

# The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California

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## I. INTRODUCTION

In today's higher education admissions policies, Asian Americans<sup>1</sup> have ceased to be "minorities" because they are no longer underrepresented.<sup>2</sup> In affirmative action policy debates, the statistical representation of racially defined groups, such as Asian Americans, in social institutions has served as a proxy for discrimination. Indeed, the statistically robust presence of Asian Americans in higher education is no secret. In 2000, for example, Asian and Pacific Islander Americans constituted 5.9% of college and university students, as compared to only 4% of the United States population.<sup>3</sup> As such, Asian Americans' alleged

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1. In this paper, I use the term "Asian American" in reference to individuals of Asian descent in the United States (Chinese, Japanese, Korean, Indian, Filipino, Vietnamese and other South Asian and Southeast Asian groups) who have been racialized and grouped as "Asian" in policy and legislation. I do not use the term "Asian Pacific American" (unless I am citing an organization, report, or statistic that uses the term) because I am not referring to Pacific Islander groups, who have distinct histories and who become marginalized by this conflation. See Vicente M. Diaz, *To "P" or Not to "P"?: Marking the Territory Between Pacific Islander and Asian American Studies*, 7 J. OF ASIAN AM. STUD. 183 (2004).

2. Some universities disaggregate Asian American and Pacific Islander data and may include certain underrepresented groups in affirmative action programs. However, Asian Americans are often aggregated and excluded from these programs. For a discussion of the invisibility of Asian Americans in minority university programs, see Keith Osajima, *Racial Politics and the Invisibility of Asian Americans in Higher Education*, 9 EDUC. FOUND. 35 (1995).

3. See WILLIAM B. HARVEY & EUGENE L. ANDERSON, MINORITIES IN HIGHER EDUCATION:

overrepresentation in higher education has served as grounds for excluding them from affirmative action programs that address the effects of past and persistent racial discrimination.

This article examines the historical process by which Asian Americans have been removed from minority status—de-minoritized—at the University of California (“UC”). Because of the decentralized structure of higher education in the United States, it is difficult to generalize across institutions, as each develops policies from its own historical, social, and political context.<sup>4</sup> In light of this consideration, the UC system is an apt focal point for the present examination because California is home to significant numbers of Asian Americans and has also been the site of critical affirmative action developments and controversies about Asian American admissions.

An examination of policy shifts at UC reveals how Asian Americans have been “racialized”<sup>5</sup> over time, through an unstable and contested process that began with the establishment of Asian Americans’ minority status in the 1960s and its removal in the 1980s.<sup>6</sup> Of particular note is the *Regents of the University of California v. Bakke* case,<sup>7</sup> in which Asian Americans’ minority status was scrutinized. While some legal scholars interpret Justice Powell’s opinion as embodying judicial indifference toward Asian Americans in the affirmative action discussion,<sup>8</sup> this article considers the surrounding historical and sociopolitical context—including activist responses from the Asian American community—and places the *Bakke* case at the center of an important struggle over the issue of Asian Americans’ minority status.<sup>9</sup>

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TWENTY-FIRST ANNUAL STATUS REPORT: 2003-2004 (2005), available at <http://www.ge.com/foundation/minorities.pdf>; RACIAL STATISTICS BRANCH, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2000), available at <http://www.census.gov/population/www/socdemo/race/api.html>.

4. JOHN AUBREY DOUGLASS, UNIVERSITY OF CALIFORNIA ACADEMIC SENATE, SETTING THE CONDITIONS OF UNDERGRADUATE ADMISSIONS: THE ROLE OF UNIVERSITY OF CALIFORNIA FACULTY IN POLICY AND PROCESS ¶ 2 (1997) (stating that “In general, public institutions have attempted to decide independently who are disadvantaged groups and who are not, and to develop policies and programs to expand access and increase diversity.”).

5. For a theoretical account of racial formations and of the manner in which racial categories are created and given meaning, see MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994).

6. See Sharon S. Lee, *Over-represented and De-minoritized: The Racialization of Asian Americans in Higher Education*, 2 INTERACTIONS: UCLA J. OF EDUC. AND INFO. STUD. (2006), available at <http://repositories.cdlib.org/gseis/interactions/vol2/iss2/art4>.

7. 438 U.S. 265 (1978).

8. See Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans From the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545, 561 (2005) (describing the mention of Asian Americans in *Bakke* as appearing only in footnotes); see also Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L. J. 225, 250 (1995).

9. Given that Asian Americans are divided on the issue of affirmative action, this paper will focus on Asian American organizations that support affirmative action. Internal divisions on this issue,

A useful lens for examining these historical shifts is the notion of representation. In the present discussion, two senses of representation are important: the *statistical* representation of Asian Americans in higher education<sup>10</sup> and the *ideological* representation of Asian Americans as a model minority.<sup>11</sup> These two senses of representation have interacted and become intertwined in the discourse of attorneys, university administrators, and judicial authorities, a discourse that has effectively de-minoritized Asian American students.

Meanwhile, Asian American students, faculty, and community members have contested these representations. Because social and ideological constructions of Asian Americans—as those of all minority groups—evolve and are perennially contested, it is always possible to reshape existing representations. Thus, with an eye to facilitating positive developments in public and professional discourses, I conclude this essay by critiquing, first, the use of parity measures as proof that discrimination against Asian Americans has ended, and second, the deployment of “model minority” discourse as a way to explain Asian American progress. My aim in so doing is to join the larger movement that challenges stereotypical assumptions and pushes for newer, more accurate means of understanding Asian American experiences.

## II. SETTING THE CONTEXT:

### THE UNIVERSITY OF CALIFORNIA’S ADMISSIONS POLICIES

An ample literature reveals that children of Asian immigrants in the United States have long faced barriers to equal K-12 education.<sup>12</sup> Depending on locale, statutes and policies defined Asian Americans either as “White” or “Black” and assigned them to segregated schools. In the late nineteenth and early twentieth centuries, a series of Supreme Court cases

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which highlight the diversity of the Asian American population, merit further research. For more on this topic, see Paul Ong, *The Affirmative Action Divide*, in *ASIAN AMERICAN POLITICS: LAW, PARTICIPATION, AND POLICY* (Don T. Nakanishi & James S. Lai eds., 2003). I return to these issues later in this essay.

10. By “statistical representation of Asian Americans in higher education,” I mean Asian Americans’ rising enrollment numbers, often invoked in arguments that Asian Americans no longer need affirmative action because they are overrepresented based on a demographic measure.

11. By “ideological representation of Asian Americans as a model minority,” I mean the image and discourse of Asian Americans as successful and acquiescent, and as living evidence that diligence can beget success.

12. See generally Charles M. Wollenberg, “*Yellow Peril*” in *the Schools (I and II)*, in *THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE: A SOURCE BOOK FOR TEACHERS AND STUDENTS* (Don T. Nakanishi & Tina Yamano Nishida eds., 1995). In addition, since their earliest days in this country, particularly on the West Coast, Asians were excluded from citizenship, enfranchisement, land-ownership, and a host of other rights. See generally RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998); SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991); ANGELO N. ANCHETA, *RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE* (2d ed. 2006).

addressed the issue of school segregation in a way that reflected racial prejudice against Asian American students and intolerance of Asian languages in schools.<sup>13</sup>

More recent historical scholarship has begun to uncover the history of Asian American access to higher education.<sup>14</sup> As of the 1960s, Asian Americans were still struggling to gain educational and occupational access, particularly at the post-secondary level. Initially, affirmative action policies protected Asian Americans along with other minority groups. The Office of Civil Rights required institutions of higher education to develop affirmative action programs specifically geared towards hiring qualified “minorities,” which, as defined by the Department of Labor, included “Negroes, Spanish-surnamed [persons], American Indians, and Orientals.”<sup>15</sup> Thus, as designated beneficiaries of affirmative action programs, many Asian Americans gained admission to reputable schools in the 1960s and 1970s.<sup>16</sup>

In the 1960s, UC administrators became concerned with increasing enrollment rates of low-income and minority students. To that end, Educational Opportunity Programs (“EOPs”),<sup>17</sup> consisting mainly of community outreach, junior high school recruitment, and tutoring for enrolled college students were initiated in 1964 and implemented on all UC

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13. See Valerie Ooka Pang et al., *Asian Pacific American Students: Challenging a Biased Educational System*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, 2ND EDITION (James A. Banks & Cherry A. McGee Banks eds., 2004) (citing the 1885 Supreme Court cases *Tape v. Hurley* and *Aoki v. Deane* as well as the 1927 *Gong Lum v. Rice* case, in which Chinese and Japanese immigrants challenged policies that barred their American-born children from White schools).

