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BOOK REVIEW

RENEGOTIATING AMERICA'S MULTI-COLORED LINES

Color Lines: Affirmative Action, Immigration and Civil Rights Options for America,¹ Edited by John David Skrentny. The University of Chicago, 2001. Pp. 363.

*Harvey Gee**

I. INTRODUCTION

During the mid-1990s, affirmative action and immigration were the most controversial political issues of the day. The fact that both subjects concerned race was perhaps part of the reason for this great fervor. As many Americans reevaluated civil rights policy, especially affirmative action, remarkably, there was virtually no discussion of the impact of immigration on affirmative action. At the time, most mainstream commentators and scholars treated each topic exclusive of one another, missing a valuable opportunity to consider what Howard University Law Professor Frank Wu deems as "the complex [and dynamic relationship] between immigration and affirmative action and between immigrants themselves and the civil rights movement."² It was not until the advent of California's Proposition 187,³ a ballot measure designed to limit wel-

¹ COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS (John David Skrentny ed., 2001).

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² See Frank H. Wu, *Shaping the Rules for Belonging: Immigration and Affirmative Action Can Work Together*, LEGAL TIMES, Sept. 9, 1996 at 25. See also Hugh Davis Graham, AFFIRMATIVE ACTION FOR IMMIGRANTS?: THE UNINTENDED CONSEQUENCES OF REFORM IN COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS 53, 55 (John David Skrentny ed., 2001) (reporting that there has been a great deal of literature written on the two policy areas of affirmative action and immigration since the 1960's. However, there has been precious little written about the relationship between the two).

³ Proposition 187 was enacted in its entirety at the Nov.8, 1994 California general election, and was codified in various California codes. See Cal. Educ. Code § 48215 (Deering 1999); Cal Health & Safety Code § 130 (Deering 1999); Cal. Welf. & Inst. Code. § 10001.5 (Deering 1999) (excluding undocumented immigrants from enrolling in public schools or universities; barring same immigrants from receiving care at

fare benefits to illegal immigrants,⁴ and its close cousin, Proposition 209, also known as the "California Civil Rights Initiative,"⁵ a measure designed to eliminate all state-sponsored affirmative action programs in the state, did the relationship between the two become so clear.⁶

Professor Wu suggests that in an increasingly multiracial society the immigration debate has much to teach us about the affirmative action debate and vice versa.⁷ According to Wu, these two subjects are rarely discussed together because they have been "based on the false assumption that liberal immigration and affirmative action cannot be reconciled."⁸ He provides examples of how

medical facilities that receive public funds; cutting social service programs such as foster care, family planning, and disability insurance for illegal immigrants).

⁴ See also Robert S. Chang, A MEDIATION ON BORDERS, IN IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 249 (Juan F. Perea ed., 1997) ("Measures such as Proposition 187 are directed against illegal immigrants. Illegal immigrants are colored as the problem. They take jobs away from those who belong here. They use public services so that there's less for everyone else. Blaming illegal immigrants slides quickly into blaming all immigrants. Welfare reform measures have been proposed that cut off aid to even legal immigrants. Although these measures focus on immigration status, problems arise because that status is not evident on an individual's features."); Kevin R. Johnson, THE NEW NATIVISM: SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED, SOMETHING BLUE, IN IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 177 (Juan F. Perea ed., 1997) ("[Proposition 187] is reminiscent of past nativist outbursts in the United States. Proposition 187 supporters repeatedly proclaimed that 'we' must be saved from 'illegal aliens.' Like the legal responses to the immigrants of yesteryear, the measure attempted to halt the alleged harms caused by unwanted non-citizens in our midst.")

⁵ Bill Jones, Secretary of State, Proposition 209 in California Ballot Pamphlet, General Election, Nov. 5, 1996.

⁶ Daniel Tokaji and Mark Rosenbaum have provided an especially prescriptive analysis of the expected effects of the California Civil Rights Initiative. See generally, Daniel P. Takaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129 (1999).

⁷ See Frank H. Wu, *Shaping the Rules for Belonging: Immigration and Affirmative Action Can Work Together*, LEGAL TIMES, Sept. 9, 1996 at 25. Cf. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 52 (1996) ("The arguments for exclusion of immigrants from affirmative action programs are self-defeating. The argument that focuses on excluding immigrants because of affirmative action presents the circular and paternalistic logic that discrimination against racial minorities within a society justifies their exclusion from it. The perverse result is that efforts to remedy discrimination need not ever include immigrants. Immigrants are deemed to have consented to assuming a subordinate status. Some politicians have gone so far as to suggest that immigrants be barred for their lifetimes from receiving any governmental entitlement, not only those with a race-based component.").

⁸ See Frank H. Wu, *Shaping the Rules for Belonging: Immigration and Affirmative Action Can Work Together*, LEGAL TIMES, Sept. 9, 1996 at 25.

racial politics are constantly in flux and how the position of racial groups in these two debates is dependent on their context.⁹ According to Wu, Latinos are often thought of being the beneficiaries of liberal immigration laws, while African Americans are perceived to be the beneficiaries of affirmative action.¹⁰ Between these two racial groups, Wu argues, rest Asian Americans who are on the one hand, allied with Latino interests in the immigration context; yet on the other hand, they are perceived to be in opposition along with whites, against African Americans interests on the issue of affirmative action.¹¹ These tensions underscore why it is imperative to address these important issues as America today stands at a civil rights crossroad, a juncture where this country must decide which path to take in addressing racial inequities and in improving race relations.

Important dialogues about immigration and affirmative action are expanding. The contributing writers in John David Skrentny's recently released anthology, *Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America*, offer their ideas and thoughts about three important issues: (1) how affirmative action has worked since its inception; (2) the unintended effects that immigration has had on affirmative action; and (3) the dynamics that exist between and amongst racial and ethnic groups that must be considered in any conversation about race in this country. Skrentny's book illustrates that although the latter half of the twentieth century has proven to be a time of profound demographic change, the political reform policies of the post-modern Civil Rights Movement have failed to respond fully to these dramatic social changes.¹²

Skrentny says in his introduction, the book's primary purpose "is to reexamine the issues of discrimination, civil rights, and affirmative action for American racial and ethnic groups in light of

⁹ *Id.*

¹⁰ These perceptions are reflected in political views of the citizenry, which often are reinforced at the ballot box. Eric Yamamoto presents this set of queries, "Concerning conflicts surrounding ballot initiatives, think about the passage of California's anti-immigrant Proposition 187 and the nearly 50 percent support by African Americans and established Asian Americans, including many worried about Latina/o and South Asian immigrants displacing current workers and draining government resources." See Eric K. Yamamoto, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

¹¹ See Frank H. Wu, *Shaping the Rules for Belonging: Immigration and Affirmative Action Can Work Together*, *Legal Times*, Sept. 9, 1996 at 25.

¹² See Skrentny, *supra* note 1 at 4.

the new immigration international developments.”¹³ The secondary purpose is to offer a discussion of basic principles about the past and present policies and goals of affirmative action, and in the process, inviting readers to challenge the traditional assumptions of both liberals and conservatives with respect to the goals and means of traditional civil rights. The anthology shows that these issues cannot be neatly framed within an outmoded black and white framework of race relations, and that Asian Americans, Latinos, other nonwhites, and women figure prominently in any argument for or against affirmative action and in efforts to open or close the nation's borders.

Skrentny, professor of sociology at the University of California at San Diego, offers a compilation containing thirteen distinct contributions from diverse groups of academics from the disciplines of sociology, political science, history and law. The book includes contributions from Erik Bleich, Lawrence Bobo, Frank Dobbin, John Aubrey Douglass, Hugh Davis Graham, Kyra Greene, Erin Kelly, George La Noue, Jennifer Lee, Michael Lichter, Deborah Malamud, Sunita Parikh, John Skrentny, Thomas Sugrue, John Sullivan, Carol Swain, Steven Teles, Roger Waldinger and Christine Min Wotipka. Each essay brings forth new empirical research on these important issues

Four themes in the book cover affirmative action as public policy, the interplay between African Americans and immigration in the workplace, the viewpoints of individual Americans about other racial groups in a multi-ethnic America, and how affirmative action is implemented overseas in Great Britain, France, and India.¹⁴ Taken as a group, the authors offer a new understanding of the racial and cultural politics that exist in the United States today.

This book review examines and critiques some of the major contributions in *Color Lines*. It consists of several sections. Part II

¹³ See Skrenty, *supra* note 1 at 2.

¹⁴ Significantly, unlike other affirmative action tracts to date, *Color Lines* offer a section examining affirmative action policies in other countries. First, the authors in these later chapters offer the propositions that Americans look to other countries for guidance on how this country can improve its equal opportunity. Britain has a compromise model and France has adopted an universalist, color-blind model to dominate public policy making. While the British looked to the United States as a model, for the French the United States was an “anti-model” to be avoided. The cases examined range from a close approximation of an officially color-blind multi-ethnic society (France), to a society with a policy of strictly “soft” affirmative action (Britain), to a society with comprehensive, “hard” quota system (India). The case studies demonstrate the political consequences of different approaches to equal opportunity policy. They share a theme in that preferences for ethnic minorities always seem to be controversial, but the degree of resistance varies cross-nationally and over time.

summarizes the descriptive sections of the book. Part III discusses Asian Americans and their place in the affirmative action debate. This section discusses the problems of Asian American students being "over-represented" at the University of California, and it also shows how the experience of Asian Americans can contribute to the jurisprudence of race. In particular, the inclusion of Asian Americans in university admissions, and it also illustrates how race should not be used as a proxy for diversity. Part IV offers some ideas about reducing racial tensions and cultural conflict between minority communities. Part V examines the interplay between policy-making and enforcement of civil rights law by courts. This part also discusses the prospect of applying alternative dispute resolution theories to resolve racial conflicts.

