
William C. Kidder

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William C. Kidder†

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I. INTRODUCTION

In 1970, Asian Pacific American (APA)\(^1\) students at the UCLA School of Law pushed for the inclusion of two slots for APAs in the school’s Legal Education Opportunity Program (LEOP), which began in the late 1960s.\(^2\) The faculty initially refused, arguing that APAs suffered less socioeconomic and educational disadvantages than African Americans, Chicanos and Native Americans.\(^3\) UCLA’s Black American Law Student Association (BALSA) and Mexican American and Indian Law Students Association (MAILSA) banded together with APA students to advocate for the change. In the pre-Bakke\(^4\) days of fixed numerical slots,\(^5\) BALSA and MAILSA both offered to give up one of their LEOP slots for APAs.\(^6\) In response to continued student pressure, the UCLA administration added six LEOP slots for APAs in 1971.\(^7\)

Three decades later in the UCLA Law Review, Stephan and Abigail Thernstrom reviewed William Bowen and Derek Bok’s *The Shape of the River*.\(^8\) The Thernstroms argued: “The cost of racial double standards in admissions is currently being paid by many Asian students. When preferences are eliminated, they derive the greatest benefit. Thus, Asian-American enrollments at the UCLA School of Law jumped by 73% when race-neutral admissions went into effect.”\(^9\)

These two examples highlight the shift in perception that has occurred with respect to APAs and affirmative action.\(^10\) The student activists at UCLA Law School thirty years ago viewed multiracial solidarity around

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1. I use the term Asian Pacific American to classify students who identify themselves as having national origins in Japan, China, the Philippines, India, Korea, Pakistan, Taiwan, Thailand, Indonesia, Southeast Asian countries like Vietnam, Laos, Cambodia, as well as the Pacific Islands (Tonga, Guam, Hawaii, Samoa). This definition is consistent with the manner in which universities like UC Berkeley typically classify students by race/ethnicity.


3. Id.

4. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down UC Davis Medical School’s affirmative action plan, in part because it relied on setting aside a predetermined number of slots for minority applicants).

5. See Muratsuchi, supra note 2, at 96, 106. UCLA’s LEOP program reserved 32 spots for African Americans, 32 for Chicanos and 2 for Native Americans during this same time period.

6. Id. at 97.

7. Id. The continued importance of the issue of access to legal education was demonstrated when over a dozen UCLA law students, including APAs, were arrested for occupying the Registrar’s office during a five hour protest over the lack of racial diversity in UCLA’s 1999 entering class, which included 2 African Americans and 17 Latinos. See Christine Byrd & Hemesh Patel, *16 Demonstrators Arrested at Law School*, DAILY BRUIN, Feb. 25, 2000; Bob Pool, *UCLA Students Arrested in Admissions Policy Protest*, L.A. TIMES, Feb. 25, 2000, at B4.


10. For a helpful introduction to the operation of affirmative action programs, along with an analysis of why such programs are needed, see generally David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 Hastings Const. L.Q. 921 (1996).
affirmative action as essential to advancing the educational interests of both APAs and other groups of color. Many members of the political Left also hold this view today. Yet, others have increasingly come to view APAs as natural adversaries of affirmative action programs. In particular, the political Right's often-successful attack on affirmative action coincides with a heightened focus on the adverse consequences for APAs of race-conscious admissions. While Thernstrom makes specific claims about APAs benefiting from the ban on affirmative action in California, others have taken the argument further. Professors Daniel Farber and Suzanna Sherry, for example, argue that many feminist and critical race theory critiques of traditional merit standards amount to being "anti-Asian" because APAs have done so well under "objective" merit standards. Thus, the debate about where to situate APAs in the affirmative action controversy quickly implicates questions of how to define merit, which in the law school context, traditionally means heavy reliance on the Law School Admission Test (LSAT).

Professors Michael Omi and Dana Takagi present a useful summary of the ways in which APAs have traditionally been located in the political discourse on affirmative action. Omi and Takagi observe:

Both the Right and the Left of the political spectrum implicate, in varying degrees, Asian Americans in the ongoing debate... It may not matter whether specific claims about Asian Americans are empirically correct or not. In fact, much of what both the Left and the Right claim about Asian Americans is contestable.

This article takes Omi and Takagi’s comment as an invitation to analyze the empirical data on the consequences for APAs of ending race-conscious affirmative action. The purpose of this analysis is to examine what light this data sheds on the nature of the affirmative action political discourse—particularly that of the Right. The goal of this article is not

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12. See Michael Omi & Dana Takagi, Situating Asian Americans in the Political Discourse on Affirmative Action, 55 Representations 155 (Summer 1996) [hereinafter Omi & Takagi, Situating Asian Americans].
13. Id. at 155-156.
14. It is not necessary to establish that affirmative action programs in the aggregate assist APAs’ numerical representation in order for APAs (or other groups, for that matter) to voice support for affirmative action. Many progressive APA legal scholars have eloquently argued that APAs should still support affirmative action policies even if most or all APAs are not given affirmative action consideration in higher education because APAs have a strong stake in a larger commitment to anti-subordination and social justice. Such progressive APA scholars often criticize the prevalent model minority myth both for obscuring the continuing obstacles faced by many APAs, and for serving as a tool to disadvantage other racial/ethnic groups. See generally Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 1 Asian L.J. 1, 24 (1994) (“In addition to hurting Asian Americans, the model minority myth works a dual harm by hurting other racial minorities and poor whites who are blamed for not being successful like Asian Americans.”); Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action, 4 UCLA Asian Pac. L.J. 129 passim (1996) [hereinafter Chin et al., Beyond Self-Interest]; 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 passim (1996); Janine Young Kim, Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 Yale L.J. 2385, 2409 (1999) (“Asian Americans play a strange and contorted role in the affirmative action debate. Those who would
simply to establish that APAs and others should support affirmative action because “race blind/by the numbers” admissions will harm APA law school candidates (though evidence will be provided that is consistent with this view). Rather, it is to study the gap between neoconservatives’ model minority rhetoric and the reality of law school admissions as a way of assessing the integrity and sincerity of the model minority political discourse.

Sections II through IV of this article explore the political discourse on APAs and affirmative action—particularly that of conservative Stephan Thernstrom—by testing whether it matches available empirical data. Whereas Thernstrom and the political Right have frequently mascotted APAs, portraying them as the group most victimized by race-conscious affirmative action admissions, the Left has often either omitted APAs entirely or attempted to bring APAs within a simplistic notion of coalition politics.

Section III provides a review of the data from three University of California (UC) Law Schools—Boalt, Davis and UCLA—for the three years before and after Proposition 209 (Prop. 209) and the UC Regents’ SP-1 Resolution (SP-1) ended race-conscious affirmative action. The data reveals that Thernstrom’s claim that APAs were the primary beneficiaries of the ban on affirmative action is untenable. Not only do the figures for three post-209/SP-1 admission cycles counter Thernstrom’s conclusions based on one admission cycle, but his conclusions based on 1997 data border on deliberate misrepresentation. Available data from Boalt Hall also establishes that Prop. 209 and SP-1 coincided with a severe drop in Filipino enrollments. Data from the three UC Law Schools reveals that Whites were the only group to see their enrollments (in numbers and proportion of each entering class) go up appreciably.

Section IV provides a comparison of Thernstrom’s critique of Linda Wightman to his other works addressing the consequences of Prop. 209 and SP-1. The comparison reveals a telling inconsistency in Thernstrom’s positions: in the former case an acknowledgement that APAs would be harmed by “race-blind” and “numbers only” law school admissions, in the latter case an assertion that APA law school applicants would reap the greatest benefit from Prop. 209 and SP-1.

Sections V and VI situate the empirical analysis of APAs and law school admissions within a broader critique of the LSAT and meritocracy. Section V shows how the LSAT has a racial screening effect for APAs, eliminate affirmative action use the Asian-American population to exemplify how affirmative action disadvantages non-Whites as well as Whites. This is especially true for affirmative action in higher education . . . . “); Theodore Hsien Wang, Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans, 95 ANN. SURV. AM. L. 463, Section IV (unnumbered pages) (1995) (“In trying to exploit the experience of Asians, affirmative action opponents conveniently ignore how Asian Americans, like other minorities, still need and continue to benefit from affirmative action in public contracting, employment, and even admissions to graduate school and faculty hiring.”); Frank H. Wu, Neither Black nor White: Asian Americans and Affirmative Action, 15 B.C. THIRD WORLD L.J. 225 passim (1995); Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, 95 Mich. L. Rev. 821 passim (1997).
how the test is a poor predictor of APAs' law school performance, and how the LSAT generally correlates negatively with social activism.

Section VI applies two concepts from critical race theory to APA issues in the law school affirmative action debate. First, the "Miss Saigon Syndrome," Neil Gotanda's term for America's indifference to how institutional racism closes doors for APAs, aptly describes Thernstrom's critique of affirmative action. Indeed, I argue, Thernstrom wields the mistaken notion that APAs do not face discrimination in higher education like a sword. He ignores discrimination against APAs in order to attack other racial/ethnic groups who receive affirmative action consideration.

Second, Derrick Bell's notion of the "tipping point" provides insight into whether or not the real threat to APAs' access to legal education is negative action designed to protect White privilege, as opposed to affirmative action. This theory is empirically tested with 1990s national admission data including nearly every ABA law school. APA admission rates have been analyzed relative to Whites only, in order to isolate White privilege issues from affirmative action for other racial/ethnic groups. The data reveals that APAs' proportional representation in the applicant pool rose significantly during the 1990s. This increase, however, is accompanied by the appearance of sizeable differences in admission rates that favor Whites.

II. APAS AND THE POLITICAL DISCOURSE ON AFFIRMATIVE ACTION

A. Historical Background

In order to better understand the political discourse surrounding APAs and affirmative action, a little background about law school admission trends is in order. As a historical matter, the remarkable rise over the last three decades in the number of APA law students should not be overlooked. In 1971 there were a mere 259 APA first-year students enrolled in ABA-accredited law schools in the U.S. This compares to 650 APA "One-L's" in 1981, 2,019 in 1991 and 2,762 in 1998. This surge in APA enrollments was accompanied by a similar growth in applications. Of 76,061 applicants in the 1975-76 admission cycle, only 829 were APAs. Twenty years later, in the 1995-96 admission cycle, there were nearly the same number of applicants to ABA schools (76,687), but 5,157 APA applicants were now in the pool.

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15. See Kang, supra note 14, at 3 (defining negative action and stating, "To be clear, Whites, not any other race, are used as the baseline. Thus, the fact that an Asian American would have been admitted had she been some other racial minority is irrelevant to the specific question whether negative action against Asian Americans is in place.").
17. See id.
It should be noted that a portion of this increase in APA enrollments occurs as an outgrowth of the increased availability of a legal education: in 1968 there were 138 ABA schools with 23,652 first-year seats, while in 1998 there were 181 ABA schools with 42,804 seats. Another factor accounting for part of APAs' marked increase in representation in legal education is that between 1970 and 1990 the APA population increased almost four hundred percent. APAs' dramatically increased presence in law school classrooms set the stage for a larger role in the national debate over affirmative action.

B. Treatment of APAs by the Political Right and Left

Omi and Takagi note that the political Right often invokes the image of APAs as victims of affirmative action in order to deflect their opponents' charge that efforts to terminate race-conscious admissions are a transparent attempt to preserve White privilege. Professor Stephan Thernstrom, a Harvard historian, is a prominent and influential example of this brand of scholarship. Thernstrom's relevant works will therefore serve as a guide for organizing this critical inquiry into APAs and the law school affirmative action debate.

Thernstrom's argument that the ban on affirmative action greatly benefits APA law school applicants is used to support his thesis that the end of race-conscious affirmative action in California (through both Prop. 209 and SP-1) has had "no 'disparate impact on people of color' in listing aggregate admission data for 98% of ABA law schools).
Thernstrom illustrates his point by analyzing the media’s coverage of Prop. 209 and SP-1’s consequences at the University of California, Berkeley School of Law (Boalt Hall).

In a section titled “The Vanishing Asian,” Thernstrom argues that the press improperly fixated on the plunge in African American admissions to Boalt that occurred in 1997, the first post-affirmative action class. He contends, rather, that the salient feature of the debate over changes at Boalt Hall was that APAs were left out of the discourse, allowing advocates of race-conscious affirmative action to speciously claim that Prop. 209 and SP-1 instituted a “cleverly disguised form of ‘preferences for whites.’” Thernstrom notes the increase in APAs in Boalt’s 1997 entering class, and concludes:

The Vanishing Asian serves a vital function in the war against Proposition 209. It obscures the truth that a fair, open, color-blind process does not greatly disadvantage racial minorities in general. Indeed, Asians are distinctly better off when judged strictly as individuals, on the basis of their academic qualifications.

Thernstrom further supports his conclusion by noting that enrollments of APAs at the UCLA Law School shot up 73%, which, in turn, caused overall minority enrollment to go up 18% at UCLA in the first admission cycle after Prop. 209. Responding to the charge that Prop. 209/SP-1 will return the UC Law Schools to the lily-white composition they had before affirmative action, Thernstrom wryly notes that UCLA’s 1997 class was “[n]ot exactly ‘F. Scott Fitzgerald’s Princeton.’” Thernstrom’s conclusions about these numbers will be critiqued in Section III.

