—race can be one part of a holistic review of an application. Based on the current makeup of the Court, it is not clear how much longer this tenuous position will last. Currently, there are two lawsuits against affirmative action pending against Harvard and the University of North Carolina, both of them filed by Asian American plaintiffs.

B. The Ideological Debate Over Asian Americans’ Stance on Affirmative Action

The debate over Asian Americans and affirmative action is dominated


59. Brief for Asian American Legal Defense And Education Fund, as Amicus Curiae Supporting Respondents, Fisher II, No. 14-981 (U.S. argued Dec. 9, 2015). Brief for Members of Asian Americans Advancing Justice as Amicus Curiae Supporting Respondents, Fisher II, No. 14-981 (U.S. argued Dec. 9, 2015). See also Brief for 39 Undergraduate and Graduate Student Organizations Within The University of California as Amici Curiae Supporting Respondents, Fisher II, No. 14-981 (U.S. argued Dec. 9, 2015). Full disclosure: I am a member of APALSA and Asian American Law Journal (AALJ) and voted for us to be listed as amici. I am also the co-president of the Coalition For Diversity at Berkeley Law, which was also an amici.


61. See Appendix; Ellen Wexler, ‘This Case Shouldn’t Be Here Again’: Activists Outside the Supreme Court on ‘Fisher’ and Race, CHRON. HIGHER EDUC., Dec. 9, 2015, http://chronicle.com/article/This-Case-Shouldn-t-Be/234552.

by two differing concepts: equality of outcomes and equality of individual opportunity. Equality of outcomes focuses on providing opportunities for historically disadvantaged or underrepresented minority groups. This concept is reflected in most affirmative action policies, which are based on the concept of parity. For example, a parity-based argument would be that a student body that reflects the general population results in equal opportunities in higher education.

Equality of individual opportunity instead focuses on the individual, without regard to the person’s status as a member of a particular group. This is the basis for the idea of colorblind policies, where admissions focus solely on individual achievement without regard to any other factors like race, gender, sexual orientation, etc. In other words, the concept is that “individuals from different racial groups should be evaluated by the same criteria.”

These two concepts particularly come to a head in terms of Asian Americans and affirmative action. Several groups argue that, based on the concept of equality of outcomes, Asian Americans are a historically disadvantaged group and should be beneficiaries of affirmative action. On the other hand, others argue that Asian Americans are disproportionately represented in higher education, and thus do not need to be recipients of affirmative action: 49% of Asian Americans who are 25 or older have completed a bachelor’s degree or higher, compared with 28% of the general U.S. population. In California, Asian Americans constitute only 14% of the population, and yet in 2013, Asian Americans comprised 33% of the population of UC Berkeley students—more than any other race or ethnicity, while Whites comprised 29%, Latinos 18.3%, and Blacks 3.6%.

In contrast, the concept of equality of individual opportunity suggests that these statistics about Asian American enrollment are proof of the importance of individual merit. As discussed earlier, Prop 209 prompted the UC school system to employ race-neutral admissions policies, which has led to Asian Americans being 33% of the total student population at schools like UC Berkeley.

63. TAKAGI, supra note 21, at 24.
64. Id.
65. Id.
66. Id.
67. Id.
69. UNIVERSITY OF CALIFORNIA, STATISTICAL SUMMARY OF STUDENTS AND STAFF (2013), 27. The most recent statistics released were for Fall 2013. Based on my calculations from Table 7k. The 33% figure includes graduate/PhD students and was calculated by aggregating the statistics for Filipinos, Chinese, Japanese, Korean, Other Asian, and Pakistani/East Indian. The percentage of Asian-American undergraduate students appears to be around 39%. See UC Berkeley Census Demographics – 2012, http://diversity.berkeley.edu/undergraduate-students-current-census.
70. Id.
Yale, and others in the Ivy League, the percentage of Asian Americans in the student population has remained constant at 16-20% the last two decades, which critics characterize as a “cap.”\textsuperscript{71} In order to gain admissions at these elite private schools, Asian Americans must score, on average, at least “140 points higher on the SAT to have the same chance at admission to private colleges as whites.”\textsuperscript{72} In support for these statistics, private colleges claim that they look at admissions holistically. They claim that Asian American applicants are not well-rounded, or that they lack the personality or extracurricular activities of their non-Asian peers.\textsuperscript{73} In this way, private colleges are able to avoid discussions of a “bamboo ceiling” by invoking the flip side of the model minority coin—implying that because a disproportionate number of Asian Americans are smart and hardworking and keep their heads down, they do not distinguish themselves as unique applicants and are basically interchangeable.\textsuperscript{74}