II. AFFIRMATIVE ACTION FOR IMMIGRANTS?

Skrentny begins his introduction by discussing the origins of affirmative action, particularly its policy history and analysis, and then connects it to the effects that immigration has brought upon affirmative action. With great precision, he recants the origins of affirmative action to establish the historical context for his discussion. Following the precedent set by *Brown v. Board of Education*,¹⁵ a litany of laws were passed that provided additional civil rights to minorities and women.¹⁶ During the height of the Civil Rights Movement of the 1960s, President John F. Kennedy issued Executive Order 10,925, which solidified the civil rights of minorities by requiring federal contractors to support affirmative action and ensure that minority applicants would not be discriminated against based upon race.¹⁷ These efforts culminated in congressional efforts to remove the race line forever with the implementation of the Civil Rights Act of 1964.¹⁸ Title VI of the Act, which applies to all programs receiving federal financial assistance, states: "No person in the U.S. shall, on the ground of race, color, or national ori-

¹⁵ 347 U.S. 483 (1954). See also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 111 (Richard Delgado ed., 1995) (stating that the *Brown* decision represents tremendous critical and cultural transformation).

¹⁶ See, e.g., Civil Rights Act of 1957, Pub. L. No. 85-315 § 151, 71 Stat. 634 (current version at 42 U.S.C. § 1995 (1994)).

¹⁷ See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 907 (1985) (describing intent of Executive Order issued by President Kennedy to prohibit discrimination on basis of race, religion, and national origin, and to require equality of employment opportunity).

¹⁸ Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000 (1994)).

gin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs, activities receiving Federal financial assistance.”¹⁹ Despite the seemingly obvious language cited above, the true goal of the Civil Rights Act was never reached. Though official discrimination was largely eliminated, systematic disparities in education and employment continues unabatedly.²⁰

Next, Skrentny points out that the Civil Rights Act arose at a time when opportunity for African Americans was *the* dominant issue. When “[p]oliticians often spoke of ending discrimination in American society, of creating opportunity for all, and of helping ‘minorities,’ they really meant Afro-Americans.”²¹ Very little regard was given to discrimination against other racial groups because the problem of opportunity for other groups, including Latinos, Asian Americans, and American Indians, were nearly at the bottom of the national agenda.²² However, affirmative action was gradually expanded to include these other non-black groups. As a result of these changes, Skrentny argues that African Americans today have ceased to be “the” minority in the United States. As a result, he argues that African Americans have, in fact, lost their place as the central focus point in discussions about race, racism, and prejudice.²³

¹⁹ *Id.*

²⁰ See Carl E. Brody Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent By the Supreme Court*, 29 AKRON L. REV. 291, 309-10 (1996) (discussing legislative intent of Executive Order implemented after enactment of Titles VI and VII). In 1965, President Johnson passed Executive Order 11,246 requiring federal agencies to identify and formulate measures to address the under-representation of minorities in the workforce. *Id.* at 310. These requirements were collectively known as “affirmative action.” *Id.*; James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment; Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 903 (1985) (defining affirmative action as “public or private actions or programs which provide or seek to provide opportunities or other benefits” to African Americans and other minorities). In 1967, Executive Order 11,375 modified the previous order by adding gender to the list of prohibited factors. Carl E. Brody Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent By the Supreme Court*, 29 AKRON L. REV. 291, 309-10. This was followed by President Nixon’s issue of Executive Order 11,478 in 1969, implementing affirmative action programs in federal agencies and departments. *Id.* Cf. Greg Toppo, *Graduation Rate Inches Upward*, Hous. Chron., Nov. 16, 2001 at A23 (reporting that Hispanic, black and low-income whites lag behind middle-class and upper middle-class whites).

²¹ See Skrentny, *supra* note 1.

²² See Skrentny, *supra* note 1 at 4. Skrentny notes that, “[f]or centuries, [African Americans] suffered blatant, often vicious discrimination. They were gaining voting clout. Through political rallies and organizing they gained public attention and sympathy. *Id.*

²³ *Id.*

Skrentny then raises the important question: Should affirmative action programs designed to open up doors of opportunity to African Americans be reserved only for African Americans? Interestingly, Skrentny never takes a strong position either way. Instead, he invites the reader to sample the essays that follow and to allow the reader to make up his or her own mind on the issue.

Among the book's highlights is a pair of essays by Hugh Davis Graham and George La Noue and John Sullivan. Graham renews the argument against including immigrants in affirmative action, and La Noue and John Sullivan examine the problematic uses of racial categories in the context of business contracts.

Is it too simplistic to say that immigrants should not be provided any preferences because they weren't early or long enough? The answer is a resounding "no," according to Hugh Davis Graham, professor of history and political science at Vanderbilt University. In his essay, "Affirmative Action for Immigrants? The Unintended Consequences of Reform," Graham suggests that affirmative action should not grant any preferences to immigrants. To grant such preferences on the basis of ancestry to recently arrived immigrants, legal and illegal, as compensatory remedy for historic discrimination in the United States, Graham proclaims, is to undermine the original goals of affirmative action to help African Americans.²⁴

To begin, Graham pays particular focus on Asian and Latino immigration. In explaining the unanticipated convergence and unintended consequences of affirmative action, his essay begins with a historical analysis of the parallel development of immigration and affirmative action policy. He states that since the advent of affirmative action, more than 25 million immigrants arrived in the United States, three-fourths of them from Latin America and Asia.²⁵ The development of affirmative action policy during the 1970s extended remedies originally intended for African Americans to persons of Hispanic and Asian ancestry, without regard to citizenship.²⁶ According to Graham, the unintended political implications of these converging trends were enormous.²⁷

Next, Graham argues that the unique moral force of affirmative action's original public rationale, as a temporary remedy to compensate for the lingering, institutionalized effects of past dis-

²⁴ *Id.* at 53.

²⁵ *Id.* at 55.

²⁶ *Id.*

²⁷ *Id.* at 56.

crimination against the descendants of slaves was eroded when preferences were extended to newly arrived immigrants from Latin America and Asia.²⁸ He characterizes this occurrence as "the ironic result for Americans at the century's end has been a two-tiered system of policy-making where affirmative action remedies are narrowed for African Americans, who have been the chief beneficiaries, the protections for immigrants, where legal or illegal, are broadened."²⁹

An even harsher critic against including immigrants in affirmative action is Terry Eastland. Eastland, a former Reagan Administration official, forcefully argues that increased immigration means affirmative action must be abolished. Compared to Graham, Eastland makes much more troubling arguments about Asian Americans and Asian immigrants. According to Eastland, "[w]hatever past wrongs might have been committed against this population were committed elsewhere, in other countries by other people. The members of this population are 'owed' nothing by Americans. . . Proportionalism and diversity can no more sustain affirmative action for immigrants than they can for anyone else."³⁰

However, Professor Frank Wu questions the aggressive arguments professed by immigration restrictionists like Eastland and others who believe immigrants are not entitled to civil rights. He argues that:

The arguments for exclusion of immigrants from affirmative action programs are self-defeating. The argument focuses on excluding immigrants because of affirmative action presents the circular and paternalistic logic that discrimination against racial minorities within a society justifies their exclusion from it. The perverse result is that efforts to remedy discrimination need never include immigrants. Immigrants are deemed to have consented to assuming a subordinate status.³¹

As an alternative, Wu claims that affirmative action and immigration can work together. But Wu's conclusion is premature, if not

²⁸ *Id.* at 67.

²⁹ *Id.*

³⁰ See TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* 145 (1996).

³¹ Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 52 (1996). Kevin Johnson seems to share Wu's belief. Johnson states that the issue of whether to include immigrants in affirmative action is "muddier" "when immigrants of color become the victims of discrimination once they arrive in the United States, or when they come to this country because of U.S. foreign policy in their native countries." See KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN?: A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* 167 (1999).

incomplete, because he fails to elaborate if there should be any limitations placed on immigrants as beneficiaries of affirmative action. As the moderate, Graham is found between the two poles occupied by Wu on the political left, and Eastland on the political right.

In Graham's view, the inclusion of immigrants in affirmative action, has come at the cost of exclusion of African Americans.³² Graham argues that this expansion is troublesome given the fact that for Asian groups economic disadvantage has proven to be a problematic criterion. Graham then rejects their inclusion primarily because many of these immigrants could not make out a *prima facie* case of financial hardship, racial discrimination, or to otherwise prove that they were entitled to affirmative action because of their race or ethnic background.

Here, Graham refers to Asians as an example that serves to undermine his arguments that immigration need not be included in affirmative action. According to Graham, in 1969, the Nixon Administration, through the affirmative action requirement of the Philadelphia Plan, committed the federal government to a norm of proportional representation for minority groups in the workforce, despite the fact that the census data showed that Japanese and Chinese Americans, although racial minorities suffering historic discrimination in America, were economically successful.

For Asians, Graham says, their economic status varied considerably depending on their particular ethnic group. He proceeds to discuss the dangers of over-inclusion based on economic status and cites studies that examined the historical discrimination against Japanese and Chinese Americans, and the demographic studies of post-1965 immigration from Asia to bolster his claims.³³ The later groups, according to Graham, faced less discrimination than those who arrived prior to this time period, and concludes that they revealed mixed patterns, ranging from high levels of education and prosperity in the United States. Immigrants from Korea, Taiwan, Indochinese, and India had a high level of upward mobility, but those from Cambodia, Laos and Vietnam were at the lower end of the spectrum.³⁴

In no uncertain terms, Graham concludes that minority racial status per se, which brought presumptive eligibility for affirmative action preferences to remedy historic discrimination, made no

³² See Skrentny *supra* note 1, at 62.