Omi and Takagi contend that while conservatives often incorporate APAs in the affirmative action debate to obfuscate White’s hegemonic decisions. Prop. 209 therefore places limitations on financial aid and scholarships, whereas SP-1 does not. See Robert Cole et al., Report of an Ad Hoc Task Force on Diversity in Admissions, University of California, School of Law, Berkeley 14 (Oct. 14, 1997) (unpublished report, on file with UC Berkeley Boalt Hall Law Library) [hereinafter Cole Report]. Since financial aid allocation is beyond the scope of this article, I will henceforth discuss Prop. 209 and SP-1 together, treating both as two parts of a consistent ban on race-sensitive admissions at UC law schools beginning with the entering class of 1997. Special thanks to Dean Kay of Boalt Hall for pointing out the distinctions between SP-1 and Prop. 209, and how these differences complicate my data presentation. For background information on the political maneuvering that led to SP-1, see CHAVEZ, supra, at 57-67; Kathleen Morris, Through the Looking Glass: Recent Developments in Affirmative Action, 11 BERKELEY WOMEN’S L.J. 182, 185-89 (1996); Maria Diana Ramos, Unqualified to be Voiceless: Inaudible Screams Falling on the Deaf Ears of a not so Color-blind Society, 11 BERKELEY WOMEN’S L.J. 1, 5-6 (1996).

26. Thernstrom, Farewell to Preferences?, supra note 9, at 41.
27. Id. at 38.
28. Id. at 40.
29. Id. at 41. For a similarly conservative argument in the context of UC medical schools, see Lance T. Izumi, Confounding the Paradigm: Asian Americans and Race Preferences, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 121 (1997).
30. See Thernstrom, Farewell to Preferences?, supra note 9, at 42. Thernstrom is technically incorrect in stating that 1997 was the first class after Prop. 209 took effect, but this is a common misunderstanding by both the political Right and Left. Throughout this article I treat Prop. 209 and SP-1 as the same in order to clarify and simplify analysis, even though in 1997 UC law schools were not yet under Prop. 209. See supra note 25.
31. See Thernstrom, Farewell to Preferences?, supra note 9, at 42.
control over the playing field, the political Left's treatment of APAs is also quite problematic. They note that liberal accounts of affirmative action sometimes treat APAs as a kind of "racial pariah" and simply exclude them from the debate. More often, Omi and Takagi observe, APAs are treated by the Left as "relatively unproblematic partners in a wider coalition politics." They further argue that the inadequacy of the Left's response is partly responsible for the success of the Right's "model minority" rearticulation of APA's fate under affirmative action. The very fact that the Left has too often left APAs out of the affirmative action debate makes it difficult to critique the Left's claims with much specificity. In other words, the detailed focus in this article on the consequences of the ban on affirmative action at UC law schools is itself the best response to the Left's underinclusive and underdeveloped defense of affirmative action.

III. RACIAL MASCOTTING: THE REAL AND IMAGINED IMPACT OF PROP. 209 AND SP-1 AT UNIVERSITY OF CALIFORNIA LAW SCHOOLS.

In Farewell to Preferences? Stephan Thernstrom reviews the consequences of Prop. 209 and SP-1 for the three Law Schools operated by the Regents of the University of California (UC): Boalt Hall, Davis and UCLA. He ultimately concludes that the end of race-conscious affirmative action at UC Law Schools "has already benefited Asian
Americans, who have won 41% more places in the first-year law-school classes than they did the year before.  Thernstrom is certainly correct to look to California to study the consequences of ending race-conscious affirmative action for APA law school candidates, and not only because of Prop. 209 and SP-1. California has far and away the largest APA population of any state, and this extends to law students as well. Thus, if prohibiting race-sensitive affirmative action were to produce any large-scale benefits for APA law students, this would surely be evident in California. For example, in 1998, there were 735 APA first-year students enrolled in California’s eighteen ABA-approved law schools, which is over one-quarter of all APA enrollments nationally. Furthermore, the eight undergraduate campuses of the University of California—which are significant feeders to law schools—enrolled a 1999 freshman class where APAs composed 38% of the overall student body. With data now available for three post-affirmative action admission cycles, it is an opportune time to reexamine Thernstrom’s claims about the effects of banning race-conscious affirmative action at California’s elite public law schools.

40. Id. at 49.
41. See ABA GUIDE 2000, supra note 16. For the curious, the individual enrollment totals are as follows: Stanford 19, Boalt 48, Hastings 69, Davis 23, USF 29, Santa Clara 62, Golden Gate 28, McGeorge 48, UCLA 49, USC 34, Southwestern 56, Western State 18, Loyola Marymount 105, Whittier 33, Pepperdine 12, U. of San Diego 42, Cal Western 32 and Thomas Jefferson 28. Id.
42. For example, over one-third (92 of 269 students) of Boalt Hall’s entering class of 1999 attended UC. The lion’s share of these students, however, attended Berkeley (38) or UCLA (29). See 1999 BOALT HALL ANNUAL ADMISSION REPORT (1999). This disparity in access to law school between graduates of different UC campuses is one reason to be concerned about a second wave of adverse consequences for underrepresented minorities stemming from the ban on race-conscious affirmative action. In another couple of years, when Berkeley and UCLA start graduating classes with dramatically fewer African American, Latino and Native American students, it is quite possible that a continuation of status quo admission policies will further stratify UC legal education opportunities because underrepresented minorities will be disproportionately located at less selective UC campuses like Riverside, which, in turn, will depress their admission chances. This is a serious problem, especially considering that the top three national feeder schools in terms of volume of law school applicants in 1997-98 were UCLA, UC Berkeley and University of Texas-Austin, respectively. See The Leading Undergraduate ‘Feeder Schools’ for Black and White Law School Applicants (chart), in Vital Signs: The Current State of African Americans in Higher Education, 26 J. BLACKS IN HIGHER EDUC. 79, 85 (Winter 1999/2000). This is one reason I take issue with Thernstrom’s rather rosy assessment that Prop. 209 and SP-1 will actually work to the benefit of African Americans by increasing Black graduation levels system-wide at UC. See Thernstrom & Thernstrom, Reflections on The Shape of the River, supra note 9, at 1626-28 (analyzing the “redistribution” of Blacks to less selective UC campuses, and arguing that this will likely produce a net gain in African Americans graduating from UC). See also James Traub, The Class of Prop. 209, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44 (arguing that Blacks’ and Latinos’ redistribution to less selective UC campuses will produce many educational advantages).
43. See Education: UC’s Freshman Class, L.A. TIMES, June 2, 1999, at B2 (listing applications, enrollments and admissions to each UC campus). It should also come as no surprise, given California’s demographics, that the University of California has historically sent a relatively large number of APA graduates to law school. See LAW SCHOOL ADMISSION COUNCIL, THE CHALLENGE OF MINORITY ENROLLMENT, app. I (1981) (listing the top three feeder institutions for “Oriental” law students in 1980 as the University of Hawaii, UC Berkeley and UCLA, respectively).
44. Cf. Thernstrom, Farewell to Preferences?, supra note 9, at 38 (“It should also be noted that the number and quality of applicants to particular schools can fluctuate for many reasons, often impossible to discern. . . Thus we should not try to make too much of the changes visible this year.”); id. at 35 (“[F]ull data are not yet available, and precisely what has happened this year is not altogether
A. A Review of the Aggregate Data

Are APA law school applicants "distinctly better off" applying to UC after Prop. 209 and SP-1? Or is Themstrom's argument merely model minority mascoting designed to make the resegregation of law schools more politically palatable by deploying APAs as a buffer group? This section will compare admissions data from the three years after Prop. 209 and SP-1 (1997-1999) with the three years before the ban on affirmative action in California (1994-1996). In total, figures for three UC Law Schools—Boalt Hall, Davis and UCLA—are presented. The fourth UC Law School—Hastings College of the Law in San Francisco—is not included (nor was it analyzed by Themstrom) because Hastings did not employ race-conscious admissions prior to Prop. 209. However, since in five of the last six years no UC Law School has enrolled more APAs than Hastings (in part because it usually has the largest class size overall), the footnotes will refer to Hastings admission figures for comparative purposes.

Tables 1 and 2 compare the number of enrolled first-year APAs in the last three years before Prop. 209/SP-1, and the first three years after Prop. 209/SP-1. Each figure in parenthesis is the percentage of each class comprised of APAs. These percentages are helpful in assessing APAs' relative representation, since it is difficult for law schools to calibrate their offers so as to enroll an identical number of students each year.

clear. Whether the patterns visible in current data can be projected into the future is also unclear.

When Themstrom restated the claim that APA law students were the prime beneficiaries of Prop. 209 in the June 1999 UCLA Law Review, 1998 admissions data was available but not utilized by Themstrom.

For a critique of the "model minority" paradigm in the context of affirmative action, see supra note 14. I selected one prominent conservative who has written extensively on the issues analyzed in this article. I could have chosen others, such as Lino Graglia or Dinesh D'Souza. I invite readers to draw parallels between my critique of Themstrom and other affirmative action critics. For another critique of Themstrom, see Richard Delgado, Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?, 93 NW. U. L. REV. 215 (1998) (book review).

Hastings has a two-track admissions policy, with about 80% of students being selected in a "race-blind" manner based on mostly academic (LSAT, UGPA, etc.) criteria. The other 20% are selected through the LEOP program, which is also not race-conscious. LEOP was instituted in 1969 and continues to be based on broad measures of "disadvantage" such as cultural, economic, educational, familial, geographic, linguistic or social background. While it is true that most underrepresented minority admits at Hastings are LEOP admits, it is also true that most—in 1997 it was two-thirds—of the LEOP admits are not underrepresented minorities. For information on Hastings admissions and LEOP, see Cole Report, supra note 25, at 51-54 (reviewing admissions at Hastings); UC Hastings LEOP Information Packet (undated material faxed by Fran Marsh, Hastings' Director of Public Affairs, Mar. 7, 2000); Richard D. Kahlenberg, Class-Based Affirmative Action, 84 CAL. L. REV. 1037, 1067-68 (1996); Mark Johnson, Some Say Poverty, not Race, is the Issue: Class-Based Plan Seen as Alternative, RICHMOND TIMES-DISPATCH, July 7, 1995 at A1.

One important distinction is that while Hastings is a public, University of California-affiliated Law School with identical tuition costs to Boalt, UCLA and Davis, it is not under the governance of the UC Regents, and as such was never subject to SP-1. Because Hastings did not employ race-conscious admissions prior to 1997, it is frequently excluded from analysis of the consequences of Prop. 209 and SP-1. See Jerome Karabel, No Alternative: The Effects of Color-Blind Admissions in California, in CHILLING ADMISSIONS 33, 44 (Gary Orfield & Edward Miller, eds., 1998). For a history of Hastings, including its autonomy from the UC Regents, see THOMAS GARDEN BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY (1978).

Enrollments at Boalt tend to fluctuate much less—between 263 and 269 first-year students in
Table 1: Asian Pacific American Enrollments at Three UC Law Schools Before Proposition 209/SP-1

<table>
<thead>
<tr>
<th>Year</th>
<th>BOALT</th>
<th>DAVIS</th>
<th>UCLA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>40 (15%)</td>
<td>24 (16%)</td>
<td>70 (21%)</td>
<td>134 (18%)</td>
</tr>
<tr>
<td>1995</td>
<td>36 (14%)</td>
<td>26 (19%)</td>
<td>62 (23%)</td>
<td>124 (18%)</td>
</tr>
<tr>
<td>1996</td>
<td>46 (17%)</td>
<td>22 (14%)</td>
<td>48 (16%)</td>
<td>116 (16%)</td>
</tr>
<tr>
<td>Pre-209/SP-1 Total</td>
<td>122 (15%)</td>
<td>72 (16%)</td>
<td>180 (20%)</td>
<td>374 (17.4%)</td>
</tr>
</tbody>
</table>

Table 2: Asian Pacific American Enrollments at Three UC Law Schools After Proposition 209/SP-1

<table>
<thead>
<tr>
<th>Year</th>
<th>BOALT</th>
<th>DAVIS</th>
<th>UCLA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>47 (18%)</td>
<td>24 (14%)</td>
<td>82 (22%)</td>
<td>153 (19%)</td>
</tr>
<tr>
<td>1998</td>
<td>48 (18%)</td>
<td>30 (16%)</td>
<td>49 (18%)</td>
<td>127 (17%)</td>
</tr>
<tr>
<td>1999</td>
<td>35 (13%)</td>
<td>24 (15%)</td>
<td>66 (28%)</td>
<td>125 (19%)</td>
</tr>
<tr>
<td>Post-209/SP-1 Total</td>
<td>130 (16%)</td>
<td>78 (15%)</td>
<td>197 (22%)</td>
<td>405 (18.3%)</td>
</tr>
</tbody>
</table>

Overall, data from three UC Law Schools indicates that there were 405 total APAs enrolled in the three years after Prop. 209 and SP-1, compared with 374 total APAs in the three years prior to Prop. 209 and SP-1. When one controls for APAs' representation as a proportion of the total number of first-year seats, APAs constituted 18.3% of UC Law School classes in 1997-99, compared to 17.4% for 1994-96. Indeed, the very
modest gains that APAs made at UC Law Schools might merely reflect, at least in part, continuing application trends in California that would have occurred with or without the ban on affirmative action. Thus, overall, the ban on affirmative action has resulted in negligible gains for APA law students at UC Law Schools. While this data is certainly not evidence of a return to "Fitzgerald's Princeton," neither does it come close to justifying Thernstrom's assertion that when race-conscious affirmative action is eliminated, APAs reap the greatest benefit. Later in this section I will demonstrate that, in fact, White enrollments have gone up the most at UC Law Schools after Prop. 209/SP-1.