These vaguely discriminatory and racially coded statements have no basis. In fact, a UCLA study recently found “no significant correlation between race and extracurricular achievements.”\textsuperscript{75} As a New York Times Op-Ed column points out, “[i]t’s perfectly fair to consider extracurriculars as an important factor in admissions. But the current system is so opaque that it is easy to conceal discrimination behind vague criteria like ‘intangible qualities’ or the desire for a ‘well-rounded class.’”\textsuperscript{76}

And here is where the problem lies: Asian Americans who are against affirmative action, as well as conservatives generally, tend to focus on the Black and Latino applicants who have received admission despite having lower GPAs and lower SAT scores. These Asian Americans are like Allan Bakke and believe that African American and Latino minority applicants are taking spots that are legitimately theirs. They see affirmative action as a zero-sum game: i.e., when an African American or Latino applicant receives an offer of admission, they are taking away a spot from a supposedly more worthy Asian American or White candidate.\textsuperscript{77} This thinking, however, completely ignores the fact that this process is “holistic,” and takes many different factors into review: just as much weight is given to applicants whose parents are alumni, and applicants who excel in particular sports, among other non-racial factors.\textsuperscript{78} As one Op-Ed

\textsuperscript{72} Carolyn Chen, \textit{Affirmative action and breaking the bamboo ceiling for Asian Americans}, \textsc{L.A. Times}, June 13, 2013.
\textsuperscript{73} Mounk, \textit{supra} note 71.
\textsuperscript{74} \textsc{Takagi}, \textit{supra} note 21, at 58.
\textsuperscript{75} Mounk, \textit{supra} note 71.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} \textsc{Takagi}, \textit{supra} note 21, at 58.
\textsuperscript{78} Richard D. Kahlenberg, \textsc{Affirmative Action for the Rich: Legacy Preferences in College Admissions} (2010).
writer in the New York Times pointed out: “Conservatives point to Harvard’s emphasis on enrolling African-Americans (currently 12 percent of freshmen) and Hispanics (13 percent) but overlook preferences for children of alumni (about 12 percent of students) and recruited athletes (around 13 percent). The real problem is that, in a meritocratic system, whites would be a minority—and Harvard just isn’t comfortable with that.”

In the UC system, there is also a preference for out-of-state students (30 percent of students), who can pay full tuition.

If they truly cared about colorblindness and meritocracy, conservatives and anti-affirmative action Asian Americans should focus their attention on legacy (for private schools), out-of-state students (for public schools), and athletic preferences (for both private and public schools) instead of race. Doing away with the “primarily white character” of universities may not be something that conservatives are comfortable with, but I suspect most Asian Americans would be.

This complex history of affirmative action in California—and Asian Americans’ role in shaping it—helps to explain the Senate Constitutional Amendment 5 (SCA5) debacle in 2014. Part II summarizes and examines SCA5’s initial passage in the Senate, followed by its quick and fiery demise at the hands of Asian American anti-affirmative action groups.

II. THE SCA5 DEBATE

In every field where we have attained a measure of success, we are underrepresented in the real power positions. And yet, we are in danger of being manipulated into opposing affirmative action by those who say affirmative action hurts Asian-Americans. What’s really going on here?

— Mari Matsuda, “We Will Not Be Used”

Sponsored by State Senator Ed Hernandez and passed by the California Senate on January 30, 2014, Senate Constitutional Amendment 5 was an initiative that proposed to repeal Proposition 209 (Prop 209), a 1996 law that prohibited California’s public universities and colleges from “discriminating against or granting preferential treatment to any group or individual in hiring, contracting, and college admissions.” In effect, it meant that race simply could not be considered at all when making hiring or admissions decisions. Prop 209 effectively ended the use of affirmative

79. Mounk, supra note 71.
81. Matsuda, supra note 10, at 81.
82. Id.
action in California public education institutions.\textsuperscript{84} Eighteen years later, the goal of SCA5 was to bring the issue back to the ballot box and have California voters decide whether to reinstate affirmative action policies back to California’s public schools.

SCA5 passed through the State Senate with little fanfare and gained the two-thirds supermajority needed to move the bill through State Assembly. But it quickly stalled once anti-affirmative action groups caught wind of it.\textsuperscript{85} The reaction was swift and severe; the usual conservative suspects came out in full force against SCA5.\textsuperscript{86} Yet this time they were joined by “newly inflamed, ad hoc Chinese American groups” such as 80-20, Chinese Alliance for Equality, and the Chinese-American Institute for Empowerment who felt that SCA5 would hurt the college admissions chances of their children.\textsuperscript{87} Rumors of racial quotas and 10% decreases in Asian American admissions rates fueled the fears of these groups even further in what activist Phil Yu termed a “misinformation campaign.”\textsuperscript{88} These groups of Asian Americans were particularly concerned that SCA5 would decrease the admission rates of Asian American students in the University of California (UC) system. Asian Americans currently make up approximately 39% of the undergraduate population at UC Berkeley, despite being only 14.4% of California’s population.\textsuperscript{89}