14. In this discussion of the history of Asian American access to higher education, I refer to studies examining pre-1980 Asian American educational experiences. See generally ALLAN W. AUSTIN, FROM CONCENTRATION CAMP TO CAMPUS: JAPANESE AMERICAN STUDENTS AND WORLD WAR II (2004); GARY OKIHIRO, STORIED LIVES: JAPANESE AMERICAN STUDENTS AND WORLD WAR II (1999). See also JOHN AUBREY DOUGLASS, THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY, AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES (2007) (mentioning the rise of Asian American enrollment at Berkeley over time). While some scholars have examined the history of Asian international students in higher education—such as Carol Huang, *The Soft Power of U.S. Education and the Formation of a Chinese American Intellectual Community in Urbana-Champaign, 1905-1954* (January 2001) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign), and Barbara M. Posadas & Roland L. Guyotte, *Unintentional Immigrants: Chicago's Filipino Foreign Students Become Settlers, 1900-1941*, 9 J. OF AM. ETHNIC HIST. 26 (1990)—here I refer to histories of Asian American students.

15. KATHRYN SWANSON, AFFIRMATIVE ACTION AND PREFERENTIAL ADMISSIONS IN HIGHER EDUCATION: AN ANNOTATED BIBLIOGRAPHY 27 (1981).

16. See JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON (2005) (noting that in the late 1960s to early 1970s, Asian Americans were included in minority recruitment efforts in admissions at prestigious schools such as Princeton and Yale). See also Sucheng Chan & L. Ling-chi Wang, *Racism and the Model Minority: Asian-Americans in Higher Education*, in THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION (Phillip G. Altbach & Kofi Lomotey eds., 1991).

17. See John Aubrey Douglass, *Anatomy of Conflict: The Making and Unmaking of Affirmative Action at the University of California*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA (John Skrentny ed., 2001).

campuses by 1968.<sup>18</sup> These efforts targeted disadvantaged students, especially racial minorities. The aim of providing equal educational access for minority groups resonated with UC's long tradition as a land-grant university that sought to ensure non-partisan, open access to students regardless of state geography, socioeconomic background, or gender.<sup>19</sup>

Sensing the need to go beyond outreach initiatives to promote minority enrollment, UC administrators instituted "special action" admissions policies whereby applicants' demographic backgrounds—their membership in racial minority groups—could be considered as supplemental criteria. Further, the UC Board of Regents decided to increase the "special action" portion of the applicant pool from 2% to 4% in 1967, then to 6% in 1979.<sup>20</sup> Additionally, in 1974, the state legislature reviewed its Master Plan and not only granted UC "the flexibility to utilize non-traditional criteria for accepting up to 12.5% of their lower division students," but also charged each campus with the task of attaining, by 1980, a student body that reflected the state's demographic composition.<sup>21</sup>

In 1975, UC made further efforts to boost still-lagging minority enrollment rates: all UC campuses instituted and increased funding for outreach and tutoring programs; administrators also modified EOP policies to reflect a more narrow focus on minority students and instituted Student Affirmative Action support services designed specifically for minority students.<sup>22</sup> Then, in 1978, the Supreme Court in *Bakke*<sup>23</sup> legitimated the consideration of race as a factor in admissions. Accordingly, then-UC president David Saxton instructed UC chancellors that, as of 1979, they could consider race and ethnicity in regular as well as in special action admissions.

At the time of the *Bakke* decision, affirmative action programs at UC Davis ("Davis") and UC Berkeley ("Berkeley") included Asian Americans among their targeted minority groups. Indeed, at Berkeley, Asian Americans were treated as an underrepresented minority group and were thus beneficiaries of special admissions considerations and minority-oriented outreach and support programs. However, these policies changed

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18. See DOUGLASS, *supra* note 4, at ¶ 16.

19. The establishment of multiple campuses in the UC system further expanded access and enabled enrollment growth, as did the emergence of mutual coordination among the UC, California State, and community college systems, which allowed for transfers from the latter two into UC. In 1960, to manage anticipated rises in enrollment, UC officials, other higher education administrators, and state legislators created the 1960 California Master Plan, which restricted UC eligibility to the top 12.5% of high school graduates. This eligibility standard would later affect views of Asian Americans' minority status, as this article describes below. See Douglass, *supra* note 17.

20. See DOUGLASS, *supra* note 14, at 99, 117.

21. See DOUGLASS, *supra* note 4, at ¶ 13. See also Douglass, *supra* note 17 regarding the Master Plan.

22. See DOUGLASS, *supra* note 14 at 108.

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

by the mid-1980s, based on rationales that would invoke particular statistical and ideological representations of Asian Americans.

### III. ASIAN AMERICAN REPRESENTATIONS

Asian American enrollment rates in colleges and universities increased rapidly in the 1970s and 1980s. In 1976, the number of Asian American students at all levels of higher education was 198,000. In 1988, that figure increased to 497,000, growing from 2% to 4% of the total number of students.<sup>24</sup> This growth occurred at competitive private and public institutions: between 1976 and 1986, the proportion of Asian Americans in freshman classes grew from 3.6% to 12.8% at Harvard, from 5.3% to 20.6% at Massachusetts Institute of Technology, from 5.7% to 14.7% at Stanford, and from 16.9% to 27.8% at Berkeley.<sup>25</sup>

Several factors help explain this growth. First, the 1965 Immigration and Nationality Act Amendments abolished quotas based on national origin, enabling the first significant influx of Asians to the U.S. since the late nineteenth and early twentieth centuries.<sup>26</sup> The increasing number of Asian Americans in higher education thereby reflected a broader demographic growth: between 1970 and 1980, the Asian American population had increased from 1.5 million to 3.5 million, making it America's fastest growing group at that time.<sup>27</sup> Moreover, the children of immigrants who benefited from the 1965 Immigration Act—which favored the entry of professional and educated persons—were entering colleges in the early 1980s.<sup>28</sup> Additionally, as scholars have noted, Asian Americans reaped economic benefits from their earlier investments in education, so that education became a standard strategy for upward mobility among members of these communities.<sup>29</sup>

Despite the availability and plausibility of these causal explanations,

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24. Eugenia Escueta & Eileen O'Brien, *Asian Americans and Higher Education: Trends and Issues*, 2 RESEARCH BRIEFS 1, 1 (1991).

25. Chan & Wang, *supra* note 16, at 53.

26. Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1151-1152 (2001)).