Recall Thernstrom's claims that APA enrollments rose 73% at the UCLA Law School after Prop. 209 and SP-1. While this is technically true, it is highly misleading. APA enrollments did increase from 48 in 1996 to 82 in 1997—as indicated in Tables 1 and 2—but much of this is accounted for by the fact that UCLA underestimated the number of admits who would accept offers in 1997. Because UCLA was experimenting with a new class-based affirmative action program, it ended up enrolling its largest class (381) in over a decade. Consequently, UCLA was forced to admit an unusually small class (277) in 1998—including only 49 APAs—in order to compensate for the strains a large class places on the delivery of legal education. As indicated by Tables 1 and 2, APAs represented 22% of enrollments at UCLA in 1997-99 compared to 20% for 1994-96. Moreover, APAs' net gain in the proportion of first-year seats at Boalt...
was even smaller, and was slightly negative for UC Davis.

Thernstrom’s failure to account for changes in the size of UCLA’s 1997 class also causes his related claim—that minority enrollment at UCLA went up 18% in the first year after Prop. 209 and SP-1—to miss the mark. UCLA’s unusually large 1997 class did indeed include 132 people of color compared to 117 the year before. However, the more significant finding is that people of color comprised 45% of the entering classes of the UCLA Law School in 1994-96 (making it possibly the most racially diverse elite law school in the country), compared to 33% in 1997-99. As will be demonstrated in more detail later in this section, the net result of Prop. 209/SP-1 at Boalt, Davis and UCLA was that enrollments increased substantially for Whites, were essentially unchanged for APAs, and plummeted for African Americans, Latinos and Native Americans.

B. Unpacking the Composite Numbers: The Example of Filipinos

 Appropriately or not, APAs are treated as a monolithic group in the political discourse on affirmative action. Throughout most of this article, I too discuss APAs as a single group. Partially, my choice reflects the reality that the social construct of “Asian Pacific American” imposes conditions upon APAs whereby people from different ethnic backgrounds are treated similarly as “Asians” in U.S. society. It also reflects the fact that admissions data across ABA and UC law schools are not reported by APA subgroup.

However, the impact of banning affirmative action can vary between APA subgroups because of heterogeneity based on socioeconomic status, educational attainment, immigration patterns, and so forth. One example

Prop. 209 and SP-1 went into effect. See Thernstrom, Farewell to Preferences?, supra note 9, at 40. This claim is inconsistent with the data in Tables 1 and 2, which originate from the UC Office of the President. As Tables 1 and 2 indicate, there was only 1 more APA student enrolled at Boalt in 1997 as compared to 1996 (a 2% increase). Alarmed by the discrepancy, I double-checked the UCOP data against Boalt Hall’s own admission reports, and verified that the numbers in Tables 1 and 2 are correct. See Boalt Hall 1999 Annual Admission Report, supra note 42. Consequently, Thernstrom’s 24% figure is either somehow based on incorrect preliminary information, or is the product of sloppy scholarship.

56. See Kay, supra note 49.

57. Cf. Gabriel J. Chin et al., Rethinking Racial Divides: Panel on Affirmative Action, 4 Mich. J. Race & L. 195, 230 (1998) [hereinafter Chin et al., Rethinking Racial Divides] (Professor Marina Hsieh commenting: “There is a perfectly valid truth that, in many instances, all Asians will be treated alike regardless of any subgroup distinctions. That is the majority culture. To some extent even Asian Pacific Islanders within the culture, with respect to each other, have certain broad assumptions that remain true in terms of external treatment, regardless of internal differences.”); Neil Gotanda, Chen the Chosen: Reflections on Unloving, 81 Iowa L. Rev. 1585, 1597 (1996) (“[M]ore specifically, if the discrimination against Koreans is similar to such discrimination against other persons of Asian ancestry, then we have, prima facie, an ‘Asian-American’ racial context. This kind of Asian American racial context is not a subjective creation of Koreans and other persons of Asian ancestry, but is a recognition of forces at work in American society.”).

58. See Robert S. Chang, Reverse Racism! Affirmative Action, the Family, and the Dream that is America, 23 Hastings Const. L.Q. 1115, 1127-28 (1996) (noting that “care must be taken to acknowledge the tremendous diversity within the Asian American community so that the relative success of Chinese Americans, Japanese Americans, and Korean Americans will not obscure the very different situations of the other Asian American groups”); Chin et al., Beyond Self-Interest, supra note 14, at 156 n.143 (“[I]t is dangerous to aggregate all APA groups in a contemporary ‘Horatio Alger’-like
of the adverse impact of Prop. 209 and SP-1 on an subgroup of APA law students is that of Filipinos, who were also recently included as plaintiffs in a suit challenging the fairness of UC Berkeley's post-affirmative action undergraduate admissions policy.\(^5^9\) Today Filipinos represent one of the largest Asian subgroups in the U.S.,\(^6^0\) yet relatively few American-born Filipinos attend college, much less graduate or professional school.\(^6^1\)

The fact that Boalt Hall's first class after Prop. 209/SP-1 included only one African American (and a deferral from the previous year, no less) received considerable attention in the media.\(^6^2\) Much less noticed was the fact that Boalt's 1997 entering class included zero Filipinos, as did its 1999 entering class.\(^6^3\) Before Prop. 209 and SP-1, Filipinos were given consideration under Boalt's affirmative action program, as were some other APA subgroups.\(^6^4\) Between 1994 and 1996, thirteen Filipinos were enrolled at Boalt.\(^6^5\) In the three years since the ban on affirmative action,

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61. See id. at 893. I attempted to get more recent data on this issue. However, the U.S. Department of Education does not provide information on educational attainments that was broken down by APA subgroup. See NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION (1999).


63. See 1999 BOALT HALL ANNUAL ADMISSION REPORT, supra note 42, at 11.

64. See RACHEL F. MORAN, ET AL., STATEMENT OF FACULTY POLICY COVERING ADMISSION TO BOALT HALL AND REPORT OF THE ADMISSIONS POLICY TASK FORCE (unnumbered page) (1993) (describing Boalt's target ranges for admission offers to "Asian subgroups" including Filipinos). Southeast Asian Americans (Vietnamese, Cambodian, and Laotian) present another example of underrepresented APA groups that were previously included in Boalt's affirmative action program. However, I did not separately analyze this group because Southeast Asians were "confusingly redefined" in 1997 to include some subcontinental Inoians, which makes comparisons before and after Prop. 209 and SP-1 problematic. See Chin et al., Rethinking Racial Divides, supra note 57, at 212 n.55 (noting the confusion in how Southeast Asians were categorized in Boalt Admission reports in 1997). See also Kaaryn Gustafson, Broken Promises, 13 BERKELEY WOMEN'S L.J. 3, 4 n.3 (1998) (noting that while SP-1 has had a detrimental effect on Southeast Asian's representation in Boalt's 1997 class, the University of California keeps few statistics on APA subgroups).

65. See 1999 BOALT HALL ANNUAL ADMISSION REPORT, supra note 42, at 11.
there have only been three Filipinos enrolled at Boalt (all in 1998).\textsuperscript{66} Some have referred to this as the phenomenon of being “zeroed out.”\textsuperscript{67}

In contrast, other APA subgroups have long been excluded from Boalt’s affirmative action plan. For example, in 1975, consideration for Japanese Americans was eliminated, and the number of Chinese Americans eligible for consideration was substantially reduced.\textsuperscript{68} UCLA Law School appears to have taken a more inclusive approach, though subgroup information is not reported. Some might find it surprising that between 1989 and 1993, 126 APAs enrolled at UCLA through the “diversity admissions” program, compared to 102 through the “regular admissions” program.\textsuperscript{69} To put this in perspective, in recent years many comparable law schools like Stanford and the University of Michigan have excluded APAs altogether from their affirmative action programs.\textsuperscript{70}

C. Vanishing White Privilege: Prop. 209 and SP-1’s Real Beneficiaries

The data presented to this point renders untenable the claim that ending race-conscious affirmative action greatly benefits APA applicants to UC Law Schools. It should also come as no surprise that other groups of color did not benefit from Prop. 209 and SP-1. Comparing the three-year totals before and after Prop. 209 and SP-1, first-year enrollments at Boalt, Davis and UCLA plummeted from 174 to 50 for African Americans, from 285 to 158 for Latinos, and from 33 to 14 for Native Americans.\textsuperscript{71}

This leaves White applicants as the main beneficiaries of Prop. 209 and SP-1’s ban on race-conscious affirmative action. Tables 3 and 4 display the magnitude of Whites’ increased representation at the Boalt Hall,
Davis and UCLA Law Schools by comparing totals from the three years before and after Prop. 209/SP-1. The reported data combines Whites with "other" applicants, most of whom declined to state their race/ethnicity in application materials. However, this reporting format is not likely to significantly overstate the increase in White law students at UC schools because available evidence suggests that students who decline to state their ethnicity are overwhelmingly White. Overall, at the three UC Law Schools that ended race-conscious affirmative action, Whites’ representation soared from 59.8% of first-year enrollments in 1994-96 to 71.7% in 1997-99.

Table 3: White/Other Enrollments at Three UC Law Schools Before Proposition 209/SP-1

<table>
<thead>
<tr>
<th>Year</th>
<th>BOALT</th>
<th>DAVIS</th>
<th>UCLA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>159 (59%)</td>
<td>98 (64%)</td>
<td>157 (47%)</td>
<td>414 (55%)</td>
</tr>
<tr>
<td>1995</td>
<td>168 (63%)</td>
<td>83 (61%)</td>
<td>158 (58%)</td>
<td>409 (61%)</td>
</tr>
<tr>
<td>1996</td>
<td>165 (63%)</td>
<td>109 (72%)</td>
<td>190 (62%)</td>
<td>464 (64%)</td>
</tr>
<tr>
<td>Pre-209/SP-1</td>
<td>492 (62%)</td>
<td>290 (66%)</td>
<td>505 (55%)</td>
<td>1287 (59.8%)</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

72. See Michelle Locke, Black and Hispanic Admissions Rebound, AP Wire Report, Apr. 3, 1999 (reviewing UC undergraduate admissions and noting that a majority of "decline to state" applicants are White); Sander, supra note 54, at 496 tbl.11 note (reporting that "others" in the 1997 UCLA Law School applicant pool “appear to be mostly Whites who did not wish to disclose their race”); Interview with Edward G. Tom, Director of Admission for the Boalt Hall School of Law, in Berkeley, Cal. (Feb. 3, 2000) (reporting that Boalt made some attempts to identify the racial/ethnic composition of “decline to state” applicants in 1997 by referencing other data sources after admission decisions were made. Mr. Tom confirmed that “decline to state” applicants were “overwhelmingly White” with a few Asian Americans, and no Blacks, Latinos or Native Americans). The fact that “decline to state” applicants are predominantly White can also be deduced from the way changes in White enrollments predictably rise or fall inversely with “decline to states.” For example, in 1999, UC changed its undergraduate application form to more clearly state that racial/ethnic information would not be used in admission decisions. After this change, UC system-wide White enrollments went up by 1,455 and “decline to state” enrollments went down by 1,741. See Education: UC’s Freshman Class, L.A. Times, June 2, 1999, at B2 (reporting admission figures for the UC system and explaining changes in the application form). This reporting ambiguity becomes a potentially difficult issue because my goal is to compare Tables 3 and 4, and because “decline to state” applications doubled after Prop. 209 and SP-1. At Boalt Hall, for example, the average number of “decline to state” applicants in 1997-99 was 537, compared to 258 in 1994-96, at a time when overall applicant volume went down slightly. See Boalt Hall 1999 Annual Admission Report, supra note 42, at 7. If, for example, a larger number of people of color were to suddenly decline to state their ethnicity after Prop. 209 and SP-1, then my data would exaggerate the benefits Whites received from the ban on affirmative action. My hypothetical example, however, is highly unlikely, at least as far as I can tell.

73. See Kay, supra note 49. The figures for Hastings were as follows: 293 (70%) in 1994, 314 (76%) in 1995, and 311 (63%) in 1996. See Hastings Admission Statistics, supra note 49.
Table 4: White/Other Enrollments at Three UC Law Schools After Proposition 209/SP-1

<table>
<thead>
<tr>
<th>Year</th>
<th>BOALT</th>
<th>DAVIS</th>
<th>UCLA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>206 (77%)</td>
<td>134 (78%)</td>
<td>249 (65%)</td>
<td>589 (72%)</td>
</tr>
<tr>
<td>1998</td>
<td>188 (70%)</td>
<td>136 (74%)</td>
<td>201 (73%)</td>
<td>525 (72%)</td>
</tr>
<tr>
<td>1999</td>
<td>209 (78%)</td>
<td>118 (73%)</td>
<td>149 (63%)</td>
<td>476 (71%)</td>
</tr>
<tr>
<td>Post-209/SP-1 Total</td>
<td>603 (75%)</td>
<td>388 (75%)</td>
<td>599 (67%)</td>
<td>1590 (71.7%)</td>
</tr>
</tbody>
</table>

Finally, Chart 1 summarizes the six years of data analyzed in Tables 1 through 4. Chart 1 reveals the overall impact of Prop. 209 and SP-1 on Whites, APAs, African Americans, Latinos and Native Americans. Comparing 1994-96 with 1997-99 at Boalt, Davis and UCLA combined, White enrollments increased a substantial 20%, while APA enrollments were basically unchanged. Together, enrollments for African Americans, Latinos and Native Americans went from 23% of the first-year classes in 1994-96 to a mere 10% in 1997-99, a drop of 56%.