The anti-affirmative action Asian American groups rallied together against SCA5, calling it the “Skin Color Act” and using racially coded language like, “Other ethnic groups don’t put their kids’ education as number one priority [sic] [. . .] You don’t realize how much Asian parents sacrifice. Asians are minorities, and even though we’re doing very well, we should be the role model for other minorities. If you punish us for that, that is wrong.”\textsuperscript{90} Over 100,000 people, most of them with Asian surnames, signed a Change.org petition urging the State Assembly to reject SCA5.\textsuperscript{91} Perversely, many quoted Martin Luther King, Jr. in their petition signatures, saying, “I have a dream that my four little children will one day

\textsuperscript{84.} Sharon Noguchi, \textit{Chinese Americans wooed by the GOP over anti-affirmative action in public universities}, SAN JOSE MERCURY NEWS, Mar. 16, 2014.
\textsuperscript{86.} \textit{Id.}
\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} Frank Shyong, \textit{Affirmative action amendment divides state’s Asian Americans}, LA TIMES, May 18, 2014.
\textsuperscript{90.} \textit{Id.}
live in a nation where they will not be judged by the color of their skin, but by the content of their character”—an irony because Dr. Martin Luther King, Jr. would have definitely supported SCA5 and affirmative action.¹⁹²

Not surprisingly, Republicans were quick to capitalize on this anti-affirmative action fervor. Peter Kuo, a Taiwan-born GOP candidate running for State Senate, proclaimed that “[t]his is a turning point for the Republican Party to really share their values with Asian-Americans.”¹⁹³ At one “Stop SCA5” forum in Cupertino that was organized by the Chinese-American Institute for Empowerment, top Republican leaders, such as Senate Minority Leader Bob Huff, Assembly Minority Leader Connie Conway, and former UC Regent Ward Connerly, whipped up the mainly Chinese American crowd with anti-affirmative action rhetoric while raising contributions and funds for the Republican Party.¹⁹⁴

This newfound connection between Asian Americans and Republicans was newsworthy enough that national outlets like Politico picked the story up, noting that the Republican Party in California is “moving to capitalize on the themes of education, preferential treatment and personal responsibility to woo skeptical voters in a fast growing demographic group.”¹⁹⁵ Even the website of conservative hawk Andrew Breitbart posted a blog entry that approvingly pointed out similarities between this insurgent group and the Tea Party: “Last month, a collection of Asian-Americans groups, which one University of California professor compares to the Tea Party, helped defeat a bill designed to revive affirmative action in California’s college admissions. Now the Republican Party is hoping to exploit this unexpected break with Democrats.”¹⁹⁶

There is some indication that these Chinese American anti-affirmative action groups were just a very vocal minority in the Asian American population. As the LA Times pointed out, these groups were composed of relative newcomers to American politics:

The coalition that shot down SCA 5 was not a traditional political movement. The protesters organized mainly on Chinese social networks like Weibo (a Twitter-like network), Wechat (a mobile-based group

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¹⁹⁴ Noguchi, supra note 84.

¹⁹⁵ Tau, supra note 93.

messaging service), and a Chinese-language forum, mitbbs.com. Many, but not all, of them were recent immigrants from mainland China without a party affiliation. Some were simply mothers with children preparing for college. Two distinct camps had formed. The first—familiar to politicians and minority leaders—contained younger Asian Americans and older immigrants who are typically Democrats with a history of forming political coalitions with Blacks and Latinos to elect Asian officials and achieve policy goals. The other group, recent immigrants from mainland China and elsewhere, seem to enter political life only when an issue attracts them.

Because these protesters are recent immigrants, they do not have the same experiences or knowledge as “younger Asian Americans and older immigrants who are typically Democrats,” and likely do not understand the purpose of affirmative action nor why it is still important to many Asian Americans. These protesters are the types of Asian Americans that I am not as familiar with; as mentioned before, my family and I fall very much in the Democrats camp, and have a history of “forming political coalitions with Blacks and Latinos.”

Survey data suggests that most Asian Americans do not agree with these protestors. According to the most recent field poll taken by the National Asian American Survey, 69% of Asian Americans in California favor “affirmative action programs designed to help Blacks, women, and other minorities get better jobs and education.” Groups like the Asian Law Caucus, Asian Americans Advancing Justice, Chinese for Affirmative Action, the Southeast Asia Resource Center, Hmong Innovating Politics, and Filipino Advocates for Justice have all supported SCA5 and affirmative action. As former UC Hastings Law School Dean Frank Wu points out, “Asian-Americans appear ready to make a terrible mistake. I’m embarrassed by some of the racist rhetoric being offered by so-called Asian-American community leaders.”