27. Don T. Nakanishi, *A Quota on Excellence? The Asian American Admissions Debate*, CHANGE 38, 41 (1989).

28. See MEYER WEINBERG, ASIAN-AMERICAN EDUCATION: HISTORICAL BACKGROUND AND CURRENT REALITIES (1997).

29. See Stanley Sue & Sumie Okazaki, *Asian American Educational Achievements: A Phenomenon in Search of an Explanation*, 45 AM. PSYCHOLOGIST 913 (1990) (stating that Asian Americans have experienced improved access to jobs, especially in the sciences and technical fields, due to their educational credentials; however, Asian Americans have experienced limited access to arenas beyond education, such as entertainment, athletics, and politics). At the same time, an examination of historical and structural contexts reveals a wide variation of educational success among Asian groups in accordance with ethnic and socioeconomic differences. In particular, post-1975 Southeast Asian refugees have enjoyed less academic success than have post-1965 East and South Asian immigrants. See Shirley Hune & Kenyon S. Chan, *Special Focus: Asian Pacific American Demographic and Educational Trends*, in MINORITIES IN HIGHER EDUCATION: FIFTEENTH ANNUAL STATUS REPORT, 1996-1997 (Deborah Carter & Reginald Wilson eds., 1997).

perhaps the most commonly invoked accounts of Asian American success in the late 1960s were those that cast Asian Americans collectively as a “model minority.” The model minority stereotype, which lauds Asians as more diligent and thus more deservedly successful than other racial groups, has a long history that dates back to Reconstruction.<sup>30</sup> Journalists of that era praised Chinese immigrants in contrast to freed slaves in the South and Irish immigrants in the North.<sup>31</sup> Such messages divided the labor force along racial lines and fueled anti-Chinese sentiment, particularly among Whites.

This model minority image reemerged in the late 1960s, not coincidentally, as other “non-model” minorities struggled for equal opportunities. One of the earliest pieces promoting this image in its modern form was William Petersen’s “Success Story, Japanese-American Style” in *The New York Times Magazine*,<sup>32</sup> which described how Japanese Americans had surmounted a history of racist oppression and wartime incarceration and were now enjoying educational and professional success. Other journalists followed suit with stories that likened Asians to Whites and attributed Asian American success to cultural values of discipline, strong family bonds, and respect for authority.<sup>33</sup>

Citing at least three important reasons, scholars of education and Asian American studies have since refuted this ideologically driven representation. First, the model minority image sweepingly projects cultural tendencies and successful outcomes upon a multi-faceted group that actually encompasses diverse ethnic communities, each of which has distinct types and degrees of need.<sup>34</sup> Second, the image obscures persisting racial discrimination against Asians in the United States today. Third, the

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30. Some education scholars point to the 1960s as the genesis of the image of Asian Americans as the model minority, which signaled an abrupt departure from their racialization as uncivilized and foreign. See Ji-Yeon Jo, *Neglected Voices in the Multicultural America: Asian American Racial Politics and its Implications for Multicultural Education*, 6 MULTICULTURAL PERSPECTIVES 19 (2004); Joy Lei, (Op)Posing Representations: Disentangling the Model Minority and the Foreigner (April 1998) (unpublished manuscript, on file with ERIC ID Clearinghouse: ED421564); Bob Suzuki, *Revisiting the Model Minority Stereotype: Implications for Student Affairs Practice and Higher Education*, 97 NEW DIRECTIONS FOR STUDENT SERVICES 21 (2002). Yet, as I argue here, the model minority has a longer history.

31. According to one Baton Rouge newspaper, the Chinese “are more obedient and industrious than the negro, work as well without as with an overseer, and at the same time are more cleanly in their habits and persons than the freedmen.” Likewise, the *New York Times* opined that “‘John Chinaman’ was a better addition to [U.S.] society than was ‘Paddy’.” See Wu, *supra* note 8, at 231.

32. William Petersen, *Success Story, Japanese-American Style*, THE N.Y. TIMES MAGAZINE, Jan. 9, 1966, at 180.

33. See Ki-Taek Chun, *The Myth of Asian American Success and Its Educational Ramifications*, 15 I.R.C.D. BULLETIN 2 (1980) (citing *Success Story of One Minority Group in U.S.*, U.S. NEWS AND WORLD REPORT, Dec. 26, 1966, at 73; *Japanese Joining Hawaii’s Elite*, N.Y. TIMES, Oct. 24, 1970, at 17; *Success Story: Outwhiting the Whites*, NEWSWEEK, June 21, 1971, at 24; *The A.J.A.s (Americans of Japanese Ancestry): Fast Rising Sons*, TIME, Oct. 20, 1975, at 26; and *Japanese in U.S. Outdo Horatio Alger*, L.A. TIMES, Oct. 17, 1977, at 11.

34. See Hune & Chan, *supra* note 29.

image attributes upward socioeconomic mobility to “culture” and to “hard work” while neglecting historical factors and structural barriers. Additionally, the image serves to divide Asian Americans from other racial groups, essentially pitting minorities against each other.<sup>35</sup> Yet in the face of these discrediting factors, the model minority image, along with its implicit endorsement of individualism and meritocracy, has persisted in the mass media and among conservative critics of race-conscious policies such as affirmative action.<sup>36</sup> Hence, in the conservative discourse, Asian Americans’ statistical representations (their rapidly increasing presence on many college campuses, which is often equated with their over-representation) and their ideological representations (their reduction to a model minority role, according to which their success is attributable to cultural peculiarities) bolster each other. These representations became prominent and mutually intertwined in the late 1970s as universities began to re-shape affirmative action admissions policies.

#### IV. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*: THE ASIAN AMERICAN QUESTION

In the wake of dramatic increases in Asian American enrollment, UC administrators in the 1970s reconsidered their affirmative action policies in relation to Asian Americans. The events at Berkeley’s Boalt Hall School of Law aptly illustrate the ensuing policy changes. In 1970, Boalt Hall established a special admissions program for Asian Americans in response to activism by the Asian American Law Students Association (“AALSA”). However, five years later, the law faculty submitted a proposal to eliminate the program in consideration of Asian Americans’ apparent ability to succeed through the regular admissions process. In response, AALSA submitted an eighty-three-page report. This report refuted the contention that Asian Americans needed no special admissions consideration, specifically challenging the model minority image by pointing to Asian American communities that still faced major hurdles in the areas of

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35. The model minority image is dangerous in this regard because it divides communities of color, preventing them from collaborating to oppose racial discrimination. In particular, the image supports a discourse of individual meritocracy and hard work that dismisses structural and institutional racism. The model minority image also imparts a message that shames other minorities (Blacks, Latinos) for not working hard or for engaging in political activism to challenge racism. Unfortunately, because of this discourse, some African Americans and Latinos also resist seeing Asian Americans as minorities, a tendency that obstructs fruitful coalitions. See Keith Osajima, *Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960's and 1980's*, in CONTEMPORARY ASIAN AMERICA: A MULTIDISCIPLINARY READER (Min Zhou & James V. Gatewood eds., 2000); Claire Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105 (1999) (theorizing that divisions between people of color are part of a field of racial positions by which Asians are valorized in relation to Blacks); see also S. B. Woo, *America's Second-class Citizens*, ASIAN WEEK, Jul. 4, 1997, at 7.

36. See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

immigration, housing, employment, and English language acquisition.<sup>37</sup> Asian Americans collectively, AALSA noted, were also underrepresented both nationally and locally among attorneys; thus, there remained a strong need for bilingual and bicultural attorneys to serve these communities. Despite AALSA's arguments, in 1975 the Boalt faculty adopted a policy that eliminated special admissions for Japanese Americans while capping Chinese, Korean, and Filipino special admits at less than 3% of all special admits per year.<sup>38</sup>

The issues at the heart of Boalt's policy change—the questions of whether success in regular admissions disqualified Asian Americans from special consideration and whether model minority-related rationales were relevant or legitimate—reemerged in fuller detail during the landmark Supreme Court case, *Regents of the University of California v. Bakke* (1978).<sup>39</sup> An examination of *Bakke*—and of the activism it triggered—highlights the crucial role of statistical and ideological representations for Asian Americans, as well as the stark contrasts between various interpretations thereof.