Chart 1: Overall Enrollment Percentages by Race/Ethnicity Boalt Hall, Davis & UCLA Law Schools Before and After the Ban on Affirmative Action

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74. See Kay, supra note 49. The figures for Hastings were as follows: 232 (75%) in 1997, 242 (68%) in 1998 and 280 (67%) in 1999. See Hastings Admission Statistics, supra note 49.

75. See supra note 50.

76. See Kay, supra note 49.

77. See id.
IV. WHAT SELECTIVE ADMISSION MODELS REVEAL ABOUT THERNSTROM’S SELECTIVE USE OF THE ‘MODEL MINORITY’ DISCOURSE

In Section III, I established the inaccuracy of Thernstrom’s claim that APA law students were the primary beneficiaries of the ban on affirmative action in California. In this section, I will demonstrate that Thernstrom’s argument about increased APA representation after Prop. 209/SP-1 is also disingenuous. Thernstrom, in assessing the consequences of Prop. 209 and SP-1, argues that it is unreasonable to expect that ending affirmative action will only marginally impact enrollments for groups receiving affirmative action consideration:

"What changes should we expect to find in law- and medical-school student bodies now that preferences have been eliminated? Those who profess great ‘shock’ at the discovery that minority numbers have fallen in many University of California schools are being remarkably disingenuous."

This statement rings true, especially for those who are cognizant of the high degree to which law school admission decisions are governed by LSAT/UGPA index scores, and the magnitude of average racial/ethnic score gaps on the LSAT. In light of his argument, an interesting question is whether or not Thernstrom himself had a reasonable basis to expect that APA law school candidates would be the greatest beneficiaries of Prop. 209 and SP-1.

Thernstrom’s critical review of Professor Linda Wightman’s “The Threat to Diversity,” which he published contemporaneously with the other works critiqued in this article, provides a telling answer to this
question. Wightman, using the Law School Admission Council’s massive national database of 1991 law school applicants, conducted a statistical analysis of how the composition of first-year law students would change if admission decisions were made exclusively based on a combination of LSAT scores and UGPAs.83 Table 5 displays what the racial/ethnic composition of ABA law schools would be if students were selected purely on a ranking of applicants’ LSAT/UGPA index scores.84 In Table 5 these admission projections are contrasted with the decisions that were actually made nationally by ABA law schools during the 1990-91 application cycle. In order to facilitate easier comparisons, I have upwardly adjusted the projected admission figures to be equal to the total number of students actually admitted.85

Table 5: Actual Admission Decisions Versus LSAT/UGPA “Numbers Only” Decisions for 1990-91 Applicants to ABA Schools

<table>
<thead>
<tr>
<th>Racial/Ethnic Group</th>
<th>Actual Admits</th>
<th>Projected Admits under LSAT/UGPA Model</th>
<th>Percentage of Actual Admits Excluded under “Numbers Only”</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>3,435</td>
<td>822</td>
<td>76%</td>
</tr>
<tr>
<td>Mexican American</td>
<td>629</td>
<td>300</td>
<td>52%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>1,351</td>
<td>810</td>
<td>40%</td>
</tr>
<tr>
<td>American Indian</td>
<td>302</td>
<td>177</td>
<td>41%</td>
</tr>
<tr>
<td>Asian Pacific Amer.</td>
<td>2,312</td>
<td>1,727</td>
<td>25%</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td>324</td>
<td>118</td>
<td>64%</td>
</tr>
<tr>
<td>People of Color Total</td>
<td>8,353</td>
<td>3,955</td>
<td>53%</td>
</tr>
<tr>
<td>White</td>
<td>42,287</td>
<td>46,684</td>
<td>(INCREASE OF 10%)</td>
</tr>
<tr>
<td>Overall Total</td>
<td>50,640</td>
<td>50,638</td>
<td>UNCHANGED</td>
</tr>
</tbody>
</table>

83. See Wightman, Sex Differences in LSAT Scores, supra note 80. Wightman also used this data to analyze subsequent law school graduation rates and bar passage rates for those students. To mirror the common weights assigned to these two factors by law schools, Wightman weighed LSAT scores 60% and UGPAs 40% in her index. Id. at 270.

84. More technically, the figures for projected admits by LSAT/UGPA index score are derived from one of two models Wightman devised in her study. Wightman’s Logistic Regression Model—the one used here—“mimicked the relationship between the two predictor variables and the actual admission decision uniquely for each school by using each school’s applicant and admission decision data. Thus 173 regression models were developed, one for each of the 173 schools included in the study.” Wightman, Threat to Diversity, supra note 82, at 6. Wightman’s second model, the law school grid model, collapses all law schools and applicants into a single pool, from which hypothetical decisions are made based on LSAT/UGPA ranking. See id. at 9-10 (describing the grid model). Wightman argues that the grid model is less realistic in its assumptions because it is unlikely that applicants of color would necessarily accept offers from admission to law schools that are lower ranked than the schools to which they applied. See id. at 18, 22-23.

85. Lest the concern be raised that my “adjustments” inflate admission disparities in order to bolster my argument, I wish to alert readers that the opposite is true. Failing to make these corrections would exaggerate the degree to which the LSAT/UGPA model screens out people of color because the total admitted under Wightman’s logistic regression model is 43,777 whereas the actual number admitted is 50,640. See id. at 22 tbl.5. Therefore, within each ethnic group I multiplied the number of projected admits by 1.15677 (which is 50,640 divided by 43,777) in order to equalize comparisons with actual admits. Before corrections, the projected LSAT/UGPA admits in Wightman’s model were: African American, 711; Mexican American, 260; Hispanic, 700; American Indian, 153; Asian American, 1493; Puerto Rican, 102; students of color total, 3419; and Whites, 40,358. Id. Another way in which Wightman highlights the disparities created by “numbers only LSAT/UGPA” admissions, is that 26% of actual 1990-91 applications from both White and APA candidates resulted in offers of admission, while under her LSAT/UGPA model 26% of White applications versus only 15% of APA applications would result in offers of admission. Id. at 14 tbl.1.
The data indicates that over half of all students of color would have been excluded from an ABA legal education under a LSAT/UGPA model. While the drops for African Americans, Puerto Ricans and Mexican Americans are more severe, it is also important to note that APA admissions would drop by one quarter while White enrollments would increase by ten percent under Wightman’s LSAT/UGPA model.

Though it is inconsistent with his claims about APAs and Prop. 209/SP-1, Thernstrom basically acknowledges the accuracy of Wightman’s findings. For example, Thernstrom converts Wightman’s data into a table titled “The Estimated Strength of Racial Preferences in Admissions to Law School.” In this table, Thernstrom calculates that APAs are 1.55 times more likely than Whites to be admitted to law school with the same numerical credentials compared to what would occur under a model based completely on ranking applicants by LSAT scores and undergraduate grades. Yet, his “divide and conquer” narrative focuses on criticizing the magnitude of “preferences” for African Americans, and ignores the disparate impact of LSAT/UGPA admissions on APAs. Thus, when the opportunity presents itself to use data on APA law school admissions as ammunition in his assault on affirmative action, Thernstrom seizes the chance. When attention to APA law school applicants might undermine his attack on race-conscious admissions, Thernstrom employs the very same sleight-of-hand technique—which he terms the “Vanishing Asian”—that he criticizes the Left and the media for using.

V. THE MERITS OF TESTOCRACY: TESTING THE CONSEQUENCES AND VALIDITY OF THE LSAT FOR APAS

So far I have concentrated on the divide between Thernstrom’s claims

86. See Thernstrom, Diversity and Meritocracy, supra note 81, at 16 (“Professor Wightman is doubtless correct that strong racial preferences were given in the law school admission process in the 1990-91 application cycle . . .”). See also Linda F. Wightman, Through a Different Lens: A Reply to Stephan Thernstrom, 15 CONST. COMMENT. 45, 47 (1998) (responding to Thernstrom’s critique of her study and concluding: “He criticizes the [Wightman’s] models, but concedes that their predictions of the impact of eliminating race as a factor in law school admissions are likely correct.”).
87. Thernstrom, Diversity and Meritocracy, supra note 81, at 17.
88. See id. at 17 tbl.1. Thernstrom derives this figure from Wightman’s logistic regression model. See Wightman, Threat to Diversity, supra note 82, at 22 tbl.5. Thernstrom divided the number of APAs actually admitted to law school in 1990-91 (2,312) by the number of APAs projected to be admitted (1,493) to arrive at the 1.55 figure.
89. See Wightman, Through a Different Lens: A Reply to Stephan Thernstrom, supra note 86, at 46 (concluding: “Professor Thernstrom introduces an implicit ‘divide and conquer’ strategy to his agenda by suggesting that the elite law schools gave a greater boost to blacks than to other minority groups.”).
90. See Thernstrom, Diversity and Meritocracy, supra note 81, at 16-19.
91. See Thernstrom, Farewell to Preferences?, supra note 9, at 39-41.
about APAs' post-affirmative action and the actual fallout of Prop. 209/SP-1 at UC law schools. A persistent problem in the debate over affirmative action, however, is how to define and measure merit. In the current law journal literature, increasing attention is being devoted to critical examinations of merit, particularly after the growing backlash against affirmative action. For example, critical race theorists like Richard Delgado and Daria Roithmayr argue that traditional merit standards quietly embody socially accepted biases that generally work to the advantage of Whites, men and the affluent. In contrast, Farber and Sherry argue that Delgado, Roithmayr and other "radical multiculturalists"—who critique the power dynamics that historically ground conventional merit criteria—unintentionally uphold a view of merit with "anti-Asian" implications.

Just as the political Left's neglect of APA issues surrounding affirmative action has contributed to the ascendancy of the Right's "APAs as victims of affirmative action" discourse, so too has the exclusion of APAs from the critique of merit contributed to the misperception that deconstructing merit is somehow "anti-Asian." In the next two sections I will advance a critique of merit in the law school admissions context that focuses specifically on APAs. My APA-centered critique of merit focuses on the LSAT for the simple reason that the test plays such a decisive role in admission decisions. Professor Sumi Cho appropriately expresses the spirit of my inquiry when she urges critical race theorists to question the fairness

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93. For leading anthologies of critical race theory, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

Fairness, including fairness in testing, is always a contested concept, always relative to someone's interests, perspectives, and purposes. It does not stand outside experience in some external realm. It's a matter of what we deem important. And the 'we' is generally those who are in a position to assure that their own merits, values, standing and excellence remain untouched.

Delgado, at 1742. Roithmayr argues:
[The] conventional distinction between merit and bias no longer seems self-evident because merit necessarily defers to the social bias it seeks to exclude. Thus, we are left with the task of reconstructing new meanings for merit by having difficult political conversations about what constitutes social value in the legal profession, whether exams accurately predict the ability of a practicing lawyer, whether case law instruction or practical clinical instruction is more appropriate for certain kinds of law, and finally, whether we want our law schools to become resegregated under an admissions process that looks only at the number of a person's LSAT score and GPA, rather than at the content of her character.


95. FARBER & SHERRY, supra note 11, at 52-71. I believe that the evidence presented in this article spotlights how Farber and Sherry's argument that race-critical investigations of merit are "anti-Asian" is overly broad, to say nothing of strained and illogical. For a critique/response to Farber and Sherry's claim about critical race theory and merit, see Richard Delgado, Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond, 86 GEO. L.J. 1051, 1057, 1062 (1998) (calling the anti-Semitic/anti-Asian contention a "straw man" argument, and arguing that "Farber and Sherry put words in our mouths, then take us to task for what they think we must be saying."). See also Daria Roithmayr, Guerrillas in our Midst: the Assault on Radicals in American Law, 96 MICH. L. REV. 1658 (1998) (book review). For a symposium dedicated to the scholarly debate over BEYOND ALL REASON, including a reply by Farber and Sherry, see 83 MINN. L. REV. 1589-1666 (1999).
of standardized tests:
Race-critical approaches would encompass... the more thorough-going radical critique that makes visible the differentational logic of racial supremacy which historically, institutionally, and ideologically grounds meritocracy. From this perspective it is crucial to interrogate the utopia of equal opportunity standardized test-taking as a sufficient vision of a racially just future.  

In the present interrogation of the merit I will attempt to establish three reasons for APAs and others to be concerned about the social consequences of heavy reliance on LSAT scores. First, the LSAT has a racial screening effect between Whites and APAs, even among students who perform equally in the same universities. Second, available predictive validity evidence from APA students at Boalt shows that the correlation with law school grades is disturbingly low. Third, the LSAT “utopia” also can contribute to the production of a dystopic legal profession because the test has a consistently negative correlation with social activism, both among students at specific law schools, as well as within the test taking population overall.

A. The Racial Screening Effect of the LSAT

Wightman’s empirical analysis sheds light on the findings in Section IV, and why it is that APA enrollments would decrease if LSATs and UGPAs were the sole admission criteria. Wightman created separate logistic regression admission models using either only UGPA or LSAT/UGPA combined. Bearing in mind that there were 2,312 APAs actually admitted to ABA law schools in 1990-91, it is significant that the UGPA model would admit 1,954 APAs (85% of actuals), compared to 1,727 (75% of actuals) under the LSAT/UGPA model.  

Thus, under “race blind numbers only” admissions, APA enrollments in law school would go down twelve percent under the LSAT/UGPA model compared to the UGPA only model. The racial screening effect of the LSAT relative to college grades is also much more severe for most other groups of color.