Regardless of what the vast majority of Asian Americans may believe, there was such an outcry from these vocal anti-SCA5 Chinese American groups that State Senators Carol Liu, Ted Lieu, and Leland Yee, three Democratic Asian American senators who all initially voted for the bill, asked Assembly Speaker John Perez to prevent SCA5 from proceeding any further in the State Assembly. In a statement to Perez, the three senators noted that they were following the wishes of the thousands of constituents

97. Shyong, supra note 88.
98. Id.
101. Hing, supra note 85.
who had contacted them, stating, “[a]s lifelong advocates for the Asian-American and other communities, we would never support a policy that we believed would negatively impact our children.”

Ultimately, the efforts of the anti-affirmative action groups were successful: Senator Ed Hernandez, the original sponsor, placed the bill on hold for the foreseeable future. A special task force has been created to study California’s diversity-outreach efforts. Black and Latino lawmakers released a statement reiterating their support for SCA5 and their commitment to reviving it: “The Black caucus and Latino caucus strongly support SCA5, and we are committed to put something on the ballot in 2016.

The success of the Asian anti-affirmative action groups in defeating SCA5 cannot be taken as an isolated incident; there is clearly more at play here. In Part III, I analyze the SCA5 debate through a racial triangulation lens, and demonstrate that by opposing affirmative action, Asian Americans are in danger of becoming “honorary Whites,” who betray our fellow people of color without receiving any of the true privileges of whiteness.

III. RACIAL TRIANGULATION AND THE DANGERS OF “HONORARY WHITENESS”

Marx wrote of the economic bourgeoisie—the small merchants, the middle class, the baby capitalists who were deeply confused about their self-interest. The bourgeoisie, he said, often emulate the manners and the ideology of the big-time capitalists. They are the wannabes of capitalism. [. . .] Is there a racial equivalent of the economic bourgeoisie? I fear there may be, and I fear it may be us.

— Mari Matsuda, “We Will Not Be Used”

One day, early in my first year of law school, I urged a fellow Asian American student and friend to join the Asian Pacific American Law Students Association. I told him that it would provide us with a great support network and community as Asian Americans. His response was both surprising and rather unsettling: “No thanks, I’m not interested. I identify more with White people, anyway.”

Perhaps I shouldn’t have been surprised. In a campus like Berkeley’s, with a 39% Asian American undergraduate population as of 2012, we are

102. Katy Murphy, California Affirmative Action Revival Bill is Dead, SAN JOSE MERCURY NEWS, Mar. 18, 2014.
105. Matsuda, supra note 10, at 79.
heavily present. The percentage of Asian Americans on campus even surpasses the percentage of Whites on campus. At Berkeley at least, we are, for all intents and purposes, part of the majority. More generally speaking, many people view Asian Americans as “lying on the white end of the racial spectrum.” In 1992, influential journalist Andrew Hacker argued that we are already gradually becoming honorary whites, while “Latinos are, at minimum, nonwhite and still have a choice to make.”

Why are we seen as honorary Whites? Should we distance ourselves from this representation? I firmly believe it is an imperative that we do.

I do not agree with Andrew Hacker and I do not believe that all Asian Americans are gradually becoming honorary whites. But I do believe we are in danger of becoming so. The consequences of becoming honorary whites are dire: we will be seen as traitors who do not care about the issues affecting other minorities, while also being unable to achieve any true form of parity with Whites. As a result, we need to “exercise constant vigilance in renegotiating the black-white binary.”

Constant vigilance entails continually working to build cross-racial coalitions with all communities of color.

There are many different terms for Asian Americans’ liminal status in the black-white binary of race relations in America: we are the “racial