³³ *Id.*

³⁴ *Id.*

sense as proxy for economic disadvantage.³⁵ In his arguments that immigrants, especially Asians, are not entitled to be affirmative action beneficiaries, Graham seems to agree with the stereotype that Asians and Asian Americans are an exemplary minority. This thinking is most clear in his discussion of the immigrant work ethic. He states that "[t]he immigration success ethos, however, with its emphasis on hard-work, merit, and social assimilation, clashed with affirmative action's emphasis on historic victim-hood, reparations, and racial entitlement. These tensions were underlined in the 1990s by Asian Americans challenges to affirmative action preferences in university admissions."³⁶

III. THE PERENNIAL SUBJECT OF CAMPUS DEBATES: THE CONTROVERSY OVER AFFIRMATIVE ACTION FOR ASIAN AMERICANS

Race is a poor predictor of societal disadvantage worthy of a remedy. A recent Vietnamese immigrant who achieves good marks in high school against remarkable linguistic, cultural, and economic odds may justly wonder why he is denied admission to an elite college merely because he is Asian. He may look at a lower-achieving black prep school graduate, the son of affluent professionals, and wonder why the latter gained admission merely because of his skin color.³⁷

The notion that Asian Americans are situated in a unique place within the context of the affirmative action debate is as apparent and prevalent in any discussion of racial preferences in higher education. This point does not escape the attention of John Aubrey Douglass, Research Fellow at University of California at Berkeley. Douglass' essay is valuable for two reasons: he examines the past and present admissions policies that were in place at the University of California at Berkeley, one of the premier public institutions in the state, and, second, he presents practical-arguments that university admission policies have failed to serve the interests of Asian American students or meet the goal of a diverse university campus through affirmative action policies.³⁸

³⁵ *Id.* at 63.

³⁶ *Id.* at 68.

³⁷ See Miranda Oshige McGowan, *Diversity of What?*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION 282* (Robert Post & Michael Rogin eds., New York, Zone Books, 1998).

³⁸ To form the necessary background for his analysis, Douglass provides the history of affirmative action admission policies on campus. He states that in the 1960s several factors influenced the creation of affirmative action admission preferences at UC and eventually established a new principle: undergraduate admissions of the university

First, Douglass uses raw data from case studies to demonstrate that during the 1960s, the University of California's admissions policies was diverted from its initial target of contributing to the larger effort by the University of California to admit students from a broad range of California society.³⁹ Affirmative action, and specifically the use of race as a factor in admissions, is historically consistent with this ideal. As in most, if not all, public universities, the admissions policy at the University of California has been formulated to advance the interests of the institution and to fulfill the university's large obligations as a force for social and economic changes.⁴⁰ However, in the 1980's, Asian Americans represented the largest racial minority group, while African Americans and Latino enrollment steadily declined, resulting in serious concerns about the adequacy of the University of California's admission policy and the university's goal of diversity. This outcome seems to be at odds with the logic of affirmative action because, in effect, by maintaining affirmative action for African Americans and Latinos while seeking proportional representation of whites this would clearly require limiting Asian American opportunity.

Douglass explains with great detail that there were two reasons for this pattern. First, race and ethnicity together with grades and test scores came to dominate what was once a more dynamic process of admission. Second, there were other systematic ways to provide access to underrepresented groups at a time when post-*University of California Regents v. Bakke*⁴¹ era quotas were to be

should encompass the general ethnic, gender, and economic composition of California high school graduates. These new factors included the adoption of the master plan in 1960. This new plan rationalized the admission process and encouraged a new focus on standardized test scores as a tool for diversity enrollment demands. This in turn had a negative impact on future minority enrollments. *Id.* at 123.

³⁹ *Id.* at 119.

⁴⁰ *Id.*

⁴¹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, a white male who was refused admission to the University of California Davis Medical School subsequently brought suit against the University. Bakke claimed that the school's admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act. Specifically, Bakke contended that his grade point average and MCAT scores were higher than those of some minority persons who had been accepted for minority set-aside slots. Professor Cass Sunstein had referred to *Bakke*, and states that Justice Powell rested his opinion on a close analysis of the relationship between the particular affirmative action program at issue and the justification involved on its behalf. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). He rejected the view that all affirmative action programs would be illegitimate. For Justice Powell, the legitimacy of an affirmative action program would not turn on whether it was an affirmative action program, and hence not any clear rule, but on the close investigation of the particular program and its function in promoting legitimate social groups. *Id.*

avoided. The University significantly altered its admissions process in an effort to select a diverse student body out of this large pool of prospective students.⁴² Not only did it use special action to expand minority enrollment, which had been limited to six percent of all freshman admission by the Regents, but it also now used the process of regular admission to meet the diversity goals, developing formulas that rely heavily on race to determine admissions.⁴³ The net effect was that race had become a variable for determining not only inclusion but also exclusion.⁴⁴

Within the confines of the University of California, Douglass claims, race-based decision-making first proved problematic when it emerged as a perceived method for rejecting applicants seeking enrollment who were, on academic criteria alone, eligible to enter the university.⁴⁵ Adherence to a strict definition of academic aptitude, as determined by high school grade point averages and SAT scores, and the selection of students only from the top of this pool would have resulted in an overwhelmingly white and Asian American student population.⁴⁶ Far exceeding their proportionate share of the available undergraduate pie, Asian Americans became over-represented, and, hence, no longer a "disadvantaged" group.⁴⁷ They were transformed from being an under-represented group to an over-represented group.⁴⁸ Without an adjustment in policy, even whites would have become a minority group.⁴⁹ In response, the University committed to racial diversity to achieve a proportional representation of whites.⁵⁰

Douglass explains that campus officials decided that their goal was general parity between the racial and ethnic composition of the undergraduate enrollment and the state population in general.⁵¹ In the course of attempting to attain this parity, in 1984 the admission office stopped considering Asian Americans eligible for

⁴² *Id.* at 128, 129.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 127.

⁴⁶ *Id.*

⁴⁷ *Id.* at 128.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 128. Clarence Thomas has also pointed out the problems with Sunstein's parity as a proxy for discrimination. See Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 94, 95 (Nicolas Mills ed., 1994) (arguing that the use of goals to monitor a past discriminator, based on the assumption that absent discrimination, there would be more members of various groups rep-

special consideration outside of academic achievement because their numbers, especially at Berkeley, were high.⁵² This change had a measurable impact on the admissions of Asian Americans.

Noticeably, the campus' Asian Americans undergraduate enrollment declined significantly during this two-year period. Although their numbers would again climb, considerable consternation ensued.⁵³ Statistics are used for support. According to Douglas, though minority undergraduate enrollment grew from 23,000 in 1980 to just over 70,000 in 1995; most of this growth was in the number of Asian American students.⁵⁴ In 1980, Asian Americans represented fifty-four percent of the university's undergraduate minority enrollment; by 1995, they represented sixty-three percent. Retention rates after enrollment also varied tremendously by ethnic groups, with African Americans and Latinos having among the lowest graduation rates.⁵⁵

Berkeley officials were attempting to fulfill the university's social contract, as they understood it. But this change quickly aggravated a relatively new and powerful special interest group and heightened a growing public perception: that access to Berkeley should not simply be an internal policy decision of the academy.⁵⁶ Berkeley's choice to add race and ethnicity as determinants for regular admission raised an important question: had Berkeley set quotas for admission of Asian Americans and for other racial and ethnic groups?⁵⁷ Douglass asserts that when the goal of a program is representation, it may be appropriate to exclude Asian Americans from programs where their institutional numbers would also exceed their proportionate numbers, but Douglass provides no further evidence than this normative examination of the admission controversy. He only intimates that the University guidelines became self-defeating in the end. If nothing else, his discussion is a good beginning to a more erudite analysis of Asian Americans in the context of higher education and a more complete explanation of the affirmative action debate that caused the University to change their policies, and the admissions controversy ended in the late 1980's.

resented in the labor market is dubious and ultimately fails because it allows an employer to hide continuing discrimination behind good numbers).

⁵² *Id.* at 128.

⁵³ *Id.*

⁵⁴ *Id.* at 138.

⁵⁵ *Id.*

⁵⁶ *Id.* at 128.

⁵⁷ *Id.* at 128, 129.

Douglass' essay treats Asian Americans exclusively as victims of affirmative action. Douglass summarizes the impact that Berkeley's admissions have had in its actions to redefine who was and who was not a disadvantaged minority. His analysis follows those of others who have already addressed the significant impact that any affirmative action program in college admissions have had on Asian Americans.⁵⁸ The over-inclusive nature of affirmative action categories can be illustrated by examining areas other than business formation; for example, among Asian Americans, who are sometimes included in higher education affirmative action programs and sometimes excluded as an over-represented group.⁵⁹

The exclusion of Asian Americans from preferential programs in educational institutions serves to marginalize the status of Asian Americans by assuming that they are not in need of affirmative action. As is often done in a traditional equal protection analysis, the tendency to frame affirmative action in black and white terms diminishes the significance of Asian American under-representation and invites misconceptions colored by the model minority myth. Thus, the myth prevents institutions from placing Asian Americans in the affirmative action equation. While many Asian Americans are succeeding at university campuses across the country, many still could benefit from preferential treatment provided by affirmative action.⁶⁰

Relatedly, the present issue of the overrepresentation of Asian

⁵⁸ See also Patricia K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 1 (1994) (examining multifaceted dynamic of Asian American population which currently exists today). All too often Asian Americans are superficially defined as a single minority group, but they collectively represented more than thirty diverse groups, with ancestral roots in Asian, the Pacific Rim, and the Pacific Islands. *Id.*

⁵⁹ See GEORGE R. LA NOUE and JOHN C. SULLIVAN, DECONSTRUCTING AFFIRMATIVE ACTION CATEGORIES, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS 82 (John David Skrentny ed., 2001).