The *Bakke* case addressed and redefined the consideration of race in admissions policies. The Court ruled explicit racial quotas unconstitutional but affirmed as legitimate the consideration of race as a factor in admissions.<sup>40</sup> Although Asian Americans were not the key constituent group addressed in this case, documents presented in the deliberations effectively challenged Asian Americans' status as affirmative action beneficiaries. Fifty-seven amicus briefs were filed, including one by the Asian American Bar Association ("AABA") of the Greater Bay Area in support of Davis's affirmative action policies.<sup>41</sup> AABA argued that affirmative action was an important instrument for diversifying the "nearly all-white" legal profession and asserted that Asian Americans, as minorities, needed to be represented in the bar.<sup>42</sup>

AABA invoked numerical underrepresentation as a reason to include Asian Americans in affirmative action programs, citing that only 1000 of the 2.09 million Asian Americans counted in the 1970 census were attorneys: Asian Americans constituted approximately 1% of the total population but only 0.3% of the nation's lawyers.<sup>43</sup> Citing further instances of historical and continuing patterns of discrimination, AABA defended Davis's race-conscious admissions policies as constitutional and as

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37. Asian American Law Students' Association, *Report of the Boalt Hall Asian American Special Admissions Project*, 5 AMERASIA 21, 26-27 (1978).

38. *Id.* at 25.

39. 438 U.S. 265 (1978).

40. *Id.*

41. Brief for Asian American Bar Association of the Greater Bay Area, as Amicus Curiae Supporting Petitioners, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

42. *Id.* at 2.

43. *Id.* at 16.

properly including Asian Americans, a population in dire need of attorneys able to address their legal and social concerns.

AABA's brief also outlined terms by which special admissions programs should be evaluated. Prominent among these terms was the measure of statistical parity, according to which,

[a special admissions] program should be discontinued when minority groups are no longer disproportionately excluded by the normal admissions process, either because currently criticized admissions tests have been replaced by validated and racially neutral tests, or because the effects of the prior discrimination have been dissipated *and adequate numbers of minorities are being admitted under the regular admissions criteria.*<sup>44</sup>

Based on AABA's proposed measure, one could conclude that if and when Asian Americans began to excel in regular admissions, they could properly be deprived of special consideration.

The Justice Department and the Supreme Court invoked this reasoning. The Justice Department filed its own amicus brief,<sup>45</sup> and Solicitor General Wade McCree represented the government's position in support of UC's race-conscious policies. The government's argument singled out Asian Americans as a minority group that excelled in regular admissions. The brief began by citing statistics that revealed a strong Asian American presence at Davis.<sup>46</sup> More generally, the government emphasized the socioeconomic progress of Asian Americans (Japanese, Chinese, and Filipinos) vis-à-vis other minority groups that continued in their struggles to secure financial stability, educational access, and gainful employment. An extensive footnote provided statistics that painted an optimistic picture of Asian American success, citing lower rates of poverty and unemployment as well as higher rates of educational achievement among certain Asian American groups.<sup>47</sup> The government set forth a statistically

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44. *Id.* at 25 (emphasis added).

45. Brief for the United States as Amicus Curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), reprinted in ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA 3 (Alfred A. Slocum ed., 1978).

46. The brief began, "In 1969 the faculty of the Medical School adopted a resolution establishing a special admissions program for disadvantaged applicants. Under that program, sometimes called the 'task force' program, between 1970 and 1974 the school admitted 71 minority persons: 26 black, 33 Chicanos and 12 [Asian Americans]. An additional 49 minority persons, including 41 [Asian Americans], were admitted through the regular admissions process during those years." *Id.* at 9 (internal citations omitted).

47. The footnote stated: "The figures for [Asian Americans] (Japanese, Chinese, and Filipino only) are somewhat different [as compared to figures for other minority groups]. The number of families with incomes below the poverty level was 8.8%. Among [Asian American] persons 25 years old and over, 62.2% had completed four years of high school and 20.4% had completed four or more years of college. The median school years completed among [Japanese Americans] was 12.5, among [Chinese Americans] it was 12.4 and among [Filipino Americans] it was 12.2. Only 2% of [Asian Americans] were unemployed. 29.1% of [Asian American] persons held professional, managerial, and administrative positions, while 7.2% were laborers, and 16.9% were service and private household

based argument that Asian Americans were overrepresented among physicians in particular: according to the 1970 census, Asian Americans constituted only 0.75% of the United States population but 3.6% of all physicians.<sup>48</sup> Asian American students' average medical school entrance exam scores and grade point averages also exceeded those of Whites.<sup>49</sup>

Although the government acknowledged that Asian Americans had faced historic discrimination and perhaps still experienced its effects, it saw no reason for Asian Americans' continued inclusion in Davis's special admissions programs. In outlining unresolved questions from the trial court, the government argued:

Although we do not know the application rates for [Asian Americans] at Davis, the available evidence suggests that [Asian American] applicants are admitted in substantial numbers even without taking special admissions into account. In 1973, 13 of the 84 regular admissions places in the class were filled by [Asian American] students, although no more than six percent of the young college graduates in California are [Asian American]. Other data also suggest that [Asian American] applicants compete successfully for professional school admission without the assistance of special consideration. Although it may well be that disadvantaged [Asian American] persons continue to be in need of the special program to overcome past discrimination, the record is silent on that question.<sup>50</sup>

Several Asian American groups were troubled by the government's brief. One such group, the Asian and Pacific American Federal Employee Council ("APAFEC"), countered these interpretations of Asian American parity by submitting a fact sheet to United States Attorney General Griffin Bell and Solicitor General McCree on September 30, 1977. APAFEC expressed particular concern that the manner in which the government addressed the issue of special admissions for Asian Americans during the October 1977 oral arguments could significantly reduce Asian American access to "minority programs affecting every sector of American life."<sup>51</sup>

APAFEC protested that the government's brief had invoked statistical support in potentially misleading ways. First, APAFEC argued, the

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workers." *Id.* at 47 n.39.

48. *Id.* at 51 n.51.

49. *Id.* at 52 n.51.

50. *Id.* at 75-76.

51. The brief forewarned: "By filing its amicus brief, the Government has become the first participant in a case of the *Bakke* type to single out Asian/Pacific Americans from other minority groups for a constitutional challenge to their participation in a minority program. An unfavorable decision towards Asians in *Bakke* could gravely jeopardize Asian and Pacific American participation not only in minority admissions but also in minority programs affecting every sector of American life. Even in the absence of such a decision, the brief casts doubt upon the Administration's support for including Asian/Pacific Americans in these programs." ASIAN AND PACIFIC AMERICAN FEDERAL EMPLOYEE COUNCIL, GOVERNMENT'S AMICUS BRIEF: THE BAKKE CASE AND ASIAN/PACIFIC AMERICANS I (1977) (ERIC Document Reproduction Service No. ED 154 057).

government's argument seemed to assume that higher rates of college completion by Asians relative to Whites translated ultimately into income parity. Second, the government failed to note that unemployment rates among Asians were subject to underreporting due to the significant presence of limited English proficient persons among the unemployed. Third, in highlighting that Asians occupied a high percentage of professional, managerial, and administrative positions, the government overlooked the fact that few Asians occupied policymaking positions.

APAFEC went on to note that the government's brief failed to recognize that many Asian doctors were educated prior to their immigration to the United States. In other words, the government's argument erroneously assumed that the presence of "foreign born and educated doctors" of Asian descent constituted evidence of ample access to medical education for Asian Americans—a premise that APAFEC found "absurd."<sup>52</sup> Further, the government's brief conflated the respective communities of Koreans, Asian Indians, Samoans, Vietnamese, Hawaiians, Pakistanis, and Cambodians into a single group, thus failing to account for their diverse needs. In so doing, APAFEC argued, "the Government opens the possibility that Asian/Pacific American participation in any or all minority programs could be eliminated,"<sup>53</sup> potentially leaving many communities without remedy in their ongoing struggles.