107. Murphy, supra note 102.
109. Id. at 248.
110. Id. at 249.
111. One current example of the difficulties of Asian Americans’ liminal status within the black-white binary is that of Peter Liang, the Asian American New York City police officer who was recently convicted of manslaughter in the killing of Akai Gurley, an unarmed 28-year-old black man. On April 19, 2016, Peter Liang was sentenced to only five years probation and 800 hours of community service. Liang was not sentenced to any jail time. Alan Feuer, Ex-New York Officer Gets 5 Years of Probation, N.Y. TIMES, Apr. 19, 2016, http://www.nytimes.com/2016/04/20/nyregion/peter-liang-ex-new-york-police-officer-sentenced-akai-gurley-shooting-death-brooklyn.html. Thousands of Asian Americans protested his conviction, asking why the first officer to be convicted was an Asian American cop, despite the fact that many white cops were never even indicted. As Jay Caspian Kang eloquently put it, “There are many within the Asian-American community, for example, who believe that Liang deserved to be convicted of manslaughter, but who also wonder why it was the Asian cop, among many other equally deserving officers, who took the fall.” He concludes his article with this paragraph, which strongly resonated with me: “Asian-Americans have begun to protest in the streets, in part, because they have begun to wake up from that multicultural dream in which their concerns are lumped in with the rest of the minority groups of America. The word “minority” has increasingly come to encompass only black and Hispanic people. Perhaps it always did. It is my belief that Asian-Americans have to form their own way of talking about race, privilege and justice, one that acknowledges both our relative privilege and the costs of our invisibility. But that language takes time to build, and at the next political action, the message will certainly still be clumsy and riddled with contradiction. I only hope it serves a more just cause than the freedom of Peter Liang.” Jay Caspian Kang, How Should Asian-Americans Feel About the Peter Liang Protests?, N.Y. TIMES, Feb. 23, 2016, http://www.nytimes.com/2016/02/23/magazine/how-should-asian-americans-feel-about-the-peter-liang-protests.html?login=email&_r=1&utmref=undefined.
bourgeoisie,\textsuperscript{112} the “racial middle,”\textsuperscript{113} the “honorary whites” who are being offered the “racial bribe.”\textsuperscript{114} However, the framework I would like to use is Claire Jean Kim’s notion of racial triangulation.\textsuperscript{115} The concept of racial triangulation is Kim’s reaction to the limitations that she saw in the two dominant approaches that place Asian Americans in the Black/White binary: (1) the “racial trajectories” paradigm, in which racialization has occurred in different and independent ways for each subordinated group as an independent subordinated group; and (2) the “racial hierarchy” paradigm, in which “Asian Americans have been rendered an intermediate group on America’s bipolar racial scale.”\textsuperscript{116} Both approaches, she argues, have shortcomings. The racial trajectories approach ignores the notion that Asian Americans have not been racialized independently in a vacuum; rather, they have been “racialized relative to and through interaction with Whites and Blacks.”\textsuperscript{117} The racial hierarchy approach, on the other hand, fails to address that “Whites appear to have ordered other racial groups along at least two dimensions or axes historically: Blacks have been deemed inferior, while Asian Americans have been deemed outsiders or foreigners.”\textsuperscript{118} Accordingly, Kim created her own framework: racial triangulation.

Kim’s notion of racial triangulation is represented by a “field of racial positions” that has superior/inferior and foreigner/insider axes.\textsuperscript{119} On this
graph, Asian Americans are seen as inferior to Whites and superior to Blacks, but more foreign than both Whites and Blacks.\textsuperscript{120} These racial positions are constantly in negotiation and flux with one another, and are based on the views of the “major opinionmakers: White elected officials, journalists, scholars, community leaders, business elites, and so on.”\textsuperscript{121} This field is viewed through two processes: “relative valorization” and “civic ostracism.”\textsuperscript{122} Relative valorization is where Whites praise Asian Americans relative to Blacks in order to subordinate both groups, particularly Blacks.\textsuperscript{123} Civic ostracism is where Whites paint Asians as “immutably foreign and unassimilable in order to ostracize them from body politic and civic membership.”\textsuperscript{124} Thus, Kim argues, racial triangulation has served as the “normative blueprint for which groups should get what, reproducing patterns of White power and privilege.”\textsuperscript{125} One shortcoming to this framework is that Kim does not go into detail about her axes, particularly the superior/inferior axis. As a result, it is not clear what factors are taken into account to evaluate a race’s relative valorization, although one can infer that education, political power, and representation in media and culture might all be relevant factors.

Despite this ambiguity, Kim’s racial triangulation provides a nuanced framework to the notion of Asian Americans as honorary Whites. She illustrates exactly why Asian Americans should not try to become honorary Whites. If we become honorary Whites, we simply reinforce White domination and remain a subordinate group. If we ally ourselves with conservative Whites to get rid of affirmative action, we will be contributing to the efforts to keep Blacks and Latinos as far on the “inferior” axis as possible. At the same time, we will also continue to be seen as perpetual foreigners, people who will never truly become insiders in positions of power in American society.

One clear example of Asian Americans’ shift towards honorary whiteness is demonstrated in the Asian American Legal Foundation’s (AALF) brief in support of Abigail Fisher in \textit{Fisher II}.\textsuperscript{126} Supported by 117 Asian American organizations, most of which appear to be cultural Chinese and Indian American groups (at least by name), the AALF brief argues that Asian Americans suffer “the greatest harm under race-determinant admissions policies.”\textsuperscript{127} Equating affirmative action to the internment of Japanese Americans during World War II, the brief argues that the University of Texas’s plan is racist and discriminatory towards Asian

\textsuperscript{120} \textit{Id.} at 108. \textit{See also} Appendix.
\textsuperscript{121} \textit{Id.} at 107.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 107–08.
\textsuperscript{126} Brief for The Asian American Legal Foundation, \textit{supra} note 61.
\textsuperscript{127} \textit{Id.} at 9.
What Side Are We On?

Americans, an extension of discriminatory policies against Asian Americans in the past. AALF’s position is that the use of race in any form is proof that the University of Texas views Asians Americans as “inferior to other races,” despite the fact that 19% of the University of Texas’s student population was Asian American, while only 3% of the total population in the state. Only by eliminating Texas’s plan, the brief argues, will Asian Americans be able to be judged as individuals.