⁶⁰ See also Margaret Chon, *The Truth About Asian Americans*, in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS 239 (Russell Jacoby & Naomi Glauberman eds., 1995). According to Chon, "Asian Americans must not allow themselves to be misused. . . . To do so would just exacerbate two problems that we already face in the United States. First painting Asian Americans as super-intelligent just lets America pretend we don't exist. Social service agencies ignore us because we don't need help. Governments ignore us because we've already made it. Schools won't recruit us because we do so well on the SATs. Yet Asian Americans have inadequate access to culturally and linguistically appropriate voter assistance, health care, and job training. Asian-American households are less wealthy than white ones. Asian Americans occupy substandard housing projects and attend funded public schools. And at least historically Asian Americans died in 1993 as a result of homicides in which racial animus was suspected or proven. Asian Americans, of all intelligence levels, face discrimination based on accent and appearance." *Id.*

Americans in the student body can be used as a proxy for bias against Asian Americans by universities. By singling out Asian Americans, the stereotypes of the "yellow menace" are perpetuated by academic institutions exercising preferences for whites and "preferred minorities."⁶¹ Notably, Asian Americans who are against affirmative action have strenuously argued that schools, such as the University of California at Berkeley, have de-emphasized objective admissions criteria in the game of achieving diversity, resulting in more qualified whites and Asian Americans losing admission slots to lesser qualified African Americans and Latinos.⁶² In addition, many Asian Americans who oppose affirmative action believe that without affirmative action there would be more Asian Americans on university campuses.⁶³ In effect, such criticisms reveal how universities can design admissions policies which function to set aside the successful achievements of Asian Americans simply because there are "too many of them."⁶⁴

In 1995, the Board of Regents of the University of California

⁶¹ See Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 667 (1989) (asserting that "[h]istoric discriminatory practices are now directed at the newest [Asian] immigrant group to challenge the racial composition of highly selective institutions").

⁶² See John D. Lamb, *The Newest Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 508 (1993) (stating that university preferences for alumni children during admission process had "definite negative impact on acceptance rates among Asian Americans . . ."). Cf. See also Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L. J. 185, 209 (1996) ("At the University of California, Berkeley, for example, it is taken for granted that Asian Americans and whites form the group that is disadvantaged by affirmative action, and African Americans and Latinos form the group that benefits.").

⁶³ See Peter Schrag, *Backing Off Bakke: The New Assault on Affirmative Action*, NATION, Apr. 22, 1996, at 11 (discussing exclusion of Asian Americans from admission for purposes of diversity). Asian American students themselves are ambivalent on the issues. Reporter Ellis Cose has reported that "[s]ome Asian Americans wonder whether they have become the Jews of the 1990s, whether they are being sacrificed, despite their academic accomplishments, for a political agenda that does not serve their best interests." See ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 128 (1997).

⁶⁴ See Karen Avenoso, *Asian Americans Question Latin Quotas: Many Say the System Works Against Them*, BOSTON GLOBE, Oct. 14, 1996, at B1 (reporting on angry Asian American parents who feel their children are being discriminated against because of their ethnicity and scholastic achievement). See also Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996) (arguing that the disingenuous use of the model minority myth is "divide and conquer" at its worst). According to Chang, "Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for white students. Through negative action against Asian Americans, whiteness becomes a diversity category to show the merit and fairness rationales are a smoke screen for what is really being protected—white entitlement." *Id.*

voted in Resolution SP-1 to prohibit the use of race as a criterion for student admissions.⁶⁵ Significantly, following the passage of CCRI and SP-1, there was a sharp curtailment of racial diversity in university admissions.⁶⁶ The enrollment of African Americans and Latinos at Boalt Hall Law School dropped dramatically from twenty percent in 1995 to 5.6 percent in 1997.⁶⁷ Confirming that the impact of banning affirmative action also affects Asian Americans, and the impact effects varied between Asian American groups, and there were no Filipino law students admitted in 1997 and 1999. This is notable since there were, on average, over a dozen Filipino students who were admitted before affirmative action was abolished at Boalt Hall.⁶⁸ To address this dearth in minority student enrollment, the University again revamped its undergraduate admissions plans in order to implement a review policy to include life experience and special talents in an effort to increase racial diversity in the student body on campus.⁶⁹ Perhaps, the law school will follow suit.

Douglass claims that heavy reliance on race was a mistake. Yet, he also believes that the abandonment of any consideration of race is improvident.⁷⁰ Douglass concludes that the constructs of the University of California admissions policy will continue to change and problems will likely continue because of a representational diversity/parity model that remains the formal policy of the university.

⁶⁵ See Bryan K. Fair, *A Chance to Act Affirmatively*, in *A LARGER MEMORY: A HISTORY OF OUR DIVERSITY*, WITH VOICES 343 (Ronald Takaki ed., 1998).

⁶⁶ See Harvey Gee, *Race, American Values, and Colorblind Justice*, 5 TEX. F. ON C.L. & C.R. 121, 132 (2000) (Book Review).

⁶⁷ See Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1583 (2000). Under the decision by the University of California Regents to end affirmative action at the University of California, even though Latino residents represented more than thirty percent of the population, in 1997 only thirty-nine Latinos - down from eighty - were offered admission to Boalt Hall School of Law and the admission of African Americans dropped eighty percent to fourteen. See LYDIA CHAVEZ, *THE COLORBIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 254 (1998).

⁶⁸ See William C. Kidder, *Situating Asian Pacific American in the Law School Affirmative Action Debate: Empirical Facts About Thernstoms's Rhetorical Acts*, 7 ASIAN L.J. 29 (2000).

⁶⁹ See Tanya Schevitz, *UC Regents Set to Alter Admission*, S.F. CHRON. NOV. 15, 2001 at A1 (reporting that UC Regents are expecting to approve "comprehensive review proposal"). Under this new plan, a broader set of admission policy standards will be in place, and applicants will be judged. In addition to academics, admissions communities will consider a student's special talents or activities and any examples of overcoming adversity. Proponents of the plan claim that it is only fair to look at students in the context of their obstacles and hardships they had to face to ensure that campuses reflect the state's population.

⁷⁰ Skrentny, *supra* note 1, at 140.

Douglass asserts that the affirmative action programs based on parity shifted their focus to addressing the problems of under-representation and increasingly and myopically away from the concept of serving the "disadvantaged" students. In the view of university officials and state policymakers, these two categories become one and the same.⁷¹ The new concept of being underrepresented was made synonymous with being disadvantaged, even if that student was from a second-generation college-educated family with an upper-middle-class to higher income.⁷² Douglass' treatment of the admission controversy, as it relates to Asian Americans, reflects the difficulties of such an examination, and reveals the precarious position in which Asian Americans find themselves situated within the affirmative action debate.

Though Douglass fails to mention it, parity obscures discrimination against Asian Americans. Even if Asian Americans are over parity, that does not mean they do not face discrimination either overt or in the form of "glass ceilings" in the work place.⁷³ As some commentators have asserted, "[t]he admissions controversies of the 1980s illustrate that over-parity representation and discrimination against [Asian Americans] are by no means mutually exclusive."⁷⁴ Douglass adds that this is problematic since it elevates a larger societal goal over the rights of individuals and remains a vague doctrine not understood by either University officials or the general public, and insists that "[a]lthough it is steeped in the rationale of egalitarianism, the policies of its logical conclusion is substantial: only by limiting the access of one racial group (or economic category) can another 'under-represented' group gain increased access."⁷⁵ This policy would mean systematically constraining access by "over-represented" groups, for example, Asian American students. The irony of such a path illustrates the complexity of seeking social redress based on parity.⁷⁶

The primary reason why Asian Americans are not considered active players in the affirmative action debate is because most Americans have accepted the ideal of the "model minority myth." Since the 1960's, the dominant image of Asian Americans, within mainstream American society, has been one of monolithic racial

⁷¹ *Id.* at 127.

⁷² *Id.*

⁷³ GABRIEL J. CHIN, ET AL., BEYOND SELF-INTERESTS: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE: A POLICY ANALYSIS OF AFFIRMATIVE ACTION 21 (1996).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 142.

groups that has achieved economic, educational, and social success though hard work and perseverance, without turning to assistance from the government or racial preferences.⁷⁷ The truth is that Asian Americans have benefited from a broad range of affirmative action programs that exist in the contracting context and the "glass ceiling effect" that they still face.⁷⁸ Behind the facade of Asian Americans as a successful minority group lies the fact that Asian Americans are the victims of past and present hostility and discrimination.⁷⁹ The reality of Asian Americans' progress towards racial equality reveals the existence of substantial discriminatory obstacles in the areas of employment and education.⁸⁰

The "glass ceiling" has created barriers that have prevented Asian Americans from equal opportunity and professional advancement in both the private and public sectors of the economy.⁸¹ Compared to whites, Asian Americans are over-represented in lower paying, non-skilled positions.⁸² Although Asian Americans generally fare better than other minority groups, they still do not enjoy the same social opportunities that whites do. Overall family income figures, which show higher incomes for white families than for Asian Americans families, expose the model minority myth.⁸³ Statistics about median Asian American household incomes con-

⁷⁷ See ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 158 (1998). See also Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE 200 (George E. Curry ed., 1996) ("As it has become more acceptable to compliment Asian-Americans in order to condemn African Americans, it has become acceptable to champion Asian-American interests as a means of casting doubt on the advances of the civil rights movement. The politicians who have used Asian-Americans to attacked affirmative action claim to be concerned about racial minorities. Again and again, however, they have been shown that their genuine concern is with whites.").

⁷⁸ See THEODORE HSIEN WANG & FRANK H. WU, BEYOND THE MODEL MINORITY MYTH IN THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE 197 (George E. Curry ed., 1996).

⁷⁹ See e.g., Gregory Freeman, *Asian-Americans Deserve Fair Share in Business Contracts with City*, ST. LOUIS POST-DISPATCH, Jan. 16, 1996, at 9B (discussing complaints made by Asian Americans for not being included in city construction projects).

⁸⁰ See Selena Dong, Note, *"Too Many Asian": The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1027 (1995) (reporting charge that many institutions of higher education are discriminating against Asian Americans through quotas).