APAFEC's fact sheet had a tangible impact on *Bakke*: oral arguments on October 12, 1977 reflected a more nuanced perspective of Asian American identities and issues. When the Court cited Asian Americans' representation in the medical field as grounds for questioning their eligibility for special admissions at Davis, Solicitor General McCree acknowledged logistical hurdles to the accurate assessment of discrimination against Asian Americans; in particular, he noted the diversity of the Asian American population within and among its various communities.<sup>54</sup> Additionally, when the Court cited the high representation of Asians in professional fields—29.1% of the Asian American population

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52. *Id.* at 3 (emphasis added).

53. *Id.* at 7.

54. McCree was quoted as saying, "Our reference to [Asian Americans] here certainly was not to suggest that they are not entitled to consideration within the program, but just to indicate that the sparseness of this record makes it difficult, if not impossible, to determine the extent of continuing—the continuing impact of racial discrimination upon that segment of our society. If I may continue in this answer, it may appear that the [Asian American] population isn't monolithic any more than any other categorical segment of the American population. Certainly, in addition to Chinese and Japanese, there are Korean, Philippine [*sic*], Cambodian, Laotian, Indonesian; and the impact upon these varying segments is not known and doesn't appear from the record, except where we make a reference—I believe on page 40 of our brief—to some census statistics concerning it." See Transcript of Oral Argument, *Regents of the Univ. of Cal. vs. Bakke*, reprinted in 100 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT: REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE, PART TWO 621, 641-42 (Philip B. Kurland & Gerhard Casper eds., 1978).

occupied professional, managerial, and administrative positions—suggesting that, “on its face, the 29 percent hardly would support any ready conclusion that there’s a pervasive discrimination against people of Asian ancestry,” McCree replied, “On this record, this is possible. But we know how sparse the record is.” The Solicitor General was referring to the lack of disaggregated data on the Asian American community, within which certain segments (e.g. Koreans, Taiwanese, Cambodians, or others) were likely to be underrepresented.<sup>55</sup>

In the end, the Supreme Court left unresolved the issue of Asian Americans’ status as beneficiaries of special admissions at Davis. Still, Justice Powell’s controlling opinion made salient the issue of Asian Americans’ ability to gain admission without the aid of special programs. In 1974, the special admissions program at Davis’s medical school targeted “minority groups,” defined as “Blacks,” “Chicanos,” “Asians,” and “American Indians.”<sup>56</sup> Among these groups, Justice Powell noted, Asian Americans exhibited questionable eligibility for preferential treatment. He argued that the University was unable to justify its policy of favoring only these four groups, and that the inclusion of Asians was “especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.”<sup>57</sup>

Yet, citing concerns expressed by Justice Douglas, Powell also recognized the technical complexities involved in using various statistical measures for special admissions consideration. Powell described the potential ways a university might decide whom to include (or exclude) in minority programs, characterizing such decisions as part of a difficult process “fraught with dangers” in light of the fierce competition for admissions slots. He illustrated these “dangers” by invoking the hypothetical case of a Japanese American plaintiff denied admission:

But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner.<sup>58</sup>

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55. *See id.* at 641–42.

56. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

57. *Id.* at 310 n.45.

58. *Id.* at 297 n.37.

These comments raised the complex question of how to measure discrimination. Should proportionality be used to establish whether discrimination exists? If so, what sense of proportion should serve as a baseline? With reference to the hypothetical example above, should proportionality be defined as congruence between representation in a profession and representation in the population, or as an extrapolated proportion based on estimates of discrimination's effects, or as an allocated proportion based on assessments of the relative severity of discrimination suffered vis-à-vis other groups? And how should the court decide which sense to uphold?

The Court left these questions unanswered as well, but the *Bakke* deliberations reflected a decisive shift in views on the propriety of including Asian Americans as affirmative action beneficiaries. Namely, the Court and the Justice Department set forth the notion that Asian Americans, as evidenced by statistical measures, had "outgrown" the need for affirmative action protections. The social and political implications of these notions were a matter of concern for Asian Americans, as the APAFEC brief outlined. The sentiment among many Asian Americans, in the words of Anthony Kahng, was that "[w]hile the [*Bakke*] decision will have no immediate impact on the status of Asian Americans, it places them on a more slippery ground."<sup>59</sup> During and after the *Bakke* case, Asian American groups responded by exposing the presumptions and ideologies underlying the model minority discourse and by demanding recognition of the diversity among Asian American communities.

#### V. THE UNIVERSITY OF CALIFORNIA IN THE 1980S: THE ASIAN AMERICAN QUESTION ANSWERED

Since *Bakke* affirmed the limited use of race as an admissions criterion, the UC administration continued to support admissions and outreach programs that fostered diversity. Through the 1980s, meanwhile, University admissions grew increasingly competitive. For the first time, UC campuses rejected a large number of academically qualified high school students who were eligible for admission based on Master Plan criteria.<sup>60</sup>

The Asian American student population at Berkeley, in particular, had grown dramatically since the 1970s—from 16.1% of the freshman class in

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59. See Anthony Kahng, *University of California v. Bakke . . . Who Won?* 4 BRIDGE: AN ASIAN AM. PERSPECTIVE 10 (1978).

60. At this time, Berkeley and UCLA were rejecting approximately two of every three eligible applicants. See Douglass, *supra* note 17, at 127. This trend was aggravated by a 1985 policy change that, by enabling students to apply to multiple UC campuses, generated greater applicant demand within the UC system overall. See DOUGLASS, *supra* note 14, at 132-33.

1975 to 26.9% in 1983.<sup>61</sup> Given the limited number of admissions slots, the Berkeley administration decided to aim for “general parity between the racial and ethnic composition of the undergraduate enrollment and that of the state population in general.”<sup>62</sup> In so doing, administrators presumed that a minority group’s disadvantaged status should be gauged by the extent of its numerical underrepresentation in a privileged institution, and, accordingly, Asian Americans—whose numbers exceeded “their proportional share of the available undergraduate pie”—had ceased to qualify as a disadvantaged group.<sup>63</sup> Hence, in 1984, Berkeley administrators deemed Asian Americans no longer eligible for special admissions consideration and no longer proper targets of minority-oriented outreach and support programs.<sup>64</sup> The slippery ground on which Asian American minority status stood, in accordance with Kahng’s forecast, had shifted.

This decision entailed critical changes to Berkeley’s EOP policies, which were initially designed to serve socioeconomically-disadvantaged applicants and were now modified along racial lines—specifically to exclude Asian Americans (except Filipinos). Particularly at Berkeley, the most prestigious and selective UC campus, EOPs had served to protect UC-eligible applicants of disadvantaged backgrounds from rejection or from redirection to other UC campuses.<sup>65</sup> Now that Asian American applicants were no longer considered “disadvantaged,” they no longer enjoyed the same EOP protections as Black, Chicano/Latino, and Native American students.<sup>66</sup> The effect on Asian American enrollment at Berkeley was profound: in 1983, there were 62 White and 248 Asian American EOP students; in 1984, 55 White and 136 Asian American students; and in 1985, 24 White and 83 Asian American students.<sup>67</sup>

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61. DOUGLASS, *supra* note 4, ¶ 43. Douglass notes that, in fact, by 1951, Asian Americans constituted 8.5% of Berkeley undergraduates but only 3% of the state population: “In short, Asian Americans had become an ‘over’-represented minority in the university by 1950 and perhaps much earlier.” DOUGLASS, *supra* note 14, at 74.