This is a perfect example of racial triangulation. AALF positions itself as between Whites and Blacks, trying to assert itself into the conversation about the “white and minority binary.” AALF contends that Asians are not White, but also should not be lumped in with the other minorities. By distancing themselves from Blacks and Latinos, AALF is trying to position itself as closer to Whites while still utilizing the bogeyman of past discrimination. It is, in essence, trying to have it both ways: to be treated like a minority when it is advantageous, and reaping the benefits of honorary Whiteness when that’s available as well. If Fred Korematsu knew about this, he would be rolling in his grave right now. The AALF brief fails to take into account the many ethnic Asian subgroups that would benefit from affirmative action, like the Vietnamese Americans, Native Hawaiians, and Pacific Islanders.

But what the AALF brief underscores is that no matter how many Asian Americans we get into our colleges, we will still never be white. Racial triangulation demonstrates that even if we become “honorary Whites” by rejecting affirmative action, such an act does not absolve us of our status as perpetual foreigners. Whites will never see us as one of their own; we will always be seen as outsiders and foreigners, and as inferior to Whites. I delve further into this idea in the next section.

IV. A CALL TO ARMS

I hope we will be known to history as a people who remembered the hard road of their ancestors, and who shared, therefore, a special commitment to social justice. This song is now at an end, a song of my hope that we will not be used.

— Mari Matsuda, “We Will Not Be Used”

In this final Part, I draw upon everything I’ve discussed above to argue that Asian Americans should absolutely support affirmative action.

As I wrote this paper, I thought of another Asian American friend of
mine at Berkeley Law named Darren Wong. Darren is incredibly intelligent, thoughtful, and caring. We have a shared love of football and the San Francisco 49ers. Darren is also the President of the Federalist Society and is firmly against affirmative action. I wrote this section with him in mind: what arguments would convince him—and all other Asian Americans who are against affirmative action—that they should support affirmative action policies?

The argument that resonates most with me, but that I suspect will not resonate with everyone, is a moral one. I believe that all people, Asian American or not, should support affirmative action because it is the right thing to do. Our country’s shameful and disgraceful treatment of African Americans—through slavery, then Jim Crow, and now the “New Jim Crow”—demands that we do everything we possibly can to reverse centuries of oppression. This entails creating policies that dismantle institutional and structural racism, as well as policies that help those who are suffering from the effects of institutional and structural racism. Affirmative action, while not the only solution, is one of those policies. The current achievement gap between White children and Black and Brown children in primary education, the extreme overrepresentation of Black and Brown bodies in our nation’s prisons, and the police brutality of Black and Brown communities are just a few of the major examples of the injustice that still exists in our nation.

Even if Asian Americans are non-beneficiaries of affirmative action, we can set an example and counterpoint for Whites: “If Asian Americans accept the same duty as whites vis-à-vis affirmative action, without begrudging the gains of other people of color, whites hardly have any cause for complaint. […] Asian Americans can set an example—not one that defeats affirmative action, one that rescues it.” We have a moral imperative to do all we can to reverse the tides of oppression and White supremacy.

However, I also recognize that this moral imperative may not convince everyone, including my friend Darren. Anti-affirmative action Asian Americans may ask, “What’s in it for me?” or “I’m not personally affected, so why should this be my problem?” To them I would say that there are a number of reasons why affirmative action is still important, and why coalition building should be our main priority.

My first argument is that Asian Americans—like Blacks and Latinos—have experienced their fair share of discrimination. Acts of

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134. This Note has led to some productive and thoughtful conversations for both of us.
137. Id.
138. Id. at 171.
discrimination that immediately come to mind are the Chinese Exclusion Act of 1882 and the internment of Japanese Americans during World War II, not to mention countless cases of hate crimes, like the murder of Vincent Chin. The various experiences of microaggressions that people of color face daily, like “Your English is so good!” or “Where are you really from?” Anyone who thinks that these events were products of their time and will never happen again is naïve: look no further than the way our country has racially profiled Muslims, Arab-Americans, and South Asians after the 9/11 terrorist attacks—and continues to racially profile these groups with the rise of Donald Trump as a Republican presidential candidate.