Essentially, these results occur because in recent years APAs have had a very modest gap of about one to two points on the LSAT (on a 120-180 scale) compared to Whites. Table 6 displays White and APA applicants’

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97. This data is derived from Wightman, Threat to Diversity, supra note 82, at 16 tbl.2. As with Table 5, these calculations are different than Wightman's reporting format in that I have equalized the overall total number of admits to be the same under both models. For a critique of Wightman’s data presentation, and how it masks the disparate impact of the LSAT for APAs and other groups of color, see William C. Kidder, Portia Denied, Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education, 12 YALE J. L. & FEMINISM 1, 10 tbl. 2 (2000) [hereinafter Kidder, Portia Denied] (calculating that LSAT/UGPA admissions increases projected White enrollments by 1,636 compared to UGPA-only admissions).
98. See Kidder, Portia Denied, supra note 97.
99. Across the five years listed in Table 6, the unweighted average gap was 1.7 points on the 120-180 scale. Converting this figure to standard deviation units yields a better sense of what this LSAT gap means more broadly. The estimated standard deviation on the LSAT for all applicants in 1995-96 was 8.5 points for both Whites and APAs. See Sander, supra note 54, at 493 tbl.8. This means that the
average LSAT scores and UGPAs for five recent admission cycles. While the existence of group differences in test scores does not necessarily establish that the LSAT is unfair or biased, one disconcerting feature of the small LSAT gap between Whites and APAs is that it is not accounted for by differences in educational attainment as expressed in college performance. One recent study by Testing for the Public investigated 1996-98 Boalt Hall applicants. Controlling for college attended, graduation date (i.e., grade inflation over time) and UGPA within each of Boalt's top five feeder schools by applicant volume—Berkeley, UCLA, Stanford, Harvard and Yale—APAs were still over two points behind Whites on the LSAT. Further analysis also revealed that underrepresented APA subgroups such as Filipinos and Southeast Asians had average LSAT scores over five points behind those of whites among students with the same grades in the same college.

White-APA gap on the LSAT is one-fifth (.20) of a standard deviation. In comparison, the UGPA standard deviation is about .40, which means that the gap of .02 in 1995-96—bearing in mind it was lower, even zero, in other years—amounts to only a .05 standard deviations difference, which is not meaningful. See LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 11 (1996) (listing UGPA standard deviation information for ABA law school applicants). Although LSAT/UGPA was slightly less predictive of admit/deny decisions for APA applicants than for White applicants in Wightman's 1990-91 sample, the correlation between admission decisions and LSAT/UGPA ranking was still .67 for APAs. See Wightman, Threat to Diversity, supra note 82, at 12-13. Given the discussion of a “tipping point” that has developed since 1991, see infra Section VI, it would not be surprising if reliance on LSATs and UGPAs in choosing APA candidates has increased in the 1990s relative to Whites. However, I am not aware of any data directly bearing on this question.

100. See U.S. COMMISSION ON CIVIL RIGHTS, THE VALIDITY OF TESTING IN EDUCATION AND EMPLOYMENT 16 (1993) (noting that most psychologists reject the notion that group differences necessarily mean a test is biased); Ronald L. Flaugher, The Many Definitions of Test Bias, AM. PSYCHOL. 671, 673 (1978).

101. See David M. White, Presentation to the Committee on Higher Education of the Texas House of Representatives (Sept. 24, 1998). For coverage in the college and academic press, see ANDREA GUERRERO, SILENCE AT BOALT HALL (forthcoming 2001); Brady R. Dewar & Vasant M. Kamath, Report Shows LSAT Score Gap, HARV. CRIMSON, Oct. 2, 1998 (on file with author); Chris Jenkins, Study Highlights Disparities in LSAT Scores, DAILY CAL., Oct. 29, 1998, at 1; Kirstin Swagman, LSAT Scores Show Race Gap, DAILY NW., Nov. 3, 1998 (on file with author). Despite a sea of change in the applicant pool, Testing for the Public's study confirms the result of a national study conducted twenty years earlier. See Joseph Gannon, College Grades and LSAT Scores: An Opportunity to Examine the 'Real Differences' in Minority-Nonminority Performance, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 272, 275-77 (David M. White ed., 1981) (reporting a 36 point White/APA gap on the LSAT (200-800 scale) after controlling for UGPA and college attended). Themstrom criticized Testing for the Public's study for, among other things, failing to control for student differences in courses of study. See Dewar & Kamath, supra (quoting Themstrom as asking, "The question you have to ask is were the students taking essentially the same courses?"). This is a fair criticism. Time and resources permitting, I hope to provide empirical answers to this question in the future.

102. See David M. White, Presentation to the Asian Pacific Americans in Higher Education Conference, San Francisco (Mar. 13, 1999) (presenting LSAT data analysis conducted by William C. Kidder). LSAC reports, to my knowledge, have never listed performance on the LSAT separately for APA subgroups. Thus, Testing for the Public's study may heretofore be the only one to report LSAT averages for Filipinos and Southeast Asians. I encourage other scholars to pursue this neglected area of research.
Table 6: Average LSAT Scores and UGPAs for Applicants to ABA Law Schools

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<tr>
<td>LSAT: Whites</td>
<td>153.8</td>
<td>154.2</td>
<td>154.6</td>
<td>153.7</td>
<td>153.9</td>
</tr>
<tr>
<td>LSAT: APAs</td>
<td>151.7</td>
<td>152.5</td>
<td>152.8</td>
<td>152.2</td>
<td>152.6</td>
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<tr>
<td>UGPA: Whites</td>
<td>3.09</td>
<td>3.12</td>
<td>3.13</td>
<td>3.14</td>
<td>3.16</td>
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<tr>
<td>UGPA: APAs</td>
<td>3.08</td>
<td>3.12</td>
<td>3.12</td>
<td>3.12</td>
<td>3.14</td>
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B. Predictive Invalidity

There is an ongoing debate over whether the LSAT is an accurate predictor of law school performance. Traditionally—especially within the educational measurement community—the fairness of a standardized test like the LSAT is evaluated by measuring how well it predicts some criterion variable, in this case defined as first-year law school grades. Predictive validity is measured using linear regression statistical techniques. While LSAC researchers routinely study the predictive validity of the LSAT for first-year grades, LSAC has yet to publish data regarding the LSAT's ability to predict law school grades for APAs specifically. Furthermore, LSAC has rarely studied the predictive power...
of the LSAT beyond the first-year. The evidence for three recent entering classes at Boalt Hall indicates that there is a .21 correlation among APAs between first-year law school grades and a combination of LSAT and UGPA, which is extremely modest. A correlation coefficient of .21 means that only four percent of the total variance in actual law school grades among Boalt’s enrolled APA students is accounted for by the multiple regression equation that predicts first-year law school performance from an optimal combination of LSAT and UGPA. Furthermore, this


For the only LSAC study in the last couple of decades that looked at the predictive validity of the LSAT after the first-year of law school, see Donald E. Powers, Predicting Law School Grades for Minority and Nonminority Students: Beyond the First-Year Average, LSAC 81-1, in Law School Admission Council, Reports of LSAC Sponsored Research: Volume IV, 1978-1983, 261, 275 (1984) (noting that the predictive validity of the LSAT for a sample of 12,000 students goes down from the first- to the third-year of law school, while the correlations for UGPA go up). The study also found that minorities’ performance improves slightly relative to Whites in the second and third years of law school. See id. at 263.

This data is reported in Malcolm M. Feeley et al., Report of the “Merit” Committee for the University of California, Berkeley, School of Law, at 8 tbl.1 (Nov. 17, 1998) (unpublished report, on file with the author). This data was based on 91 APA students at Boalt in the entering classes of 1992, 1993 and 1994 (though the Merit Committee stated it was 1993-95). See Law School Admission Council, LSAT Correlation Study Report for Boalt Hall (1996). The standard deviation for this cohort was 5.54 points on the LSAT and 0.18 UGPA points. See id. The correlations are derived from the weighting of the LSAT and UGPA that would produce the highest possible correlation among this sample. Since optimal weights fluctuate from year to year and between racial/ethnic groups—and thus depart from the actual index formula used by schools in making selection decisions—these figures may actually overstate slightly the actual correlations with law school grades among this group of selected students. See also Cole Report, supra note 25, at 31 (discussing this same predictive validity evidence at Boalt). I should also mention that the Boalt Hall Redefining Merit Committee has commissioned LSAC to conduct a study of Boalt’s 1992-96 entering classes to examine the predictive validity of the LSAT and UGPA for all three years of law school. However, I was unable to obtain permission to publish these results in time for publication. I encourage interested scholars to contact the Boalt administration regarding this forthcoming research.

The correlations might be somewhat higher for a random sample of APAs who possessed a wider range of LSAT Scores and UGPAs. See Wightman, Threat to Diversity, supra note 82, at 32-33 (arguing that “restriction of range” depresses the correlations between LSAT scores and law school grades). But see Sturm & Guinier, supra note 92, at 972-73; Kidder, The Rise of the Testocracy, supra note 92 (critiquing the restriction of range adjustments). Nonetheless, range restriction is insufficient to explain the relatively low correlations for APAs compared to Whites. The 336 White Boalt students in the same study had standard deviations of 5.18 for the LSAT and .21 for UGPA (slightly more compressed than APAs on the LSAT), and yet White’s LSAT/UGPA correlations were higher (.35). See Feeley et al., supra note 110, at 8 tbl.1; Law School Admission Council, LSAT Correlation Study Report for Boalt Hall, id. (listing standard deviation units for the students in this study). This limited data set suggests that the LSAT and UGPA may have differential validity for APAs. There is also research to indicate that standardized tests also have less predictive validity for Hispanics compared to Whites. See Michael A. Olivas, Legal Norms in Law School Admissions: An Essay on Parallel Universes, 42 J. Legal Educ. 103, 114 (1992).

These results resemble Hathaway’s study of Columbia law students. See James C. Hathaway, The Mythical Meritocracy of Law School Admissions, 34 J. LEGAL EDUC. 86, 91 tbl.3 (1984) (reporting that by the third year of law school, minority students”—APAs included—law school grades correlated .17 with LSAT scores, a correlation that dropped below statistical significance). It would therefore be surprising if the LSAT/UGPA correlations with law school grades in the second and third years are higher for APAs. The forthcoming Boalt Hall Redefining Merit Committee study, see supra note 110, should provide answers to this question.
predictive validity framework fails to consider whether the criteria of law school grades itself is a fair and adequate benchmark for assessing the broad range of skills required to succeed in the legal profession.\footnote{113} Defenders of the LSAT are quick to point out that since the students who are admitted and enrolled at a particular law school vary much less in their LSAT scores than applicants generally, this "restriction of range" will tend to artificially depress the predictive power of the LSAT compared to what would occur with a random sample.\footnote{114} However, even if one were to be more than generous in correcting for range restriction by doubling Boalt APAs' LSAT/first-year grade correlation to .40, this would still be less than compelling evidence of the LSAT's ability to predict law school grades. Assuming a .40 correlation, suppose there was a first-year law class of 200 students, 100 of whom have LSAT scores of 150 (46\textsuperscript{th} percentile) and 100 of whom have LSAT scores of 160 (84\textsuperscript{th} percentile). It would still be true that of the 100 students who scored ten points lower on the LSAT, 41 would finish in the top half of the class (random would be 50) and 18 would finish in the top quarter of the class (random would be 25).\footnote{115}

\textbf{C. How the LSAT Organizes a Legal Community that Excludes Community Organizers}

Instead of relying so heavily on LSAT scores as the polestar of merit, some critics like Ralph Nader argue that law schools should seek to admit applicants who show promise as social activists and community organizers.\footnote{116} This issue takes on greater importance in the affirmative action debate as more and more studies indicate that students of color for whom race was a consideration in admissions demonstrate significantly higher rates of social activism compared to students enrolled under "regular" admissions. For example, Bowen and Bok's mammoth study of

\begin{itemize}

Good lawyers do a wide variety of things and employ a wide variety of skills. Lawyers question and listen to clients, witnesses, decision makers, and opponents. They counsel, comfort, and cajole. They negotiate. They work collaboratively with clients and others to solve problems in ways that require practical wisdom as well as legal analytical skill. Lawyers are public speakers. Lawyers are storytellers. Relatively little of what many lawyers do involves the kind of legal analysis taught in law schools. Which law school applicants will become good lawyers is a question legal educators have barely begun to ask.... Consider the use of LSAT scores in law school admission decision making. The LSAT predicts, within a certain range of error, performance in the first year of law school. However, it does not purport to predict success in lawyering.... Nonetheless, decision makers use the LSAT extensively in law school admissions, despite its substantial adverse impact on African-American and Latino/Chicano applicants, and despite its limited utility in predicting success in lawyering.

\textit{Id.}

\item[114.] \textit{See} Wightman, \textit{Threat to Diversity}, supra note 82, at 32-33 (arguing that available data understates the predictive validity of the LSAT in large part because of restriction of range).

\item[115.] This example is taken from Philip D. Shelton, \textit{The LSAT: Good—But Not That Good}, LAW SERVICES REPORT (LSAC, Newtown, PA.), Sept./Oct. 1997, at 2-3.

\item[116.] \textit{See} LEMANN, supra note 25, at 230.
\end{itemize}
Black and White elite college graduates found that the African Americans in their sample who went on to become attorneys were more likely than their White peers (21% versus 15%) to become leaders of community service organizations. In addition, a recent study of 1970-1996 University of Michigan Law School alumni found that minority graduates had statistically significantly higher rates on measures of social activism such as being on the board of directors of a nonprofit organization or hours of pro bono legal work.