62. Douglass, *supra* note 17, at 128.

63. *Id.*

64. Asian Americans thus were no longer defined as an underrepresented group. Douglass notes that most outreach programs were now reserved for Chicanos-Latinos, African Americans, and Native Americans, although campus administrators did include Filipinos in 1984 recruitment efforts. See DOUGLASS, *supra* note 14, at 135. Filipinos remained under affirmative action recruitment and retention programs until 1985 at UCLA and until 1989 at Berkeley. See Matt Grace, *Asians Suffer Under Model-Minority Myth*, DAILY BRUIN, Sept. 22, 1997, at ¶ 57, available at <http://dailybruin.com/news/1997/sep/22/asians-suffer-under-model-mino/>.

65. This was prior to the 1985 policy change enabling interested students to apply to multiple UC campuses. As of 1985, students would apply for admission to UC using a single form on which they could indicate their first-, second-, and third-choice campuses. If possible, students denied admission to their first choice were redirected to their second or third choices. See DOUGLASS, *supra* note 14, at 132.

66. L. Ling-Chi Wang, *Meritocracy and Diversity in Higher Education: Discrimination Against Asian Americans in the Post-Bakke Era*, 20 URB. REV. 189 (1988).

67. *Id.* at 196.

Between 1983 and 1986, the decline in Asian American admissions rates at Berkeley was paralleled at other campuses nationwide, despite a growing Asian American applicant pool. In response, Asian American professors, students, and activists levied charges that universities were covertly setting quotas to limit Asian American enrollment. Controversies and investigations ensued at Brown, Harvard, Stanford, Princeton, UCLA, and Berkeley. The charges hinged on two points: (1) admissions rates for Asian Americans were lower than those for Whites, and (2) Asian American enrollment had not risen in proportion to the dramatic growth of the Asian American applicant pool.

At Berkeley, a group of concerned Asian American faculty and community leaders established the Asian American Task Force on University Admissions to protest policy changes, such as the weighing of supplemental admissions criteria, that disproportionately reduced Asian American admissions rates.<sup>68</sup> UC president David Gardner responded by affirming that while the administration was opposed to ethnic quota systems, it had to consider ways to admit a balanced student body. Asian Americans were numerically “overrepresented” at Berkeley,<sup>69</sup> as they constituted only 6% of the state population but over 20% of the undergraduate enrollment at UC campuses. This “ethnic imbalance,” according to Gardner, warranted new policies that would enable enrollment patterns to mirror state demographics.<sup>70</sup>

Statistical representation similarly served as a gauge for determining protected status under the California Master Plan, which established access to a UC education for the top 12.5% of California’s high school graduates. According to the Plan, a racial group was underrepresented, and thus disadvantaged, if its members achieved UC eligibility at rates lower than 12.5%; conversely, the Plan deemed a group whose members qualified at rates exceeding 12.5% as overrepresented and thus not disadvantaged.<sup>71</sup> In 1983, California’s African American and Chicano/Latino graduates

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68. Asian Americans charged that criteria of some high school subject requirements (four years of college preparatory English and several years of foreign languages) worked against recent immigrant Asians for whom English was a foreign language. See DANA TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* 36 (1992); Wang, *supra* note 66; Nakanishi, *supra* note 27.

69. Michael Scott-Blair, *Ethnic Imbalance Shifts at UC*, SAN DIEGO UNION, Dec. 1, 1986, at A1. In a December 12, 1986 Associated Press story, UC President David P. Gardner stated: “Asian students have been so successful they have become over-represented at the university.”

70. *Id.* at A37.

71. According to the California Postsecondary Education Commission, “eligibility rate” is defined as “the number of public high school graduates who meet the minimum entrance requirements of CSU (California State University) and UC divided by the total number of graduates from public comprehensive high schools, public continuation high schools and public alternative schools.” See CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, *UNIVERSITY ELIGIBILITY STUDY FOR THE CLASS OF 2003—FACT SHEET* (2004) 1, available at <http://www.cpec.ca.gov/completereports/2004reports/OP04-02.pdf>.

qualified at rates of 3.6% and 4.9% respectively; meanwhile, Whites and Asian Americans exceeded the 12.5% bar, qualifying at rates of 15.5% and 26.0% respectively.<sup>72</sup> Because Asian Americans were overrepresented among high school graduates who were UC-eligible under the Plan, the goal of achieving racial parity created a dilemma for Berkeley administrators, who were also committed to promoting equal opportunity. In the words of Bud Travers, Berkeley's Assistant Vice Chancellor for Undergraduate Affairs, "We are supposed to service the top 12.5% of high school students *and* have affirmative action programs. Take these two things and add the fact that [Asian Americans] are at Berkeley in numbers four times higher than they graduate from high school, and you have a model that is unworkable."<sup>73</sup>

#### VI. AFTERSHOCKS OF DE-MINORITIZATION: ASIAN AMERICANS AS MODEL VICTIMS

As Asian Americans were officially de-minoritized by changing UC policies, "model minority" rhetoric became prominent in the surrounding public discourse.<sup>74</sup> Echoing the 1960s news media, critics of affirmative action in the 1980s described Asian Americans as a hardworking, acquiescent minority group that had succeeded on its own merits in the face of discrimination. Asian Americans thus came to embody a new non-white victim group that provided grounds to critique race-conscious policies. In the controversy over UC admissions policies, the admissions slots denied to Asian Americans (as well as to Whites) were framed, particularly by neoconservatives, as casualties of unjustifiable special action programs.<sup>75</sup>

By the late 1980s, when the admissions controversy had died down, conservative commentators had created and popularized a perception of Asian Americans not as affirmative action's proper beneficiaries, but rather as its maltreated victims. Through the 1990s, this portrayal persisted in the media and in the public discourse as opposition to affirmative action mounted in California through the 1990s, resulting in Special Policies 1 and 2 in 1995 and Proposition 209 in 1996.<sup>76</sup>

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72. Douglass, *supra* note 17, at 137.

73. *Id.* at 129.

74. See Lee, *supra* note 6.

75. Takagi explains: "By bringing Asian *achievement* into the ring of conflict over black and white differences in academic achievement, neoconservatives insisted that their free market vision of admissions was not racially motivated but, rather, inspired by fairness. Still, several neoconservative authors were acutely aware that their struggle to gore affirmative action once and for all was possible because the high achievers were *Asian*, not white." TAKAGI, *supra* note 68, at 120. Wu also notes: "Asian Americans become the 'innocent victims' [of affirmative action] in place of whites. As 'model minorities,' both facets of that title are important to the martyrdom of Asian Americans—'model' hence 'innocent,' and 'minority' hence 'victim.'" Wu, *supra* note 8, at 273.

76. In 1995, the UC Board of Regents passed Special Policy 1, which ended the consideration of race, religion, color, gender, ethnicity, and national origin in admissions. Special Policy 2 ended such

More recently, similar constructions of Asian American success were invoked in the 2003 Supreme Court cases *Grutter v. Bollinger*<sup>77</sup> and *Gratz v. Bollinger*.<sup>78</sup> In the former, Barbara Grutter, a white female applicant to the University of Michigan Law School (“Michigan”), sued the University on the basis of racial discrimination, claiming that the law school gave unfair advantages to African American, Latino, and Native American applicants.<sup>79</sup> In the latter case, Jennifer Gratz, a white female, filed a class action suit claiming that Michigan’s undergraduate admissions process illegally gave “bonus points” on an admissions scale to underrepresented minority groups.<sup>80</sup> At the time of these cases, Michigan’s affirmative action policies did not apply to Asian Americans.<sup>81</sup> The law school considered each applicant’s background, which included, for example, “the experience of having been a Vietnamese boat person”—but not Vietnamese identity per se.<sup>82</sup> Only Blacks, Hispanics, and Native Americans received extra consideration for membership in their respective racial groups.<sup>83</sup> In undergraduate admissions, members of specified minority groups received bonus points, which was the focus of Gratz’s suit.<sup>84</sup> Asian Americans, who constituted 10% of Michigan’s undergraduate body, as compared to 2% of the state population, did not receive such points.<sup>85</sup> Citing these facts, Grutter’s supporters argued that Michigan’s race-based admissions policies benefited certain minority groups only by harming Asian Americans and Whites.<sup>86</sup>

The Asian American community was (and remains) divided on the issue of affirmative action, a fact illustrated by the contrasting amicus briefs submitted by different Asian American organizations for the Michigan cases. On one side, the Asian American Legal Foundation (“AALF”) disfavored policies that prioritized group privileges over individual rights, disparaging affirmative action programs as race-conscious “schemes” that “are almost always used to exclude Asian

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consideration in contracts and employment. A year later, in 1996, California voters passed state-wide Proposition 209, which prohibited the consideration of race or gender in public hiring, contracting, and education. In campaigns for these policies, opponents of affirmative action often portrayed Asian Americans as affirmative action’s victims. See Michael Omi & Dana Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 REPRESENTATIONS 155 (1996).