⁸¹ See Joseph Dolman, *Asian Success Evidence that America Still Works*, TULSA WORLD, June 23, 1996, at G6 (identifying model minority myth as contributing to high poverty rate among Asian Americans).

⁸² See Robert S. Chang, *Reverse Racism! Affirmative Action, The Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1128 (1996) (discussing "glass ceiling" as preventing Asian Americans from advancement).

⁸³ See Patricia K. Chew, *Asian Americans: the "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 28 (1994) (noting that percentage of Asian Americans groups living below poverty level exceeds percentage in U.S. general population).

ceal the fact that they are usually comprised of more income earners than all other racial groups, including whites.⁸⁴ Even so, Asian Americans experience poverty despite their best efforts.⁸⁵

Undoubtedly, the exaggeration of the achievements of Asian American students epitomizes the societal clash between the values of meritocracy and race neutrality and those of racial balance and quality of opportunity. These issues beg the central question whether affirmative action is an issue about fairness or equal opportunity. Affirmative action contains an inherent conflict between numerical equality that is sought by universities and moral equality sought by admissions applicants.

In his widely-cited law review article, *Neither Black Nor White: Asian Americans and Affirmative Action*,⁸⁶ Frank Wu has taken an innovative analytical approach to traditional equal protection analysis, and applies it to an analysis of discriminatory state action against Asian Americans and the use of the model minority myth by affirmative action opponents.⁸⁷ Wu argues that African Americans should remain the central focus of all affirmative action programs, and that the compensatory rationale makes it difficult, if not impossible, to justify affirmative action, as it is presently practiced, for any racial group other than African Americans.⁸⁸ However, other nonwhites should not be excluded in any type of contrived zero-sum game of any sort offered by affirmative action opponents. Instead, while admitting that Asian Americans and other non-black groups complicates the compensatory model, they should be included in affirmative action programs since they would contribute to the diversity rationale for affirmative action.⁸⁹

Wu makes the intriguing argument that Asian Americans face

⁸⁴ See Diane Crispell, *People Patterns: Family Ties Are a Boon for Asian Americans*, WALL ST. J. Sept. 28, 1992, (noting that sixty-three percent of Asian American households have two or more wage earners, compared with sixty percent of whites families, and that nineteen percent have three or more earners, compared with fourteen percent of white families).

⁸⁵ See Bill Johnson, "Mixed Race" Category Shows Folly of Preferences, DETROIT NEWS, Mar. 22, 1996, at A10 (discussing Asian immigrants who face language and adjustment problems, poverty, and health problems).

⁸⁶ Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

⁸⁷ *Id.* at 254.

⁸⁸ *Id.* Christopher Edley furnishes an up-to-date thumbnail sketch of the discrimination that African Americans still endure today. He relies on social science evidence to support his findings. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 42-52 (1996).

⁸⁹ Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 263 (1995).

a disparate impact from affirmative action programs regardless of how they are structured or implemented.⁹⁰ According to Wu, under current constitutional law, Asian Americans cannot be harmed in any special way unless whites are given preferential treatment.⁹¹ Sounding like a utilitarian in his defense of affirmative action, he responds that Asian Americans and whites should together be treated equally, and that the two groups should make collaborative efforts to shoulder the burden of such programs. This way, affirmative action is, in principle, only disadvantaging the majority as a whole and not necessarily any particular racial group.⁹²

Professor Wu's theory opens up new queries for analysis. His thesis creates a vision of racial justice that liberals would find appealing, and a perspective that conservatives and neo-conservatives alike will find unpersuasive. Wu's defense of preferential admissions for racial minorities is based on two assumptions. Both focus on the social costs and benefits resulting from affirmative action. First, Wu argues that Asian Americans and whites should move beyond their own self-interests to bear the burden of affirmative action together. Second, arguing that an overrepresentation of Asian Americans would defeat any efforts to create a diverse student body assumes that affirmative action in higher education will produce a net benefit for society. According to Wu, affirmative action increases social interaction among people of different races, cultures, and backgrounds in an effort to break down misconceptions and prejudices. In addition, with this variety of life experiences, classroom interaction will encourage social discourse.⁹³

I remain skeptical of Wu's proposal, and I am not completely satisfied by Wu's conclusion. Though Wu has forcefully argued that because affirmative action does not violate the constitutional rights of whites or Asian Americans, and that whites and Asian Americans can mildly disadvantage themselves, provided they are equally disadvantaged for the important purposes of affirmative action, he fails to illustrate to my satisfaction at least, why Asian Amer-

⁹⁰ *Id.* See also Frank H. Wu, *From Black to White and Back Again*, 3 *ASIAN L. J.* 185, 210 (1996) ("Analytically and empirically, Asian Americans are distinctive only if they are treated worse than whites, that is, when whites receive preferential treatment. Asian Americans are no different than whites as long as they are treated the same, regardless of whether affirmative action is in effect for other groups.").

⁹¹ See *supra* note 90.

⁹² *Id.*

⁹³ See GABRIEL J. CHIN, ET AL., *BEYOND SELF-INTERESTS: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE: A POLICY ANALYSIS OF AFFIRMATIVE ACTION* 5 (1996).

icans should support affirmative action on this basis alone.⁹⁴ Why should we be the sacrificial lambs? In other words, Wu does not adequately explain why Asian Americans should disadvantage themselves for the greater good. What has Wu overlooked?

There are some scholars whose own research may be suggesting that Wu's theory of affirmative action, as it relates to Asian Americans, along with his vigorous defense of affirmative action should be further refined. To the extent that Wu's thesis is valuable, Professor Miranda Oshige McGowan's own work, along similar lines, considerably strengthens (or weakens) his theory. In her recent research, McGowan analyzes the mismanagement of affirmative action programs to promote diversity, and reveals how the diversity rationale for affirmative action is skewed.⁹⁵ Racial and ethnic diversity does not necessarily translate into expressive diversity in educational settings.

McGowan asserts that the dangers of relying on race and ethnicity as proxies for diversity of social experience and social affiliation, which may not be an effective means of permitting such diversity, undermines the idea of affirmative action based on race or ethnicity.⁹⁶ Thus, Wu's claim that Asian Americans may be excluded because of overrepresentation, needs to be re-evaluated in light of McGowan's findings that diversity does not necessarily or easily translate into race. This becomes evident where McGowan explains that if schools only rely on dominant social understandings of race and ethnicity, their affirmative action programs will be handicapped. Instead, schools should be aware that actual group identities and social affiliations of students and applicants do not always correlate to skin color.⁹⁷

Assistant Attorney General Viet Dinh echoes McGowan's statements. Dinh argues that affirmative action, in its present form, treats race as a form of merit.⁹⁸ According to Dinh, "the race-as-merit theory promises perpetual race consciousness . . . race, as a component of merit will always be part of the evaluation process that purports to be meritocratic."⁹⁹ In addition, Dinh says, "[l]owering the standard to admit more African Americans and Hispanics into Berkeley . . . requires raising standards to exclude

⁹⁴ See *supra* note 90.

⁹⁵ See Miranda Oshige McGowan, *Diversity of What? RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 237, 241 (Robert Post & Michael Rogin eds., 1998).

⁹⁶ *Id.* at 246.

⁹⁷ *Id.*

⁹⁸ *Id.* at 287.

⁹⁹ *Id.*

more whites and Asians."¹⁰⁰ This would lead to endless division and conflict. He believes that individual merit and not group entitlement should be widely recognized, and embraced.¹⁰¹

The diverse views on affirmative action imply that race-based programs should be avoided. With this in mind, I would suggest that a more moderate proposal to retool these programs, utilizing a nuanced socioeconomic status scheme, is in order. Such programs would also pass constitutional muster because they do not employ set-asides, preferences, or quotas. There have been a number of alternatives to race-based affirmative action programs, one of the more-renown are class-based alternatives. Though there have been criticisms made about the alleged inability of class-based schemes to address the dual problems of race and poverty,¹⁰² I would argue that proposals for class-based affirmative action programs warrant more careful consideration. If the practice of artificially manufacturing a diverse student body is dismissed, a class-based system, though, would not actually guarantee a diverse student body, but would be closer to the original intent of an affirmative action retooled for the twenty-first century.

Secondly, even though a class-based system would not address dual problems of race-poverty, perhaps affirmative action was never meant to do that. Maybe racism and discrimination must be alleviated naturally, without government intervention. Thus, even if socioeconomic status were used as an admission criteria instead of race, and Asian American enrollment would increase dramatically, resulting in the overrepresentation of Asian Americans students would run counter to the goals of having a diverse student body—so be it.

Richard Kahlenberg in his book, *The Remedy: Class, Race, and Affirmative Action*,¹⁰³ claims that race-based affirmative action subverts the traditional standards of merit and qualification, and the current affirmative action program tended to benefit affluent Afri-

¹⁰⁰ See Viet Dinh, *Multiracial Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 280, 288 (Nicolas Mills ed., 1994).

¹⁰¹ *Id.* at 289.

¹⁰² Angelo Ancheta dismisses class-based schemes, and claims that "[s]ubstitution class for race ignores the basic problem of racial discrimination in American society. Class-based affirmative action is an anti-poverty policy, not an anti-racism policy. Color-blind advocates envision a world where race and ethnicity can somehow be ignored. We do not live in such a world." See ANGELO N. ANCHETA, *RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE* 158 (1998).

¹⁰³ RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

can Americans.¹⁰⁴ He contends that a class-based approach would not leave its beneficiaries with the stigma that is attached to race-based affirmative action.¹⁰⁵ He claims that "by helping the most disadvantaged African Americans, class-based affirmative action arguably does a better job of compensation for past discrimination than race-based affirmative action does."¹⁰⁶

Kahlenberg's research may serve as a foundation for similar approaches. Such programs would be desirable since they would limit the scope of benefited individuals and would pass constitutional challenge because they would be only subjected to rational basis review.¹⁰⁷ These alternative affirmative action schemes would allow universities and employers to base their admissions and hiring decisions on the two-prong criteria.