Similar findings have been reported for APAs specifically. One study of UCLA alumni compared APAs admitted under affirmative action criteria to APAs admitted through the “regular” program. The APAs admitted to UCLA under affirmative action (with relatively lower average LSAT scores) served nearly double the number of minority clients and over triple the number of clients needing foreign language proficiency compared to APA “regular” admits. The APA affirmative action admits at UCLA also served 2.7 times more low-income and working class clients compared to the APA alumni regularly admitted. This suggests that the exclusion of APAs from affirmative action (which is the practice of many law schools) combined with heavy reliance on LSAT scores in “regular” admissions, will tend to produce a crop of APA lawyers—and other groups of lawyers—that is, in the aggregate, less responsive to the needs of those who are traditionally under-served by the legal profession.

One objection made by Thernstrom and others to the evidence above is that it is hardly a criticism of the LSAT or a justification for affirmative action because differences in social activism simply reflect admissions officers placing a premium on community service commitments in order for applicants to compensate for having lower LSAT scores. However, I contend that this objection underestimates the magnitude of the problem. The available research indicates that doing well on the LSAT negatively correlates with social activism for the larger pool of law school applicants, casting doubt on the notion that this effect is entirely an artifact of selection decisions. Professor Alexander Astin, in a national study of 5,854 LSAT

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117. See Bowen & Bok, supra note 8, at 168 (reporting also that African American graduates in the 1976 cohort of their College and Beyond database were more likely than White matriculants to lead community/social service organizations among those earning M.D.s, M.B.A.s, M.A.s and Ph.D.s); see also Derek Bok & William G. Bowen, Access to Success, 85 A.B.A. J. 62, 63 (1999) (reporting the same 21% versus 15% statistic about lawyers).

118. See David L. Chambers, et al., Doing Well & Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School, 1970-1996, L. QUADRANGLE NOTES 60, 69 (Summer, 1999) (reporting that nonprofit board membership was significantly higher in the 1970s, 80s and 90s, and that pro bono yearly hours were significantly higher in the 1990s—and modestly higher in the 1970s and 80s).

119. See Muratsuchi, supra note 2, at 130 (reviewing the findings of a 1988 survey sponsored by the Japanese American Bar Association, Southern California Chinese Lawyers Association, Korean American Bar Association and the Philippine American Bar Association).

120. See id. The exact figures were 1.8 times more minority clients and 3.1 times more foreign language clients.

121. See Thernstrom & Themstrom, Reflections on The Shape of the River, supra note 9, at 1621 (arguing that compensatory admissions may account for Bowen and Bok’s findings).
test takers, found that LSAT performance negatively correlates with social activism.\(^{123}\) Leonard Baird, in an earlier study of test takers conducted for the Educational Testing Service, reports that LSAT scores negatively correlate with self-ratings on the ability to relate to others on an individual basis.\(^{124}\) He similarly found that both GRE verbal and math scores negatively correlate with placing a value on being of service to others in choosing a vocation.\(^{125}\)

To put this in perspective, the notion that LSAT scores negatively correlate with social activism generally appears not to have penetrated the scholarly affirmative action debate. Chambers and his colleagues at the University of Michigan Law School did not make any firm conclusions about this point, but they did offer a tentative hypothesis similar to Thernstrom’s compensatory admissions explanation.\(^{126}\) Bowen and Bok offer their evidence about Black-White differences in social activism as a positive long-term outcome of affirmative action policies.\(^{127}\) Yet, Stephan and Abigail Thernstrom take Bowen and Bok to task for over-interpreting these results. The Thernstroms argue that higher social activism on the part of African Americans is not uniquely attributable to attending an elite college through affirmative action since a national control group of Whites also had higher social activism levels than Whites in Bowen and Bok’s database of elite schools.\(^{128}\)

My assertion that standardized tests like the LSAT negatively correlate with social activism is consistent with the finding that White students at prestigious colleges are less active in the community that the national norm. However, this finding is not, as the Thernstroms suggest, a reason to remain skeptical about the social benefits of affirmative action. Rather, this negative relationship calls into question the social utility of the predominant test-centered definition of merit. “Business as usual” law school admissions, with a heavy reliance on the LSAT, can harm individual applicants, the legal profession and the nation by weeding out people with lower LSAT scores who are more likely to provide services to those who need it most. In any event, this area is not well researched, and I hope that raising the issue will stimulate greater inquiry, including about APAs specifically.

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123. See ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE 213 (1993) (reporting also that LSAT scores positively correlate with scores on a hedonistic personality inventory).
125. See id. at 418-19 (also reporting that GRE math scores negatively correlate with self-ratings of having sympathy for others in trouble, and that MCAT scores negatively correlate with valuing opportunities for leadership in vocational choices).
126. See Chambers et al., supra note 118, at 71 (concluding that the cause of their own findings about a negative correlation between community service and index scores is unclear, but that it may reflect Michigan placing a greater emphasis on social activism for those it admits with lower index scores).
127. See BOWEN & BOK, supra note 8, at 158-61.
128. See Themstrom & Themstrom, Reflections on The Shape of the River, supra note 9, at 1621 n.143.
VI. APPLYING CRITICAL RACE THEORY TO APAS AND LAW SCHOOL ADMISSIONS

Professor Frank Wu argues, "The ease with which the model minority myth has been manufactured and manipulated presents an ideal test case for critical race theory." In order to better situate APAs in the legal education affirmative action debate—and to locate Ternstrom's strategic deployment of the model minority discourse in particular—this section will apply two key concepts from critical race theory to the subject of law school admissions. More specifically, this section will explore Professor Neil Gotanda's notion of the "Miss Saigon Syndrome" and Professor Derrick Bell's notion of the "tipping point."

A. Miss Saigon Goes to Law School

Neil Gotanda, a critical race theorist best known for his critique of color blindness, argues that mainstream America clings to a deeply-held belief that racism directed at APAs is nonexistent, or at least inconsequential. The "Miss Saigon Syndrome" is Gotanda's term for this ubiquitous belief, a belief buttressed by the model minority ideology. This syndrome refers to the unanimously hostile reaction by the press and general public that ensued when APA actors protested the exclusion of APAs from casting auditions for the role of a Eurasian pimp in the Broadway production of Miss Saigon.

In this article, I assert that there an element of the "Miss Saigon Syndrome" operating in Ternstrom's critique of affirmative action. Consequently, I argue, his deployment of the model minority thesis perpetuates the fiction that APAs are shielded from racial prejudice. There are at least two reasons to conclude that Ternstrom's celebration of APA achievement has more to do with a collateral attack on affirmative action than an abiding and nuanced concern for the fate of APA law school candidates. The first is the wide divergence between the admissions data

129. Wu, supra note 14, at 247.
131. See Neil Gotanda, Asian American Rights and the "Miss Saigon Syndrome," in ASIAN AMERICANS AND THE SUPREME COURT 1087, 1088 (Hyung-Chan Kim, ed., 1992) [hereinafter Gotanda, Miss Saigon Syndrome]; see also Wu, supra note 14, at 246 ("[T]he model minority myth whitewashes the discrimination faced by Asian Americans. As an Asian-American leader remarked about discrimination, 'people don't believe it.' There can be no appreciable racism against Asian Americans, because as the model minority myth posits, they all are well-off or have the ability to overcome discrimination.").
132. See Gotanda, Miss Saigon Syndrome, supra note 131, at 1088-89.
133. See id. at 1087-88.
134. Cf. Wu, supra note 14, at 261 ("Asian Americans rarely appear in the affirmative action context, except... when they are part of a collateral attack on the programs.").
135. See also Wightman, Through a Different Lens: A Reply to Stephan Ternstrom, supra note 86, at 48 (concluding that the impact of Ternstrom's aim of organizing law school admissions with the primary goal of minimizing group performance differences is "not good for legal education, is not good for students, and is disingenuous in its goals"); id. at 52 (querying whether Ternstrom is really
reviewed herein and Thernstrom’s claims that APA law students benefited the most from Prop. 209 and SP-1. The second is the transparent inconsistency between Thernstrom’s critique of Wightman and his analysis of UC law schools.

The question then becomes whether Stephan Thernstrom is not only mascoting APAs in order to assault affirmative action, but whether his critique of race-conscious solutions also perpetuates the notion that APAs do not confront racial subordination. While the “Miss Saigon Syndrome” is frequently a little-noticed undercurrent in the affirmative action debate that must be inferred by carefully listening to what is not stated, Thernstrom explicitly argues that APAs do not confront serious problems with racism. In the context of Prop. 209 and SP-1, he contends: “The whole idea of ‘people of color’ is a politically correct concept designed to promote the fiction that Asian Americans face enormous problems in contemporary America because of their race. One positive effect of the California admissions controversy may be to bury that silly notion for good.” This argument about the lack of racism faced by APAs functions as a moral and rhetorical underpinning to Thernstrom’s claims that other groups of color should not be given affirmative action consideration.

One example of Thernstrom’s indifference to educational barriers for APAs involves his repeated references to APAs as being “overrepresented” at prestigious colleges and universities, an idea he also posits to cast doubt on the efficacy of affirmative action. However, as Professors Chin, Cho, Kang and Wu point out in their article opposing Prop. 209, the focus on over-parity status—myopia clearly supported by the model minority ideology—obeys higher education discrimination against APAs.

advancing “an agenda designed to assure that those who have most benefited from the privileges of a majority society continue to be assured those privileges”).

136. Thernstrom, Farewell to Preferences?, supra note 9, at 48.
137. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 400 (1997). The Thernstroms contend:

The spectacular academic achievements of the Asian students—records that have made these students impossible for colleges to turn down—account for the surge in their enrollments in elite colleges and universities over the past decade and a half. Less than 4% of the population, they account for 24% of undergraduate enrollment at Stanford and Columbia, 19% at Harvard, 17% at Cornell, and 16% at Yale. The striking differences between Asian and black students clarify the difficulties involved in engineering racial balance in highly competitive institutions. The number of Asian students at places like Harvard has soared, but not because of admissions policies designed to recruit more of them for ‘diversity’ purposes. By now, indeed, Asian Americans are so overrepresented at many elite schools that their presence actually reduces diversity, if it is defined as some approximation of proportional representation for all groups.

Id. See also Thernstrom & Thernstrom Reflection on The Shape of the River, supra note 9, at 1629; Stephan Thernstrom, Status Anxiety, NATIONAL REV., Dec. 6, 1999, available in 1999 WL 11342500.

138. See Chin et al., Rethinking Racial Divides, supra note 57, at 221. Professor Sumi Cho commenting:

Now let me make clear that I’m not taking issue with the equation of under-parity representation with the inference of discrimination. Rather, I dispute the assumption that the kind of logically converse relationship that over-parity, or as its been called, over-representation, automatically comports with an inference of non-discrimination or the absence of discrimination. I believe that this converse equation has also been made, not in legal doctrine, but flowing from the logic of legal doctrine, so that it has just become ‘common sense’ that groups that are over-parity automatically are considered to be free from any type of discrimination. For students of APA history, we know that this common sense is not in
These authors point to the much-publicized investigations in the 1980s of colleges like Harvard, Berkeley, Brown and Stanford on the issue of whether admission preferences were given to Whites vis-à-vis APAs. Such discrimination, or negative action, against APAs despite equivalent qualifications in terms of extracurricular activities, test scores, grades, etc., is a stark reminder that so-called merit criteria can be easily manipulated when White privilege is threatened.

In another telling example, the Office for Civil Rights—the enforcement branch of the U.S. Department of Education—concluded that preferences for the children of alumni loomed large in creating admission disparities between Whites and APAs in elite college admissions, yet found that such legacy preferences “were long-standing and legitimate, and not a pretext for discrimination.”

keeping with what we often have experienced. Rather, in keeping with our history of labor market exclusion, racialized and gendered labor, and immigration policies that created confined labor ‘niches’ for APAs, our experiences confirm the co-existence of over-parity representation and discrimination. In other words, it has been at the very moment at which we exist over-parity in a particular labor market that we have been subjected to the most discrimination.

Id. See also Chin et al., Beyond Self-Interest, supra note 14, at 155-61.


140. See Kang, supra note 14.

141. See Bunzel & Au, supra note 139 passim; Tsuang, supra note 139, at 662-65 (reviewing the evidence of different measures of qualifications between Whites and APAs). It should not be inferred that I am arguing that traditional measures of educational attainment, like standardized test scores, should be the primary basis on which students are admitted.

142. One example is UC Berkeley, which instituted a SAT verbal cut-off score in 1984. This cut-off was partly responsible for the 20% drop (1,303 to 1,031) in APA enrollments to Berkeley compared to the previous year. See Tsuang, supra note 139, at 673-74. Similarly, in 1984, a confidential memo from the UCLA Director of Admissions revealed the University’s agenda of wanting to preserve White entitlement. See Chang, supra note 58, at 1126 (quoting a memo from Rae Lee Siporin to UCLA’s Undergraduate Enrollment Committee: “The campus will endeavor to curb the decline of Caucasian students... A rising concern will come from Asian students and Asians in general as the number and proportion of Asian students entering at the freshman level decline—however small the decline may be.”). Ling-Chi Wang, the current Chair of UC Berkeley’s Ethnic Studies Program fears this will likely happen again once there is a backlash against APA “overrepresentation” at UC undergraduate campuses after Prop. 209 and SP-1. See Caught in the Cross Fire: Asian American Progressives Respond to the Lowell Settlement, NEWSLETTER OF THE CENTER FOR THIRD WORLD ORGANIZING 3-4 (Mar. 12, 1999). Wang comments:

I predict that in 3-4 years when all 9 University of California campuses are 50% plus Asians, the supporters of 209 will come back and say that this is not what we intended and we want to change admission policies again. At which time, where would Asian Americans turn for support? It has to be other minorities. So Asian Americans cannot be arrogant and racist. We should be aiming and working with other minorities... When the backlash happens... [t]he first thing they’ll do is to look at the English proficiency of Asian Americans and say that this isn’t enough to get into Cal. This will affect about 50% of Asians trying to get into University of California or CSU campuses. The Asian American population now is about 70-80% foreign born, with high percentages of Korean, Vietnamese, Chinese and Filipino.