The only way to assure that these acts of discrimination never happen again is to dismantle White supremacy through various programs, including affirmative action. As Frank Wu points out, despite being overrepresented in colleges’ and universities’ student population, “Asian Americans are still rare among the decision makers: department chairs, senior administrators, provosts, president, and trustees. We can even be simultaneously overrepresented and still subjected to racial discrimination.” For example, as of 2012, only 1% of college presidents (including community colleges) were Asian American, despite being 5% of the overall American population. Dismantling affirmative action may help more Asian Americans gain acceptance into college, but it will certainly not lead to Asian Americans gaining more positions as “decision makers.” In order to access positions of power, we need affirmative action programs. Asian Americans need access to positions outside of academia as well; as of 2011, only 1.5% of Fortune 500 CEOs are Asian American, again despite Asians being 5% of the population. Asian Americans have benefited from employment affirmative action programs in the past, and will continue to benefit from such programs in areas where we are underrepresented and struggling to break the so-called “bamboo ceiling”

139. Both questions are ones that I’ve heard countless times. This goes back to Kim’s theory of racial triangulation: I am a perpetual foreigner, despite being a fifth-generation American. Asian Americans will always be viewed as inherently more foreign. When asked the question, I usually respond with, “I’m from Hawaii.” When pressed, I say, “I was born in San Francisco.” When asked where my parents are from, I say that my mom is from Hawaii and my dad is from New Jersey. This infuriates people.


141. Wu, supra note 136, at 144.


that is keeping us from succeeding in top leadership positions. Many corporations and businesses, like Microsoft and General Motors, implement affirmative action in the employment context, and Asian Americans are beneficiaries of those programs.\footnote{Wu, supra note 136, at 145.} It would be disingenuous for Asian Americans to benefit from affirmative action in areas like employment while denying the benefits to others in the area of education. Wu highlights the irony of this selfish mentality:

Privately, some Asian Americans consider affirmative action as if the only issue is whether their children can attend Harvard or Stanford. They forget the importance of remedial programs. Alongside other people of color and rightly so under the circumstances, affirmative action opens access to jobs on the San Francisco police force and its fire department or opportunities to win federal government contracts. These Asian Americans are elitists who do not rightfully represent the majority of Asian Americans, whose ambitions are not to be the chief executive officers of Fortune 500 companies but to have their own small business. Their wealth makes them less sympathetic toward other racial minorities as well as less fortunate Asian Americans.\footnote{Id. at 163.}

By focusing solely on whether their children can get into an elite school, these Asian Americans are being selfish. By opposing affirmative action, they are hoping to improve the lives of their child at the expense of many other children. In these parents’ minds, if eliminating affirmative action will get their child into UC Berkeley (which is, again, a false idea because affirmative action is not a zero-sum game), then it must be eliminated. Heaven forbid their child might have to go to UC Riverside or UC Merced instead, simply so that other, less-fortunate minority children may also get the chance to go to UC Berkeley. These anti-affirmative action parents are losing sight of the bigger picture: the goal of our country should be to improve the lives of all children, not just one’s own.

A second reason Asian Americans should support affirmative action is because it still benefits various ethnic groups that fall under the Asian American “umbrella.” There are some historically disadvantaged Asian American groups that continue to benefit from affirmative action in higher education: Filipino Americans, for example, saw their UC Berkeley admissions numbers drop drastically following the passage of Prop 209.\footnote{Id.} Other groups that fall under the pan-ethnic umbrella of “Asian American” that are also historically underrepresented in higher education include Vietnamese Americans, Hmong Americans, and Pacific Islanders. For example, “[i]n 2013, while other ethnic groups had poverty rates at or below the national average for Asian Americans (12.7%), rates for Hmong
(25.6%), Cambodians (19.9%), and Vietnamese (15.5%) were substantially higher.’’ Furthermore, ‘‘[u]nemployment rates for Hmong (6.6%), Laotians (6.3%), and Cambodians (7.2%) also exceeded the average for all Asian Americans (4.2%).’’ Poverty (20.1%) and unemployment (8.4%) rates for Native Hawaiians and Pacific Islanders are similarly high.’’

In addition to the disadvantaged ethnic groups that fall under the Asian American umbrella, there are other groups that benefit from affirmative action: women and LGBT people. By opposing affirmative action, we are opposing admissions for our Asian American daughters, sisters, gay relatives, our female and LGBT family and friends. Eliminating affirmative action will help wealthy East Asian American children get a leg up while keeping underrepresented Asian American children (in addition to Black and Brown children) down. This self-serving agenda could very well lead to Asian Americans being ‘‘shunned by other communities, because we [can] not be counted on to engage in the mutual give and take of democratic politics.’’

This leads to the third reason why Asian Americans should support affirmative action: the importance of building coalitions with other communities, particularly communities of color, cannot be overstated. We cannot afford to be ‘‘shunned by other communities,’’ because we need those alliances with other communities in the future. For example, Asian Americans and Latinos have a shared interest in immigration. If we turn our backs on affirmative action, Latinos may decline to work with us on immigration. Another example is racial profiling: while cops target black men as criminals, the FBI targets Asian Americans in science as spies, and South Asian Americans as terrorists. As Kim’s racial triangulation model suggests, any of us could be accused of being spies, simply because we are seen as ‘‘foreign.’’ Although these are slightly different forms of racial profiling, the core is the same: people are assumed to be guilty simply because of their race. This is a very important issue that Asian Americans and African Americans have in common, one that we could work on together.