77. 539 U.S. 306 (2003).

78. 539 U.S. 244 (2003).

79. *Grutter*, 539 U.S. 306.

80. *Gratz*, 539 U.S. 244.

81. See Brief for National Asian Pacific American Legal Consortium et al. as Amici Curiae Supporting Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

82. Peter Schmidt, *For Asians, Affirmative Action Cuts Both Ways*, CHRON. HIGHER EDUC., June 6, 2003, at A24.

83. *Grutter*, 539 U.S. at 316.

84. *Gratz*, 539 U.S. at 255.

85. Schmidt, *supra* note 82, at A24.

86. See Brief for National Asian Pacific American Legal Consortium et al., *supra* note 81, at 4.

Americans from educational institutions.”<sup>87</sup> Citing *Ho v. San Francisco Unified School District*,<sup>88</sup> AALF predicted that, if the Court upheld affirmative action in *Gratz* and *Grutter*, its decision would open the door to diversity-based rationales for ceilings on Asian American admits to various institutions, drastically reducing educational access for Asian Americans collectively.<sup>89</sup> In AALF’s view, racial plans that purported to promote diversity by setting floors (minimum quotas) and ceilings (caps) ultimately violated individual rights and hurt groups that had already suffered from *de jure* discrimination and segregation.<sup>90</sup>

On the other side, a consortium of twenty-eight Asian American civil rights, legal, and community advocacy organizations—including the National Asian Pacific American Legal Consortium (now the Asian American Justice Center), Asian Law Caucus, and Asian Pacific American Legal Center—supported Michigan’s affirmative action policies, rejecting the claim that the policies victimized Asian Americans.<sup>91</sup> This group argued that these policies were justified by the need to promote diversity, and it emphasized the flexible way in which Michigan employed racial criteria.<sup>92</sup> Additionally, this group cited numerous studies to substantiate that Asian Americans still frequently encountered a “glass ceiling” in various spheres of employment and in federal contracting, and that Asian Americans remained especially underrepresented in supervisory and administrative positions of Fortune 500 companies, federal agencies, and institutions of higher education.<sup>93</sup> In sum, the consortium’s brief argued that numerical increases in representation alone could not substantiate claims of

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87. Brief for Asian American Legal Foundation as Amicus Curiae Supporting Petitioners at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

88. 147 F.3d 854 (9th Cir. 1998).

89. *Id.* at 3. In *Ho* (1994), Chinese American community leaders sued the San Francisco Unified School District to end quotas that were designed to achieve diversity. These quotas had the effect of blocking the admission of Chinese American students to various schools once numerical caps were met. The case ended with a settlement in which the district agreed to end racial assignments based on statements by the district court and Ninth Circuit that its use of race was apparently indefensible on legal grounds. *Id.* at 11-14.

90. *Id.* at 3. The AALF described the manner in which policies seeking to achieve racially balanced student bodies had kept Chinese American children from accessing schools of their choice and from entering prestigious schools. A contentious instance was Lowell High School, considered the best high school in the district, which used admissions policies to achieve racial balance. Test score cut-offs were set higher for Chinese American applicants than for other groups in order to maintain a 40% cap on Chinese American students. *See id.* at 6.

91. *See* Brief for National Asian Pacific American Legal Consortium et al., *supra* note 81.

92. *Id.* at 2-3.

93. *See id.* at 18-23 (citing various studies demonstrating that Asian Americans were not earning income commensurate with their educational levels, that they faced “glass ceiling” barriers to advancement in the corporate sector, in federal departments, in the fields of science and engineering, in college and university positions, and in the federal judiciary, and that Asian American business owners also faced discrimination when competing for government contracts). *See* Brief for National Asian Pacific American Legal Consortium et al., *supra* note 81, at 18-23.

unqualified success.<sup>94</sup> It thus denounced the model minority myth and the notion that Asian Americans no longer faced racial discrimination.

## VII. THE SHORTCOMINGS OF STATISTICAL AND IDEOLOGICAL REPRESENTATIONS

Many legal scholars have argued that affirmative action lacks a coherent theory.<sup>95</sup> However, as the earliest affirmative action policies first emerged in the 1970s, they articulated some basic premises of social equality, prominent among them a concept of representational parity.<sup>96</sup> As John Skrentny explains, while early executive orders fell short of establishing explicit affirmative action policies, “a basic indicator of opportunity since the late 1960s, has been the ratio of members of a given group in the population to those in some sphere of employment, business, or education.”<sup>97</sup> For example, in issuing the Philadelphia Plan of 1969, the Office of Federal Contract Compliance established “target ranges” (instead of set numerical quotas) for contractors and unions; the federal government now required contractors to recruit a workforce whose minority makeup mirrored that of the pool of eligible job-seekers.<sup>98</sup> Likewise, in 1970, the Department of Labor issued Order Number 4 which, as Terry Anderson explains, expanded the Philadelphia Plan to all businesses of more than 50 employees that accepted a \$50,000 federal contract. Order Number 4 stipulated that “the percentage of the minority workforce” in that city would determine the target numbers and time frame. The goal was to correct “underutilization” of minorities “at all levels” in the workforce.<sup>99</sup>

Thus, underrepresentation of a group in a given sphere was taken to imply discrimination. Conversely, if a group’s representation in a field or institution was “at parity” with its presence in the broader population, one

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94. *See id.*

95. *See generally* David A. Hollinger, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, 55 REPRESENTATIONS 31 (1996); Paul Brest & Miranda Oshige, Symposium, *Affirmative Action For Whom?*, 47 STAN. L. REV. 855 (1995); William G. Tierney, *The Parameters of Affirmative Action: Equity and Excellence in the Academy*, 67 REV. EDUC. RES. 165 (1997).

96. *See generally* TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* (2004); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996). Anderson and Skrentny both outline the manner in which affirmative action programs moved away from colorblind models of the 1960s, developed under Presidents Kennedy and Johnson, to concepts of proportional hiring, underutilization, and disparate impact theories of discrimination, as in the Supreme Court case *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). However, by the 1980s, proportionalism was on the wane, as signaled in the Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which established a strict scrutiny requirement for any racial preferences.

97. JOHN DAVID SKRENTNY, *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 10 (2001).

98. *See* ANDERSON, *supra* note 96, at 117.

99. *Id.* at 125.

could assume that its members enjoyed equitable access.<sup>100</sup> The use of representational parity as a gauge for equitable access has had important implications in the legal sphere, as *Bakke*, *Gratz*, and *Grutter* have illustrated. Specifically in *Bakke*, Justice Powell rejected compensatory rationales for affirmative action and embraced diversity as a compelling state interest,<sup>101</sup> thereby “set[ting] the stage for the exultation of ‘diversity’ and the measurement of such, through proportionalism or the search for parity.”<sup>102</sup>

Gauging a minority group’s need for protection based on its statistical representation alone, however, is problematic. As elaborated above, Asian Americans are a diverse group, and disaggregated data shows wide disparities in academic performance and socioeconomic status among different Asian American communities.<sup>103</sup> In addition, within academia, Asian Americans generally remain underrepresented in the humanities and the social sciences, particularly in the fields of history, sociology, English literature, philosophy, education, psychology, political science, and law.<sup>104</sup> Thus, contrary to claims that Asian Americans are “over-parity” in educational and professional arenas generally, certain Asian American communities are still underrepresented in these arenas and in numerous other disciplines.