Id.

B. The Tipping Point Between Neutral Action and Negative Action

The foremost barrier for APA law school candidates is not race-conscious affirmative action, as Thernstrom has suggested. Instead, the real roadblock encountered by APA law school applicants is “negative action” admission policies like those seen at some undergraduate institutions. This question has yet to be seriously investigated, at least within the contemporary law journal literature. Again, critical race theory lends itself to an illuminating analysis of this issue. Derrick Bell, one of the early leaders of the critical race theory movement, uses the concept of the “tipping point”—which has its origins in housing—to scrutinize the limits of America’s commitment to social justice, particularly for African Americans.

In an allegory based on his experiences at Harvard Law School, Bell probes what would happen if recruitment funding from a secret foundation made it possible to produce a steady stream of exceptionally well-qualified minority faculty candidates. As it turns out in Bell’s story, the law school ceases to hire additional minority faculty once they become about 25% of the faculty. The “tipping point” in Bell’s story is the point at which the very identity of the law school begins to change, so that professors who were previously supportive of diversity efforts suddenly resist hiring the next candidate of color, no matter how well-qualified he or she is.

The “tipping point” hypothesis posits that as there are more and more promising APA applicants, law schools will perceive that there are “too many Asians” and will become more resistant to selecting APAs once a
certain threshold has been reached. Table 7 supports this hypothesis. It displays national data on Whites’ and APAs’ aggregate chances of being admitted to at least one of the ABA-accredited law schools to which they applied. Data from the early, mid- and late-1990s are included. Between 1990-91 (which was a high-water mark in terms to application volume) and 1996-97, ABA applications by Whites declined 37%, causing the overall application volume to decrease 27% even though minority applications went up 6%. During this same period applications increased 6% for APA men and 28% for APA women. In other words, even though APA applications increased modestly in absolute terms, APA increases in terms of their share of the entire applicant pool were much more dramatic due to the concomitant drop in White applications. These trends also mean that it is more informative to compare White/APA admission rates within the same year than to compare APA admission rates from different years.

A close look at the data shows that as APA applicant volume proportionally increased in the 1990s, the gap in admission rates between APAs and Whites increased as well. A comparison of 1991-92 applicants reveals that nationally, Whites and APAs had virtually identical overall admission rates (56.3% versus 56.4%, respectively) at a time when there were 6.5 APA applicants for every 100 Whites. The relative increase in APA applications meant that in 1994-95 there were 9.2 APA applicants for every 100 Whites. The 1994-95 admission results reveal a widening gap in favor of Whites of 4.7 percentage points (67.2% versus 62.5%). The trend persists in 1997-98, when there were 10.7 APA applicants for every 100 White applicants. This corresponds to a gap of 5.1 percentage points (77.0% versus 71.9%).

The contrast between recent and earlier data is also revealing. In previous years, when APA applicant volume was smaller than in 1991-92, overall admission rates were nearly equal. For example, in 1984-85 there were 2.3 APA applicants for every 100 Whites and overall admission rates were very similar (78.1% vs. 77.0%). The operation of a “tipping point”

Whites thought was the percentage of various racial/ethnic groups in the U.S. population, followed by the actual figures, are as follows: Hispanic, 14.7% vs. 9.5%; Black, 23.8% vs. 11.8%; Asian American, 10.8% vs. 3.1%; and White, 49.9% vs. 74%). For an analysis of how such cognitive biases perpetuate racial and gender discrimination, see Krieger, Civil Rights Perestroika, supra note 113 passim; Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161 passim (1995).

149. See Applicant Data Reveal National Trends, LAW SERVICES REPORT 1, 6 (July/Aug. 1998).

150. See id. Comparing 1984-85 to 1996-97, applications from APA men rose 229% and they rose 356% among APA women, compared to a 2% overall decline among Whites. Id.

151. A smaller applicant pool translates into higher overall admission rates for everyone. Thus, while it may be true that the overall APA admission rate was higher in 1997-98 than in 1991-92, that is not reason to conclude that APA applicants are doing better relative to other racial/ethnic groups in 1997-98 compared to 1991-92.

152. While it is beyond the scope of this inquiry, it is interesting to note that other groups of color have far lower overall admission rates to law school than do Whites (or APAs), notwithstanding the public’s stereotypes about out-of-control affirmative action. For an analysis of these differences, see Kidder, Portia Denied, supra note 97 at 14 tbl. 4 (listing ABA admission rates between 1993-1998); see also DERRICK BELL, RACE, RACISM AND AMERICAN LAW (4th ed. forthcoming 2000).

is brought home by comparing 1984-85 and 1997-98—two years when White applicant volume was about the same as were White admission rates (78% vs. 77%). In 1984-85, when there were only 1,101 APA applicants, APAs had a 77% chance of being admitted to at least one of the schools to which they applied. In 1997-98 APA applications increased to 4,942, but APAs' admissions rate dipped below 72%.


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<tbody>
<tr>
<td></td>
<td>WHITE</td>
<td>APA</td>
<td>WHITE</td>
</tr>
<tr>
<td>3.75-4.0</td>
<td>86%</td>
<td>87%</td>
<td>89%</td>
</tr>
<tr>
<td>(5,181)</td>
<td>(283)</td>
<td></td>
<td>(5,088)</td>
</tr>
<tr>
<td>3.5-3.74</td>
<td>78%</td>
<td>77%</td>
<td>83%</td>
</tr>
<tr>
<td>(9,940)</td>
<td>(624)</td>
<td></td>
<td>(9,041)</td>
</tr>
<tr>
<td>3.25-3.49</td>
<td>70%</td>
<td>71%</td>
<td>77%</td>
</tr>
<tr>
<td>(13,555)</td>
<td>(835)</td>
<td></td>
<td>(11,225)</td>
</tr>
<tr>
<td>3.0-3.24</td>
<td>59%</td>
<td>66%</td>
<td>69%</td>
</tr>
<tr>
<td>(14,962)</td>
<td>(793)</td>
<td></td>
<td>(11,352)</td>
</tr>
<tr>
<td>2.75-2.99</td>
<td>46%</td>
<td>51%</td>
<td>59%</td>
</tr>
<tr>
<td>(12,171)</td>
<td>(738)</td>
<td></td>
<td>(9,332)</td>
</tr>
<tr>
<td>2.5-2.74</td>
<td>36%</td>
<td>41%</td>
<td>51%</td>
</tr>
<tr>
<td>(8,796)</td>
<td>(322)</td>
<td></td>
<td>(6,360)</td>
</tr>
<tr>
<td>2.25-2.49</td>
<td>29%</td>
<td>30%</td>
<td>41%</td>
</tr>
<tr>
<td>(5,105)</td>
<td>(345)</td>
<td></td>
<td>(3,696)</td>
</tr>
<tr>
<td>2.0-2.25</td>
<td>22%</td>
<td>21%</td>
<td>33%</td>
</tr>
<tr>
<td>(2,303)</td>
<td>(155)</td>
<td></td>
<td>(1,463)</td>
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<tr>
<td>Below 2.0</td>
<td>15%</td>
<td>15%</td>
<td>23%</td>
</tr>
<tr>
<td>(472)</td>
<td>(39)</td>
<td></td>
<td>(360)</td>
</tr>
<tr>
<td>No UGPA</td>
<td>23%</td>
<td>31%</td>
<td>28%</td>
</tr>
<tr>
<td>(1,281)</td>
<td>(501)</td>
<td></td>
<td>(1,043)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>56.3%</td>
<td>56.4%</td>
<td>67.2%</td>
</tr>
<tr>
<td>(73,786)</td>
<td>(4,857)</td>
<td></td>
<td>(58,990)</td>
</tr>
</tbody>
</table>

154. There were 48,166 White applicants in 1984-85. See id. at 26. There were 46,170 White applicants in 1997-98. See LAW SCHOOL ADMISSION COUNCIL, 1997-98 NATIONAL DECISION PROFILES (1999).
155. See ANALYSIS OF MINORITY LAW SCHOOL APPLICANTS, supra note 153, at 29.
156. See LAW SCHOOL ADMISSION COUNCIL, 1991-92 NATIONAL DECISION PROFILES (1993). The 1991-92 profiles give separate listings, which I have combined, of those who applied with 120-180 scale LSAT scores and those who applied with pre-1991 10-48 scale LSAT scores. The proportion of schools included in this report is not listed, but well over 95% of ABA schools are included in the subsequent Decision Profiles. See infra notes 157-58. Law schools in Puerto Rico appear to be excluded.
157. See LAW SCHOOL ADMISSION COUNCIL, 1994-95 NATIONAL DECISION PROFILES (1996). This data covers 98% (175/178) of ABA law schools. Law schools in Puerto Rico are excluded.
158. See 1997-98 NATIONAL DECISION PROFILES, supra note 154. This data covers 99% (178/180) of ABA law schools. Law schools in Puerto Rico are excluded.
The disparity in admission rates favoring Whites may be even greater than this data suggests. The manner in which the data is reported in Table 7—presenting the percentage of applicants getting in to one or more of the law schools to which they applied—is not a very sensitive barometer of unfair treatment in admission decisions. Suppose that an APA and a White applicant apply to the same five law schools with equivalent quantifiable and non-quantifiable credentials. If the White applicant is admitted to two of these schools but the APA candidate is admitted to only one, the APA candidate may have suffered a harm that cannot be detected using the Table 7 data. It is quite likely, therefore, that the aggregate data underestimates the magnitude of admission disparities compared to what a school- or applicant-specific analysis might uncover.

In order to gain further perspective on the nature of the APA "tipping point" in law school admissions, Table 8 is included to capture trends in White/APA admission rates, application ratios and LSAT averages. For one thing, Table 8 expresses APAs' annual admission rates as a percentage of Whites' admission rates. This standardized format facilitates comparisons across years when fluctuations in applicant volume render year-to-year comparisons problematic otherwise. Table 8 confirms the general trend that as APA applications have gone up vis-à-vis Whites, APA admission rates have fallen behind those of Whites. In 1994-95, 1995-96 and 1996-97 APA admission rates were all less than 92% of White admission rates.

159. I realize that defining merit and equivalent credentials is a hotly contested subject, and deservedly so. Consider this quote:

Merit is not a neutral construct, nor is its definition, cultivation, or identification free of intergroup bias. If, as a society, we design equal opportunity policy around the concept of merit but fail to recognize the biases inherent in its construction or application, we will simply operationalize subtle forms of bias in ways that make discrimination extremely hard to identify or correct. Our civil rights laws are not presently equipped to reckon with biases of this sort. In short, basing allocation decisions on group-neutral conceptions of merit is an august goal, but like colorblindness, one more elusive than affirmative action opponents admit.

Krieger, Civil Rights Perestroika, supra note 113, at 1302. For the purposes of my hypothetical, however, it is sufficient if the reader simply applies whatever criteria he or she deems meritorious.

160. Such data is not generally available for obvious reasons. I encourage other authors to pursue further this line of inquiry.

161. In addition to a significant shrinkage in the LSAT gap compared to the year before, the modest rebound in APA admission rates in 1997-98 may be a result of continued decreases in applicant volume, rather than increased appreciation of APA applicants. In other words, as the total pool has gotten smaller, law schools have had to be a little less discriminating in whom they select, and thus also possibly less discriminatory. Time will tell if this \textit{ad hoc} explanation is correct. In 1998-99, applications to ABA schools went up slightly after seven straight years of declines. See 1999 BOALT HALL ANNUAL ADMISSION REPORT, supra note 42. Admission data for 1998-99 was not yet available from LSAC at the time this article was submitted for publication.
Table 8: Trends in APA Admission Rates, Applicant Volume and LSAT Performance

<table>
<thead>
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</thead>
<tbody>
<tr>
<td>APA Admission Rate</td>
<td>100.1%</td>
<td>95.7%</td>
<td>94.9%</td>
<td>91.6%</td>
<td>91.7%</td>
<td>91.5%</td>
<td>93.4%</td>
</tr>
<tr>
<td>as a Percentage of</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White Admission Rate</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of APA</td>
<td>6.6</td>
<td>7.5</td>
<td>8.5</td>
<td>9.2</td>
<td>9.8</td>
<td>9.9</td>
<td>10.7</td>
</tr>
<tr>
<td>Applicants per 100</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Whites</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSAT Gap^164</td>
<td>2.1</td>
<td>1.7</td>
<td>1.8</td>
<td>1.5</td>
<td>1.3</td>
<td>1.4^165</td>
<td>0.8</td>
</tr>
<tr>
<td>(White avg. − APA</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>avg.)</td>
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Table 8 also lists the average White/APA gap in LSAT scores among all applicants to ABA schools. Perhaps the most depressing feature of the "tipping point" data presented in Table 8 is the frustrating scenario whereby APAs are falling behind relative to Whites in admission opportunities precisely when they are catching up on the LSAT.\(^\text{166}\) In 1991-92, when there was near perfect parity in overall admission rates, there was a White/APA gap of 2.1 points on the LSAT among all ABA-approved law school applicants.\(^\text{167}\) In 1994-95, while APA admission rates fell to 91.6% of White admission rates, APA applicants trailed Whites on the LSAT by 1.5 points.\(^\text{168}\) In 1997-98, when APA admission rates were still 93.4% of White admission rates, the LSAT gap had been closed to 0.8 points!\(^\text{169}\) In other words, the "tipping point" barrier to APA law school


\(^\text{163}\) Id.