The implementation of class-based affirmative action programs and their effects on Asian American applicants serves as rich material for analysis. Remedies will vary depending on the program. In including Asian and Asian Americans in affirmative action, there will remain a question of including some or all Asian groups. Contrary to popular beliefs, Asian Americans actually benefit from class-based affirmative action programs. Professors Michael Omi and Dana Takagi report that "[t]he use of class preferences will present a clear racial advantage for Asian Americans applicants to all UC campuses. If socioeconomic status is used as an admission criterion instead of race, UC officials predict that Asian Americans enrollment will increase by fifteen to twenty-five percent while African Americans enrollment will drop forty to fifty percent, Latinos' enrollment will fall five to fifteen percent, and white entitlement will stay about the same."¹⁰⁸

Indochinese groups, in particular, would be the primary beneficiaries of such programs that require candidates to demonstrate a history of overcoming adversity and discrimination.¹⁰⁹ Most mem-

¹⁰⁴ *Id.* at 105.

¹⁰⁵ *Id.* at 166.

¹⁰⁶ *Id.* at 105.

¹⁰⁷ See Deborah C. Malamud, *African American and Ethnic Niches: A Legal Afterword*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 314 (John David Skrentny ed., 2001).

¹⁰⁸ See Michael Omi & Dana Y. Takagi, *Situating Asian American in the Political Discourse on Affirmative Action*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 271, 278 (Robert Post & Michael Rogin eds., 1998).

¹⁰⁹ See also Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in *THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE 2000* (George E. Curry ed., 1996) ("The inclusion of [Asian ethnic groups that generally have lower incomes and less assimilated] can bring more cultural income diversity to campuses that otherwise have a strong Asian-American presence.")

bers of these ethnic groups arrived in this country after the end of the Vietnam War.¹¹⁰ When they arrived here, almost immediately, there was a negative reaction to these refugees.¹¹¹ Unquestionably, the refugees have had an impact on the economy, jobs, wage scales, and neighborhood character in many parts of the nation.¹¹² There was serious doubt that these Southeast Asians could successfully assimilate into American society. It quickly became apparent that most of the recent Indochinese arrivals were finding it difficult, if not impossible, to adjust to American life.¹¹³ Added to their difficulties was the unfavorable attitude that many Americans had towards these refugees entering their neighborhood.¹¹⁴

Often times, "hardworking Indochinese adults were resented. . .because they competed with their American counterparts for increasingly scarce employment."¹¹⁵ The intense dislike of the refugees culminated in racially-motivated behavior against persons of Asian descent as a result of general anti-Asian sentiment exacerbated by misperception about Asians and their characteristics. Not uncommon were incidents of racially motivated violence against these refugees.¹¹⁶ The vestiges of these experiences linger to this day. Vietnamese, Cambodians, Laotians, and Hmong are amongst the poorest of Asian ethnic groups in this country.

A disproportionate number of Southeast Asians are on public assistance. In fact, they are the fastest growing segment of welfare recipients and have the highest welfare dependency rates of any ethnic or racial group.¹¹⁷ Southeast Asian welfare households are distinct from African American and Latino households on welfare, given that they are generally larger in size and have higher fertility rates.¹¹⁸ Further, the labor force participation rate among Southeast Asians in California between the ages of eighteen and fifty-four is fifty-seven percent, significantly below that of all U.S. additions. Further, Southeast Asians face the most economic hardship when

¹¹⁰ See Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT'L L. & COM. REG. 559, 602 (2001).

¹¹¹ See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

¹¹² SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETATIVE HISTORY* 100 (1991).

¹¹³ See GILL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 167 (1986).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Supra* note 102, at 73-74.

¹¹⁷ See Paul Ong & Evelyn Blumenberg, *Welfare and Work Among Southeast Asians*, in *THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES & POLICIES* 113 (Paul Ong ed., 1994).

¹¹⁸ *Id.* at 123.

compared to other Asian ethnic groups and are the most under-represented and seriously disadvantaged in higher education. While Asian Americans tend to value educational accomplishments and have the highest median school years completed of all other racial groups, they also experience cultural conflicts, language challenges, and difficulties financing higher education.¹¹⁹

There are affirmative action programs that are designed to include race and socioeconomic status and implemented in ways to achieve desirable goals in allowing access to education to all. For over two decades, the University of San Francisco School of Law program has been successfully providing access to legal education to those who have historically been denied opportunities. The University of San Francisco School of Law Special Admissions Program has made efforts to address the under-representation of seriously disadvantaged Asian ethnic groups such as Vietnamese, Cambodians, Laotians, and Hmong in the legal professions by actively recruiting applicants from these communities. Taking into consideration the history of these communities in their appropriate historical context makes it clear that they are disadvantaged and could benefit from a preferential admissions program. The program reflects the law school's commitment, providing educational opportunities to racial minorities and socio-economically-disadvantaged students. Much of the program's success can be attributed to its inclusionary nature. All applicants to the law school are provided the voluntary choice to be included or not included in the special admissions process.

Importantly, the University of San Francisco Law School does not lower its objective admissions criteria for applicants who apply through this program, but rather it considers the special qualities of each applicant.¹²⁰ Nonetheless, special admissions applicants are selected on both objective and subjective criteria, relying on educational, employment and public interest activities, as well as other achievement experiences, writing samples and letters of recommendation.

Applicants are asked to list on the supplemental special admissions questionnaire the educational background of their parents; if both the parents were present in the home during the applicant's childhood; the ages and highest educational level achieved by each

¹¹⁹ See Patricia K. Chew, *Asian Americans: the "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 28-30 (1994).

¹²⁰ See University of San Francisco School of Law Application Bulletin 1998-1999, Supplemental Questionnaire for Special Admissions Program.

sibling; the financial situation of the applicant's family during childhood, including their parents' occupation; primary language, if English was not spoken in the home; identify and describe the communities in which the applicant resided during childhood, including ethnic and economic composition; identify and describe the educational institution attended prior to attending college; describe any social, cultural, and/or economic factors that may have adversely affected the applicant's past academic performance including performance on standardized tests and describe work or other experiences during or since college which demonstrates the capacity for sustained effort necessary for successful completion of law school and effective practice of law.¹²¹

A socio-economic-based program can also be defended, if need be, on the basis of the strong argument that non-special admission applicants had weaker numerical and subjective qualifications and that the public educational system has failed to produce enough minority professions. Such a program works to enable qualified applicants from disadvantaged minority or non-minority communities to attend medical schools, law schools and other institutions of higher learning in sufficient numbers to enhance the quality of education for all.

In the end, such criteria will screen out Asian American or African American applicants whose families include four generations of college graduates and who already enjoy an upper-middle class status. There is some consensus amongst academics that programs that are at least partly based on economics are proper to achieve such desirable goals. As such, universities may wish to move to programs that emphasize socio-economic factors and language proficiency, which would be more fair and equitable, and certainly less controversial.

According to Martha Minow, a law professor at Harvard, "diversity along lines of income or economic status is as valuable as diversity by race, gender, and disability, when the goal is to promote contact and mutual exposure across groups—and to thereby undercut tendencies to stereotype or demonize the 'other.'"¹²² Similarly, conservatives such as John Miller, political reporter for the *National Review*, seem to agree. Miller says, "Certain immigrants, of course, may receive a short-term political payoff [from affirmative action]. The benefits of affirmative action can mean an

¹²¹ *Id.*

¹²² MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS & THE LAW 155 (1997).

Ivy League education for someone who might otherwise miss it."¹²³

IV. CONFLICT BETWEEN AFRICAN AMERICANS AND IMMIGRANTS

The second part of *Color-Lines* relies on solid research methods to extract necessary data to formulate cogent findings about the dynamics between African Americans and immigrants in the workplace. The issues addressed include diversity management, especially manufacturing and service-related industries; the use of racial and cultural brokering; and conflicts between African Americans and Latinos, and intra ethnic group conflict amongst Latino groups and between American born and foreign-born blacks or racial groups.

A particular strength of this section is sociology professor Jennifer Lee's perceptive analysis of inner-city hiring practices, she details how race is used in surprising ways in retail hiring by small business owners.¹²⁴ Lee asserts that:

The shop has become a site where Jewish, Korean, and black storeowners, along with their black customers, construct and negotiate race, ethnicity, and opportunity. As non-black merchants doing business in predominantly black neighborhood, Jews and Koreans fully recognize that their out-group status can easily make them targets of racially charged arguments, or even more, overt instances of conflict such as boycotts and riots. As visible racial and ethnic outsiders, Jewish and Korean merchants hire black employees to serve as 'cultural brokers' who bridge the linguistic, cultural, racial, and class gaps between the owners and their predominantly black clientele. Cultural brokers mediate, defuse, and de-racialize arguments, maintaining the day-to day routine and order in these communities.¹²⁵

Lee advocates for a rethinking about race-based hiring needs. She favors a more nuanced understanding of civil rights and race relations. She warns that race-based hiring does not necessarily mean that African Americans will benefit, and that the racial category "blacks" may be over-inclusive if it actually works to undermine the goal of guaranteeing equal opportunity to African Americans, the original intended beneficiaries of affirmative

¹²³ JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA'S ASSIMILATION ETHIC* 125 (1998).

¹²⁴ See Jennifer Lee, *The Racial and Ethnic Meaning behind: Black: Retailers' Hiring Practices in Inner-City Neighborhoods*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 168 (John David Skrentny ed., 2001).