If we can show African Americans and Latinos our solidarity with

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148. Id.

149. Id.

150. Wu, supra note 136, at 164.

151. Hing, supra note 85.

152. Take for example, the case of Wen Ho Lee or the more current case of Professor Xiaoxing Xi. See WEN HO LEE WITH HELEN ZIA, MY COUNTRY VERSUS ME (2003). See also Caitlin McCabe & Jeremy Roebuck, Days After Spy Charges Were Dropped, Temple Professor Talks at D.C. forum, PHILADELPHIA INQUIRER, Sept. 18, 2015, http://articles.philly.com/2015-09-18/news/66646778_1_espionage-federal-prosecutors-cases.
affirmative action, they may help support us with issues that we feel strongly about in the future. I would also ask and hope that our fellow African American and Latinos can also give us the benefit of the doubt, extending opportunities for us to be allies and trying to understand the different forms of racism and discrimination that we experience, too. Eric Yamamoto has suggested a framework for different racial groups to work together that I think we would do well to follow: a critical race praxis, which “moves beyond the white-black jurisprudence paradigm, addresses intergroup prejudices and resentments as well as possibilities for healing and reconciliation.”

White supremacy is too powerful for Asian Americans to fight on our own. We need all the help we can get.

A fourth reason to support affirmative action is because people of color may be more likely to help out other non-whites in various contexts, particularly in terms of leadership. People of color often understand the importance of diversity more than Whites do, and will carry out those diversity goals in practice. One need look no further than President Obama, who has appointed more diverse judicial nominees than any other president. The more people of color in positions of power there are, the more diversity we will see in our leadership, including Asian Americans.

Finally, a last reason to support affirmative action is one that is touted by none other than the Supreme Court: diversity in higher education is a compelling interest that has “substantial” educational benefits. According to Justice O’Connor in Grutter v. Bollinger, affirmative action, when applied holistically, creates a diversity in the student body that “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’ Furthermore, this diversity creates better students who are more prepared to enter the workforce, because “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Lastly, the Court noted that diversity through affirmative action is important because “access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions

156. Id.
157. Id. at 308.
that provide the training and education necessary to succeed in America.\footnote{Id. at 332–33.} Having and maintaining diversity in higher education as a result of affirmative action policies ensures that Asian American children will become more understanding and better prepared for the workforce, a goal I think we can all agree on.

In conclusion, by opposing affirmative action, Asian Americans are being self-serving and shortsighted. Do we really want to continue living in a world dominated by elitist white men and the structures and hierarchies that they’ve put into place? Because without affirmative action—by emphasizing colorblindness—we are doing exactly that. We are playing into the hands of the Republicans and neoconservatives who care solely about furthering their agenda by using Asian Americans as proxies for dismantling affirmative action. The party of established white men does not care about other Asian American issues; will they be standing with Asian Americans on issues of immigration? I think not. This vocal minority of anti-SCA5 Asian Americans is being used.

We need to inform these anti-SCA5, anti-affirmative Asian Americans who have been misled about affirmative action. If Asian Americans come together as a group with unified support of affirmative action, we can be a powerful force in advocating for race-conscious policies in higher education and beyond. As a unified group, we would be able to resist attempts by conservatives to use us as a wedge in racial politics. We could break Kim’s racial triangulation framework by no longer being seen as the middle between Blacks and Whites. Our commitment to social justice and to our Black and Brown brothers and sisters would no longer be questioned. We would be able to make American society more inclusive and loosen the ties of White domination.

CONCLUSION

Although I’ve focused my criticism on the events surrounding SCA5 and the Asian-American groups that defeated it, the purpose of this Note is not to only be critical of these anti-affirmative action groups. My main purpose is to galvanize our greater Asian American community to support affirmative action, as well as other social justice issues.

I’ve made the case for Asian Americans to support affirmative action as best I can. Is it enough to convince my friend Darren to change his mind? Perhaps not. But I do know that I (and other Asian Americans who think similarly) must continue to try to convince our friends, family, and other Asian Americans in the community who do not support affirmative action. If we do not, we risk alienation from other communities of color. We will lose future opportunities to collaborate and build coalitions on future issues that matter to us. We will continue to be left out of
conversations and lumped together with Whites, as we were in the Boalt Hall die-in. We will be seen as honorary Whites, without the real privilege or power of actually being White. We will continue to be used and defined by Whites as the model minority, in an attempt to keep the other minorities oppressed.

I cannot let this happen without putting up my best fight. I want to yell Mari Matsuda’s cry from every rooftop: Asian Americans refuse to be tools in this hierarchy of oppression! We believe in social justice, equality, and opportunity for all. This is our chance to show America that we stand with our Black and Brown brothers and sisters and reject the status quo of White supremacy. Asian Americans will no longer be America’s punching bag. We refuse to be used.
Appendix