\(^\text{164}\) These figures are derived from LAW SCHOOL ADMISSION COUNCIL, SUMMARY OF NATIONAL APPLICANT COUNTS FROM NATIONAL STATISTICAL REPORTS 1991-92 THROUGH 1995-96, supra note 103; LAW SCHOOL ADMISSION COUNCIL, SUMMARY OF NATIONAL APPLICANT COUNTS FROM LSAC DATA – 1997-98 APPLICATION YEAR (1999).

\(^\text{165}\) I was not able to obtain LSAT averages for 1996-97 from LSAC in time for submission of this article. Therefore I estimated the LSAT averages based on the categorical data reported in LAW SCHOOL ADMISSION COUNCIL, 1996-97 NATIONAL DECISION PROFILES, supra note 162.

\(^\text{166}\) In the 1990s White/APA differences in UGPAs are not significant enough to merit a separate analysis.

\(^\text{167}\) See LAW SCHOOL ADMISSION COUNCIL, SUMMARY OF NATIONAL APPLICANT COUNTS FROM NATIONAL STATISTICAL REPORTS 1991-92 THROUGH 1995-96, supra note 103. This 2.1 point gap corresponds to about one-quarter of a standard deviation.

\(^\text{168}\) Id. The 1.5 point difference corresponds to about .18 standard deviation units.

\(^\text{169}\) See LAW SCHOOL ADMISSION COUNCIL, SUMMARY OF NATIONAL APPLICANT COUNTS FROM LSAC DATA – 1997-98 APPLICATION YEAR, supra note 164. Eight-tenths (0.8) of a point on the LSAT
applicants is rising as fast as (and in some years faster than) APAs' impressive increases in LSAT averages.

One objection a skeptic might raise is whether some if not all of the White/APA admission differentials are attributable to state residency preferences. In other words, APAs' lower admission rates may at least partly occur because APAs are geographically clustered in states like California and New York, whereas Whites are more widely distributed. The argument goes, since many public universities are required by legislative mandates to reserve most of the seats in their law schools for state residents, out-of-state APA applicants will disproportionately get squeezed out even when APAs and Whites with the same residency status are treated equally.

Nonetheless, there are reasons to conclude that residency differences do not exert much of an influence on the data presented in Tables 7 and 8. First, public universities almost always charge appreciably higher (sometimes double to triple) tuition for out-of-state students. This use of pricing probably influences the self-selection patterns of applicants, explaining the frequent phenomenon that out-of-state applicants have higher LSAT/UGPA index scores than resident applicants. Second, the contrapositive of the residency hypothesis does not hold true. APA applicants to UC law schools, of whom a greater proportion are presumably California residents as compared to Whites, do not have higher admission rates than Whites. Finally, Wightman found that on average, APA candidates nationally applied to about two more schools than did Whites. This would likely lessen any differential impact of residency preferences because applying to more schools can only increase APAs' absolute chances of being admitted to at least one law school. Perhaps these factors explain why Wightman found that including state of residence in a regression model of public law schools resulted in no improvement in the prediction of actual admission decisions above her LSAT/UGPA model.

is about .09 standard deviation units.

170. According to the U.S. Census, the top five states in terms of population of APAs are California, New York, Hawaii, Texas and New Jersey, respectively. See U.S. Census Bureau, States Ranked by Asian & Pacific Islander Population in 1998 (visited Feb. 10, 2000) <http:llwwxv.census.govlpopulation/estimates/state/ranklstmktb4.txt>.

171. For example, the UC law schools like Boalt Hall must enroll classes of about 75% California residents. See BOALT HALL ANNUAL ADMISSION REPORT, supra note 42, at unnumbered page (stating that Boalt generally enrolls a class with 75% California residents); Boalt Hall School of Law Catalog & Application 1999-2000 75 (1999) (stating that Boalt's entering classes are normally 75% Californians, and that this requirement makes it harder to be admitted as a non-resident).

172. Some examples from around the country are: the four UC's average $10,931.75 vs. $19,767.75; U. of Colorado $4,953 vs. $16,171; U. of Texas $6,300 vs. $13,300; U. of North Carolina $2,881 vs. $14,743; U. of Washington $5,388 vs. $13,293; and U. of Georgia $3,757 vs. $12,357. See ABA GUIDE 1999, supra note 52, at 127-33, 151, 195, 285, 387 and 427.

173. In fact, the opposite is true. In 1999, White applicants to Boalt, Davis, Hastings and UCLA had a 27.5% chance of getting into the schools to which they applied. APA applicants, however, had a 23.6% chance. See Kay, supra note 49; Hastings Admission Statistics, supra note 49. These figures also provide little support to Thernstrom's assertion that APAs benefit most from Prop. 209 and SP-1.

174. See Wightman, Threat to Diversity, supra note 82, at 26 (reporting that APAs applied to 6.7 ABA law schools on average, compared to 4.8 for Whites).

175. Id. at 17.
More importantly, while the state residency hypothesis appears at first blush to plausibly explain a White-APA admission gap in any given year, it does not touch upon the core finding that the gap has widened more or less in lock-step with application volume during a short period of time.

VII. CONCLUSION: WHERE DO WE GO FROM HERE?

The “tipping point” associated with the rise in APA applications appears to eclipse the simultaneous trend of APAs making steady improvements in LSAT averages. If this trend continues, one could easily imagine a scenario within the next decade where APA candidates surpass Whites on the LSAT, yet are rewarded by being placed no closer to Whites — indeed, they may fall further behind — in terms of their chances of being admitted to an ABA law school. To summarize, continued growth in the APA applicant pool concurrent with a more forceful “too many Asians tipping point” produces an ironic admissions environment. A time of surging application volume and record enrollments for APAs can also be a time of unparalleled negative action.¹⁷⁶

The threat of a “too many Asians tipping point” is more formidable if APA candidates continue to increase their share of the national applicant pool, and if that pool itself grows, which would make law school admissions more competitive overall.¹⁷⁷ The principal aim in analyzing this data is to alert activists—be they professors, practitioners, students, administrators or community organizers—of the increasing danger of an APA “tipping point” in legal education in the twenty-first century. Action can be taken to reverse the current trend toward higher admission rates for Whites vis-à-vis APAs. On the one hand, excessive reliance on objective measures like the LSAT is not the answer to ensure fairness. Such a misguided approach will curtail APA admissions (and quite significantly for some APA subgroups and for other groups of color) and will misshape the legal profession by disproportionately excluding social activists. On the other hand, history has shown that discretionary criteria are often applied in a manner that, because of subtle, unconscious stereotyping,

¹⁷⁶. This finding parallels empirical studies of APA law school faculty, particularly Eric Yamamoto’s conclusion that “we have arrived, we have not arrived.” Eric K. Yamamoto, Foreword: We Have Arrived, We Have Not Arrived, 3 Asian L.J. 1, 2 (1996). The two studies that Yamamoto is addressing are Pat K. Chew, Asian Americans in the Legal Academy: An Empirical and Narrative Profile, 3 Asian L.J. 7 (1996); and Alfred C. Yen, A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty, 3 Asian L.J. 39 (1996).

¹⁷⁷. Available data indicates that the rise in APA applicants (especially relative to Whites) in the 1980s and 1990s, see discussion supra Sections II, VI, is unlikely to stop or slow down anytime soon. According to the Census, the APA population in the U.S. grew from 7.46 million in April 1990 (3.0% of the population) to 11.02 million in November 1999 (4.0% of the population), a 48% increase in one decade. See U.S. Census Bureau, Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to November 1, 1999 (visited Feb. 10, 2000) <http://www.census.gov/popest/national/asrh/1999_res.html> Between 1990 and 1999, California alone added about one million APAs. See U.S. Census Bureau, States Ranked by Asian & Pacific Islander Population, supra note 170. It is therefore not surprising that between 1996-97 and 2008-09 public high school graduates in California are expected to increase 41%. See Debra E. Gerald & William J. Hussar, PROJECTIONS OF EDUCATION STATISTICS TO 2009 at x (visited Feb. 28, 2000), available online at <http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=199903>.
harms APA applicants. 178

Given this double-bind of both objective and subjective factors potentially contributing to the exclusion of APA candidates, bar associations, alumni organizations, students and faculty must pay careful attention to overall admission rates at individual law schools and nationally. The controversy over hidden ceilings on APA enrollments at prestigious colleges and universities in the 1980s shows that continued media attention, fueled by grassroots activism, led, for example, to numerous legislative hearings, university self-studies, an investigation by the Office for Civil Rights 179 and eventually some changes in admission practices. Evidence such as a "smoking gun" confidential memo instituting a SAT verbal cut-off score 180 resulted in an unprecedented series of apologies in which Ira Michael Heyman, UC Berkeley's Chancellor, acknowledged that Berkeley's admission policies "indisputably had a disproportionate impact on Asians." 181 Another lesson from the APA college admissions controversy is the need for sustained cooperation with other groups of color and White progressives to prevent Thernstrom and others on the political Right from dismantle affirmative action. 182

The lesson to be learned from this "tipping point" phenomenon is not that we should rededicate ourselves to a "true" color-blind meritocracy in which the LSAT is the gatekeeper of opportunity. Rather, the goal should be to question the underlying functionality of the meritocracy itself, to investigate its submerged biases and, as Bell puts it, its "unspoken limit[s]." 183 In fact, Professors Susan Sturm and Lani Guinier argue that this kind of larger inquiry is essential if the innovative ideal of affirmative

178. See TAKAGI, THE RETREAT FROM RACE, supra note 139, at 61-83 (reviewing the many, often contradictory, reasons cited by admission officials to explain Whites' higher acceptance rates to elite colleges compared to APAs); Tsuang, supra note 139, at 663-65 (reviewing how admission directors often employed questionable racial stereotypes about APA applicants, such as they were too concentrated in pre-medicine or engineering majors, not well-rounded, lacked leadership qualities and personality, etc.—even when such stereotypes ran counter to the factual evidence); see also Chin et al., Beyond Self-Interest, supra note 14, at 152-53 (reviewing stereotyping of APAs in various contexts); Chin et al., Rethinking Racial Divides, supra note 57, at 224 (Professor Cho commenting on how stereotyping of APAs as lacking leadership and communication skills leads to a "glass ceiling" for APAs at the executive and managerial levels).

179. See TAKAGI, THE RETREAT FROM RACE, supra note 139, at 84-103. This controversy also resulted in much political maneuvering, with conservatives like William Bradford Reynolds of the U.S. Department of Justice trying to blame affirmative action for discrimination against APAs and progressive APA groups like Asian Americans in Higher Education and Chinese for Affirmative Action arguing that this was a White privilege issue. See id. at 92-93, 103-05.

180. Id. at 34, 96-98. Such a cut-off obviously harms immigrant APAs (and Latinos) disproportionately. See Tsuang, supra note 139.


182. See generally Chin et al., Beyond Self-Interest, supra note 14, at 159-60 ("What APAs must understand is that negative action against us does not result from affirmative action for other minorities. In fact, in cases of proven racial disparities between APA and White admission rates, the causes have been either stereotypical treatment of APA applicants or other preferences, such as that for alumni children, who tend to be predominantly White. Furthermore, eliminating affirmative action does not eliminate negative action.").

183. BELL, AND WE ARE NOT SAVED, supra note 145, at 140.
action is to be reclaimed in post-civil rights America:

It is time, we argue, for those of us committed to racial and gender equity to advance a more fundamental critique of existing selection and admissions conventions. It is time to discuss how conventional assessment and predictive criteria do not function fairly, democratically, or even meritocratically for many Americans who are not members of racial or gender minorities. To reclaim the moral high ground, we must broaden and expand the terms of engagement. By revealing faulty assumptions about the concept of affirmative action and the system of selection in which it operates, we can move from an incrementalist strategy of inclusion for a few to a transformative vision of reform for the many. 184

With respect to the debate over affirmative action in legal education, the terms of engagement rarely included APAs in a meaningful way. Conservative critics like Stephan Thernstrom irresponsibly mascot APAs, casting them as unfair victims of affirmative action policies. This conservative attack continues to gain force in part because of silence and indifference on the part of the political Left. Moreover, the “APAs as victims of affirmative action” paradigm quietly leaves unquestioned a status quo admissions environment that is neither fair nor functional for APAs, other applicants of color, or many Whites. Indeed, the legal profession overall and communities most in need of legal representation are also harmed by the underinclusiveness of our LSAT-centered meritocracy.

Particularly troubling is that the Right-wing assault on affirmative action and the over-reliance on conventional admission criteria like the LSAT are mutually reinforcing forms of myopia. This is why the manipulative claims about APAs by Thernstrom have gone largely unchallenged, and why the dangers of a “too many Asians tipping point” have not previously been investigated by legal academia. I have attempted to reverse this vicious cycle by rigorously investigating the divide between the Right’s rhetoric and the real consequences of Prop. 209/SP-1 for APA law students. Exposing this divide, in turn, opens up the space for a more searching and nuanced critique of the inadequacies and covert biases of conventional notions of merit.

184. Sturm & Guinier, supra note 92, at 956.