¹²⁵ *Id.* at 184.

action.¹²⁶

Preceding the publication of *Color Lines*, University of California, Davis Law Professor Bill Ong Hing's released work on the conflict between Koreans and African Americans in Los Angeles strengthened Lee's research. According to Hing, race is only part of a more complicated formula. In his book, *To Be An American: Cultural Pluralism and the Rhetoric of Assimilation*,¹²⁷ he addresses the inadequacies of the black/white paradigm that fails to measure interracial conflict, and argues that this bipolar framework must be expanded to accommodate an understanding of the interracial conflict involving Korean immigrant storeowners and African American residents in large urban cities.¹²⁸ Hing reports that only in the aftermath of the Rodney King verdict was considerable attention brought to the conflict between Korean American and African American communities in South Central Los Angeles.¹²⁹

Despite popular belief, Hing argues that the tensions between these two communities were not completely racial. Rather, they were a result of a combination of racial, economic, and class divisions.¹³⁰ These class distinctions are evident in the similar destruction of other minority-owned businesses.¹³¹ The destruction of Latin and African American owned businesses during the riots, in addition to the vandalism unleashed on Korean businesses, proved that racism was not the sole basis for the violence.¹³² Lee and Hing realize that recognition of the complexities of the racial dynamics of race is a prerequisite to assisting ourselves to formulate potential solutions to the tensions and the conflict.

A pair of insightful essays is found in part three, which examines the views and attitudes of whites, African Americans, Asian

¹²⁶ *Id.* at 185.

¹²⁷ BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION*, (1997).

¹²⁸ *Id.* at 162.

¹²⁹ *Id.* Lisa Ikemoto has also presented some explanations for the conflict. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* in *CRITICAL RACE THEORY: THE CUTTING EDGE*, 312 (Richard Delgado ed., 1995) ("The constructed Korean American/African American conflict has become, for many, the racial conflict of the moment. The symbolized conflict is not only for conflict among the (too) many groups of racial minorities. To the extent that the apparent Korean American/African American conflict contributes to the conclusion that a multiracial/multicultural society is doomed to conflict, it displaces white supremacy as the central race issue. That displacement, in turn, may strengthen the distinction between whiteness and race." *Id.*).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

Americans, Latinos, and makes some tentative conclusions based on data collected from focus groups.¹³³ First, the researchers argue that the major differences between their study and research on affirmative action is their findings that Asian Americans support affirmative action more than Latinos. In their discussion, Asian Americans generally agreed that affirmative action had little effect on them, and believe that Asian Americans were rarely victims of discrimination.¹³⁴ Second, Latinos adamantly disapproved of the way that affirmative action policies harmed all minority groups. They also viewed affirmative action as a policy bringing stigma for its beneficiaries since it caused the lowering of standards for minorities simultaneously labeling them as less competent than whites.¹³⁵ Notably, the inclusion of the essays that relate personal anecdotes from the individuals and poll data transform the book from being merely another policy analysis on affirmative action.

V. CIVIL RIGHTS ALTERNATIVES FOR THE TWENTY-FIRST CENTURY

The fiery debate over immigrants and affirmative action is not restricted to college admission; in fact the issue is reified in the context of the allocations of government contracts. La Noue and John Sullivan examine the issue of affirmative action categories in "Deconstructing Affirmative Action Categories."¹³⁶ Central to their discussion is the issue of which groups should be the beneficiaries

¹³³ Lawrence D. Bobo, *Race, Interests, and Beliefs about Affirmative Action: Unanswered Questions and New Directions*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 191 (John David Skrentny ed. 2001); Carol M. Swain, Kyra R. Greene, and Christine Min Wotipka, *Understanding Racial Polarization on Affirmative Action: The View from Focus Groups*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 71 (John David Skrentny ed. 2001).

¹³⁴ *Id.* at 197-98. According to Lawrence Bobo, this dialogue includes voices from individuals of different ethnic backgrounds relying on focus group discussions. Bobo explains in his contribution, public opinion views with the kind of affirmative action mentioned in surveys, with whites showing support for some types. This is especially true when affirmative action is described as special job outreach and training for minorities or as a scholarship program targeted at minorities. Focusing on views of the policy when it aids African Americans, he finds racial or ethnic differences in attitudes that are not reducible to socioeconomic and ideological factors. He contends that a person's ethnic or racial identity helps predict how one views the policy. Whites are mostly likely to see negative effects of affirmative action. African Americans are the least likely to see negative effects of affirmative action, while Latinos are less supportive, and Asian Americans fall between Latinos and whites.

¹³⁵ *Id.* at 237. See also Randall Kennedy, *PERSUASION AND DISTRUST: THE AFFIRMATIVE ACTION DEBATE*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 52 (Nicolaus Mills ed., 1994) (describing the effects of stigma attached to affirmative action beneficiaries including the perception that they cannot compete on an equal basis with whites).

¹³⁶ See GEORGE R. LA NOUE AND JOHN C. SULLIVAN, *DECONSTRUCTING AFFIRMATIVE*

of these preferences. They claim preferences for women, Latinos, Asian Americans, Native Americans, Eskimos, and Aleuts. Additionally, they examine the complex history and the decisions about what groups prefer and the socioeconomic status of these groups, suggesting that the current affirmative action categories are over-inclusive and not based on empirical analysis.¹³⁷ It was not until 1989, that the Court in *City of Richmond v. Croson*,¹³⁸ finally settled on a standard of review.¹³⁹

La Noue and Sullivan explain the need to justify the inclusion of particular groups in affirmative action programs, which became constitutionally mandated under *Croson*. The Court in *Croson* rejected the Richmond City Council's assertion that its set-aside plan was remedial in nature and was enacted for the purpose of promoting wider participation by minority business enterprise in the construction of public projects, and invalidated the minority set-aside program for contractors awarded municipal construction contracts.¹⁴⁰ The Court will strike down affirmative action programs in all but the most unusual cases.

The authors interpret the *Croson* analysis, and according to La Noue and Sullivan, the *Croson* case requires that a jurisdiction's definition of the groups eligible for preference have a proper evidentiary basis based on empirical or anecdotal evidence that discrimination had existed and that the affirmative action program is narrowly tailored to remedy that discrimination.¹⁴¹ The authors

ACTION CATEGORIES, IN *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 214 (John David Skrentny ed., 2001).

¹³⁷ *Id.* at 71. Ian Haney Lopez has completed some fascinating research on how racial categories are actually social constructions. Lopez argues that "[r]ace are categories of difference which exist only in society; they are produced by myriad conflicting social forces; they overlap and inform other social categories; they are fluid rather than static and fixed; and they make sense only in relationship to other racial categories, having no meaningful independent existence. Race is socially constructed. See IAN F. HANEY LOPEZ, *THE SOCIAL CONSTRUCTION OF RACE*, IN *CRITICAL RACE THEORY: THE CUTTING EDGE* 199 (Richard Delgado ed., 1995).

¹³⁸ *City of Richmond v. Croson*, 488 U.S. 469 (1989).

¹³⁹ There are also some scholars who advocate that the standards of review be abandoned altogether. See Girardeau A. Spann, *Pure Politics*, in *Critical Race Theory: The Cutting Edge* 111 (ed. Richard Delgado 1995) ("In light of the failure of countermajoritarian, minorities could rationally choose to forgo reliance on judicial review altogether and concentrate their efforts to advance minority interests on the overtly political branches of government.").

¹⁴⁰ *Id.* at 511. The City of Richmond, like any other public entity that wants to implement race-conscious affirmative action measures, must identify the discrimination, public or private, with some specificity before it may use any race-conscious relief.

¹⁴¹ *Id.*

observe that during the years that followed, the Court's decisions developed no clear standard of review and seemed to turn on a variety of factors including whether official findings of past discrimination had been made, whether the program used rigid or flexible quotas, whether the program had been issued by Congress or a court, and of any disproportionate impact on another racial group.¹⁴²

Under the patina of *Croson*, the authors argue the type of research being introduced to defend MBE programs now directly implicates the problem of over-inclusiveness within affirmative action group categories.¹⁴³ Under current law, a preference program for minority-and women-owned business will not meet *Croson*'s test that the jurisdiction has a compelling interest for the preferences unless the program is supported by research that identifies the discrimination being remedied.¹⁴⁴ According to La Noue and Sullivan, such research is usually compiled and caused by a disparity of students because of *Croson*'s instruction that a disparity between the number of "qualified," "willing and able" and their use might permit an inference of discrimination.¹⁴⁵

Further the authors argue that the affirmative action categories are often more bureaucratic convenience than demographic realities. Enormous economic and cultural differences exist, for example, between Asian Americans of Laotian, Indian, Japanese, and Pacific Islander ancestry. La Noue and Sullivan cite the anomaly that many affirmative action programs created separate categories of analysis for Native Americans and for Eskimos and Aleuts because the latter groups argued in 1980 that they shared the same history, custom, and tradition as American Indians.¹⁴⁶ While La Noue and Sullivan's discussion is one example of the problems that derive from assigning an umbrella category to one racial group, it is too broad for its own sake. The authors conclude that if the courts are going to reexamine the composition of the affirmative action categories, it will be important for social scientists to produce better data than currently exists.¹⁴⁷

The manner in which Asian Americans factor into any analysis

¹⁴² See *supra* note 136, at 123.

¹⁴³ See George R. La Noue and John C. Sullivan, DECONSTRUCTING AFFIRMATIVE ACTION CATEGORIES, IN *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS* 77 (John David Skrentny ed., 2001).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 83.

¹⁴⁷ *Id.* at 85.

of affirmative action in the workplace is a double-edged sword. In fact, a consideration of Asian Americans in business contracting with statistical evidence of discrimination would justify their inclusion.¹⁴⁸ Asian Americans can also be used as an example that perhaps presents a strong case for including immigrants in affirmative action. Congressional findings that Asian Americans and Asian immigration have suffered discrimination in a broader historical context of discrimination lend support to this position. As a racial group, they have experienced racial discrimination in all aspects of public and private life.¹⁴⁹ Congressional findings, which are well supported by numerous sources, demonstrate the existence of direct discrimination against Asian American owned business in the awarding of federal government contracts. In addition to direct discrimination, other, more insidious means of racial discrimination also prevent them from competing for federal government contracts. Asian Americans are disadvantaged by limited opportunities available for funding, training, and economic opportunities. In addition, Asian Americans are blocked from establishing contracting business and fair competition because of resulting higher price quotations from supplies, bid-rigging, and blocked access to bonding and financing from commercial lenders.¹⁵⁰

Finally, in the book's afterword, University of Michigan Law Professor Deborah Malamud provides some innovative policy proposals. Malamud asserts that the national conversation on civil rights and affirmative action is always over-simplified and increasingly based on memory, instead of reality. Race and gender discrimination continues to plague our society. But political commentators on both the political Left and the Right, as well as the American public, continue to disregard the changing nature of the discrimination problem, civil rights law, and affirmative action in today's increasingly multi-ethnic, multi-racial America.¹⁵¹

¹⁴⁸ See also THEODORE HSIEN WANG & FRANK H. WU, *BEYOND THE MODEL MINORITY MYTH*, IN *THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE* 197 (George E. Cui ed., 1996) ("The evidence from California strongly suggests that Asian-Americans often need affirmative action, particularly in areas where they do not have the necessary social connections or political power to break into the networks that lead to jobs and business opportunities.").

¹⁴⁹ See Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 *GONZ. L. REV.* 627, 628 (1997) (summarizing the historical discrimination that Asian groups faced almost as soon as they reached this country's shores).

¹⁵⁰ See generally, Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian-Pacific Americans*, *Ann. Survey Am. L.* 463 (1995).

¹⁵¹ *Id.* at 338-39.

Malamud seems to agree with La Noue and Sullivan that social science will play a crucial role in the current wave of affirmative action litigation and politics—whether its contribution is to provide expert testimony on the need for diversity in higher education or to provide advice to pollsters and activists on how the framing of questions about affirmative action shapes the results of polls and popular initiatives.¹⁵² She also moves beyond the legal standing requirements in affirmative action litigation and suggests that the multi-ethnic and immigrant nature of American society will play an increasingly important role in the affirmative action debate.¹⁵³

The thrust of Malamud's contribution is found in her discussion of identity policy problems. She argues that social scientists and political commentaries have fallen behind in being aware of the ethnic reality of America, and legal development lags behind as well. According to Malamud, the courts have never held ethnic or racial diversity as a constitutionally-accepted goal anywhere except in higher education. As a result, public employers hiring on the basis of diversity have not realized that there is different law for different domains. Further, she states that hiring to achieve diversity by private employers may also run afoul of the law. Malamud uses as an example Congress' refusal in Title VII to allow employers to use race as a bona fide occupational qualification.

In her conclusion, Malamud considers alternatives to current affirmative action policies, especially with respect to the review of such programs by the Supreme Court.¹⁵⁴ Malamud also entertains ideas for policy change. She suggests that if the legal system developed a sliding scale of levels of scrutiny to be applied to different racial or ethnic groups based on their relative level of suffering, and the decision was made that Asian Americans were better off than African Americans, the odd results would be that public institutions would face a lower level of legal scrutiny for their pro-Asian Americans affirmative action programs than for their pro-African American affirmative action programs.¹⁵⁵ That result, she says, would defy the remedial logic of affirmative action, but it would be

¹⁵² *Id.*

¹⁵³ *Id.* at 339.

¹⁵⁴ See Fullilove v. Klutznick, 448 U.S. 448 (1980); see also, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 776 (1979); 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, 22-25 (1996) (providing a useful discussion of the evolution of the Supreme Court's race jurisprudence).

¹⁵⁵ *Id.* at 315.

dictated by the legal systems' decision that there is no such thing as benign discrimination.¹⁵⁶

Perhaps a point that Malamud only implicitly attempts to make is: the dialogue about affirmative action needs to be reinvigorated with new ideas about racial identity, cultural politics, and realistic ways in which to review the constitutionality of its programs. As such, Americans should heed Malamud's prescriptive view, and look beyond blaming wrongdoers, identifying victims, and proclaiming good intentions. A better approach is a cooperative effort to solve problems. Here, I propose that the rules that accompany a traditional understanding of affirmative action need to be changed first. Taking notice of Malamud's concerns, in this section, and borrowing from alternative dispute resolution (ADR), a consensual alternative to adjudicative dispute resolution. ADR urges the legal profession to move away from its exclusive focus on the use of court to resolve conflicts and to consider a broader spectrum of problem-solving approaches.¹⁵⁷ Similarly, the first step in the national conversation about race is to learn and develop a new language for civil rights. Our society should not endlessly debate each other ad nauseam, but rather learn how to talk about the problems of race and racism in the shared goal of solving them.

An emerging strand of ADR is transformative mediation, which provides opportunities for personal empowerment for participants, and on empowering participants to give and receive recognition of the other's needs, concerns, and other interests.¹⁵⁸ Transformative theory may be applied in areas of research on race, sociology, and the law—Eric Yamamoto, Law Professor at the University of Hawaii School of Law, advances such theories.

In his research and writings, Professor Yamamoto has presented his theory of "interracial justice," which draws broadly from the disciplines of law, theology, social psychology, ethics,

¹⁵⁶ *Id.*

¹⁵⁷ See e.g. Pam Marshall, *Would ADR Have Saved Romeo and Juliet?*, 36 OSGOODE HALL L.J. 771 (1998); Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U.L. REV. 77 (1991); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L.REV. 577 (1997); Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503 (Summer 1996). This movement reflects what some scholars claim is a close relative of the current practice of law, in which most cases are resolved by negotiation rather than trial.

¹⁵⁸ See e.g., Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA L. REV. 253, 266-77 (1989); Jonathan F. Anderson & Lis Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997).

peace studies and indigenous practices. On a theoretical level, Professor Yamamoto offers an innovative and ambitious framework, which I believe, can serve as a bridge between racial minority communities in an effort to improve race relations in this country.¹⁵⁹ As a practical matter, I would argue that Yamamoto's ideas may be extended to further explore the dynamics within interracial conflicts in local elections, state initiative, university polices, business, and the courts.¹⁶⁰ Of particular importance is the "Critical Transformative Mediation Theory" study to the relationship between race, economics, property and power. The transformative theories may prove to be useful in these contexts, and may be used to solve contemporary conflicts over discriminatory hiring, affirmative action, and related issues. This methodology is distinguishable from most Critical Race Theory scholarship, which is largely theoretical. In fact, I believe that it would have a practical application, one that incorporates empirical data from focused studies. These practical theories would be developed in an effort to close the class gap that presently divides communities of color. For example, this new conceptual framework may be utilized to offer insightful analyses of the existing racial tensions between new Asian immigrants and African Americans in large cities, as well as the role of white hegemony in contemporary racial politics.

Critical Race Transformative Mediation Theory views communication across this gap as a means to build community and dismantle the artificial barriers that have been erected by society to divide people of color along class lines. One of the core components of this theory is an understanding of each minority groups' position, underlying needs, and motivations to allow negotiators to better understand what the other side really needs to be satisfied in the agreement or settlement. The theory would be consistent with the ideal that civil rights are a universal cause, and it is merely one approach to building gaps between community that have common interests, but that, unfortunately, have not recognized those interests.

¹⁵⁹ See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 172-91 (1999). See also Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. L. REV. 687, 689 (1996) (arguing that coalition building acknowledges the democratic process, the fact that minorities have been unable to gain any really political voice, and that "[c]oalition building has gained a new importance as demographic projections now make it possible to imagine a majority of color.").

¹⁶⁰ See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 172-91 (1999).

VI. CONCLUSION

In a society that has made race matter so pervasively, color-blindness simply leaves in place racialized thinking that benefits whites, and seems rational because it is so familiar. Ignorance or denial of longstanding racial discrimination contributes to the easy embrace of faulty neutralities.¹⁶¹

Color Lines is released at a time when the Supreme Court and other branches of the federal government, along with private institutions, are considering whether to abolish affirmative action.¹⁶² This book reveals why courts should refrain from affirmative action in the abstract, and focus more on an understanding of the facts and actual consequences of different affirmative action programs.¹⁶³ Overt and subtle institutional forms of racial discrimination persist today and are revealed in various statistics including educational attainment, employment opportunities, and infant mortality. As such, affirmative action is still needed and African Americans should remain as the central focus of such programs, however, other groups and individuals of all racial backgrounds also stand to benefit from such programs.¹⁶⁴ Based on this set of circumstances, and depending on the context, women, minorities and immigrants should be included in affirmative action.

Importantly, Skrentny's book lays out the groundwork for the additional steps that policymakers and Americans must take for a less divisive and more inclusive society in which we all benefit. The essays have shown that (1) programs based solely on diversity or representation may not be accurate; (2) programs already in existence need to be closely reexamined; (3) new groups must develop the ideal that diversity alone is insufficient; (4) programs must be more sophisticated to consider the socioeconomic and personal

¹⁶¹ MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS & THE LAW 153 (1997).

¹⁶² See also Tony Mauro, *Affirmative Action Cases May Get High Court Hearing*, THE RECORDER, Oct. 23, 2001 (reporting that "advocates on both sides of the racial preferences issue are looking to a pair of cases involving affirmative action programs at the University of Michigan as the most staying power and the highest likelihood of attracting Supreme Court attention").

¹⁶³ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 254-55 (1999).

¹⁶⁴ See also Amy Gutman, *How Affirmative Action Can (and Cannot) Work Well*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 282, 342 (Robert Post & Michael Rogin eds., 1998) ("[A]ffirmative action programs can be designed in a way that helps break down negative stereotyping, then African Americans can be well served and so can members of other groups to the extent that their opportunities to succeed in higher education and high-status occupations are now seriously blocked by negative stereotyping of their group.").

background of individuals. In the end, the volume is successful in reinvigorating serious discussions over the appropriate principals for affirmative action and immigration; and seriously considers the interactions among racial minorities and in an increasingly multi-racial society.