Beyond calling attention to underrepresented subgroups of Asian Americans, however, we must question the parity framework itself rather than simply assume and reinforce the existing analytical framework. That is, even as we recognize that the attainment of “parity” may signify progress, we need to scrutinize the concept and the ways the term is defined and used. First, how do we *measure* parity? Surely, Asian Americans constitute a quantitatively notable presence in colleges and universities, especially at the undergraduate level. Yet, they are less visible in leadership positions, both in academia and beyond. Granted that

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100. Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 46 (1994).

101. A compensatory rationale for affirmative action is one that focuses on redressing past injury. Compensation raises complicated issues (e.g., Who is the victim? Does racial group membership automatically qualify one as a victim? Who is at fault?); thus, it is controversial in the arena of legal discourse and is not regularly invoked in arguments for affirmative action. University administrators tend instead to embrace a “pro-diversity” rationale. See Tierney, *supra* note 95.

102. Gabriel J. Chin et al., Symposium, *Rethinking Racial Divides—Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 221 (1998).

103. Southeast Asians and Pacific Islanders, who are often conflated with Asian Americans generally, continue to struggle for educational access as well as for socioeconomic stability, especially relative to other Asian American groups. See HUNE & CHAN, *supra* note 29; see also Escueta & O’Brien, *supra* note 24.

104. These patterns exist at the bachelor’s, master’s, and doctoral levels. See GABRIEL CHIN ET AL., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE: A POLICY ANALYSIS OF AFFIRMATIVE ACTION 20 (1997), available at <http://www.sscnet.ucla.edu/aasc/policy/beyond.pdf>. See also HUNE & CHAN, *supra* note 29.

affirmative action policies embody efforts to “progress toward substantive, rather than merely formal, equality of opportunity for those groups . . . which are currently underrepresented in significant positions in society,”<sup>105</sup> should we understand these “significant positions” to include roles of political and economic power? If so, much progress remains to be made: Asian Americans are vastly underrepresented in Congress and on corporate boards of directors.<sup>106</sup> Within colleges and universities, Asian Americans are underrepresented in top-level administrative positions and in most fields (besides engineering and the “hard” sciences); among professors, foreign-born Asians outnumber Asian Americans.<sup>107</sup>

More fundamentally, the achievement of statistical parity is not an inherent aim of affirmative action, and it is in fact a problematic policy goal. When affirmative action programs first emerged, governing policies articulated no specific goals beyond the generic purposes of banning discrimination and ensuring equal opportunity. Hence, the policies were ambiguous as to both the programs’ aims and the standards by which to gauge the programs’ success.<sup>108</sup> In the context of such ambiguity, there is reason to doubt that parity, or “proportional representation of groups,” is an adequate policy objective. It is true that underrepresentation may signal that discrimination is present, but the converse assumption—that achievement of parity signals that discrimination has ended—is at odds with the ongoing realities of racism and racialization that minorities face. As sociologists maintain, minority status is properly defined in terms of relative access to power (or lack thereof), not in terms of numerical representation.<sup>109</sup> A group’s achievement of representational parity within certain spheres does not imply complete socioeconomic integration and may not signal a shift

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105. See Tierney, *supra* note 95, at 167.

106. In 2002, 79% of Fortune 1000 companies included at least one woman on their board of directors. 44% included African Americans, 17% included Latinos, and only 10% included Asians or Asian Pacific Americans. See THE COMMITTEE OF 100, THE COMMITTEE OF 100’S ASIAN PACIFIC AMERICAN (APA) CORPORATE BOARD REPORT CARD (2004), available at [http://www.committee100.org/publications/initiative\\_corporate.htm](http://www.committee100.org/publications/initiative_corporate.htm).

107. See Chan & Wang, *supra* note 16; HUNE & CHAN, *supra* note 29; DON T. NAKANISHI, *Asian Pacific Americans in Higher Education: Faculty and Administrative Representation and Tenure*, in RACIAL AND ETHNIC DIVERSITY IN HIGHER EDUCATION (Caroline Turner et al. eds., 1993); THE COMMITTEE OF 100, THE COMMITTEE OF 100’S ASIAN PACIFIC AMERICAN (APAS) IN HIGHER EDUCATION REPORT CARD (2005), available at [http://www.committee100.org/publications/initiative\\_corporate.htm](http://www.committee100.org/publications/initiative_corporate.htm).

108. Tierney writes, “When affirmative action came about, no one had a specific goal about what we should expect to see in the waning days of the 20th century in order to determine if the policy had been wildly successful. If we reject the idea of quotas, then would we say that affirmative action had been successful if 50% of the professoriate were women and the percentage of faculty of color were comparable to what existed in society? What constitutes failure?” Tierney, *supra* note 95, at 177. Similarly, Brest and Oshige note that although a group’s “significant underrepresentation” may indicate the need for affirmative action, no plausible political or social theory has been invoked in support of making parity an “ultimate objective.” See Brest & Oshige, *supra* note 95, n.4.

109. See generally CHARLES WAGLEY & MARVIN HARRIS, *MINORITIES IN THE NEW WORLD: SIX CASE STUDIES* (1958).

from minority to non-minority status. Accordingly, Asian American “overrepresentation” in educational and professional spheres does not establish that affirmative action has no further benefits to offer them, and proportional representation does not imply that discrimination against Asian Americans has ended.

To illustrate this point, Professor Sumi Cho uses the example of nineteenth-century Chinese-owned laundries. In 1886, Chinese Americans constituted 10% of San Francisco’s population but operated 75% of the city’s laundries.<sup>110</sup> This statistic alone may be construed as indicating Chinese American overrepresentation in the local laundry market. However, of the 201 laundry license applicants denied at the time, 200 were Chinese American. As Cho maintains, this example demonstrates the dangers of improperly conflating “over-parity” with the concept of non-discrimination, both in assessing Asian American history and in addressing contemporary experience.<sup>111</sup> Thus, widespread discrimination can and does occur against numerically overrepresented groups.

#### VIII. CONCLUSION

As affirmative action policies have changed over time, the statistical and ideological representations of Asian Americans have shifted. Asian Americans were treated as a protected minority group when their numerical presence was less pronounced in academic and professional spheres. However, as their proportional representation in these spheres increased, Asian Americans became de-minoritized in university policies and in the surrounding public discourse. Simultaneously, ideologically driven “model minority” rhetoric cast Asian Americans as a monolithic group of diligent citizens who have pulled themselves up by their bootstraps and who had become innocent casualties of affirmative action. Such rhetoric persists in today’s legal and political discourse.

This article has surveyed the historical process of Asian American de-minoritization in the context of affirmative action policy history. Beginning in the late 1970s, the era of *Bakke*, a problematic focus on parity, numerically defined, promoted the redefinition of Asian Americans as no longer disadvantaged. This led to admissions policy changes that negatively affected Asian Americans through the 1980s. As opponents of affirmative action gained political momentum in the 1990s, they cast Asian Americans as victims of race-conscious policies, reifying the notion of Asian Americans as non-minorities who were excluded and thus harmed by minority programs.

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110. *Rethinking Racial Divides*, *supra* note 102, at 222.

111. *See id.* at 223. At the same time, Cho concedes that challenging modern tendencies to conflate parity and discrimination is difficult, especially in the legal sphere, because the prevalent understanding of discrimination that most lawyers assume is based on a Black/White model.

Concerned Asian American groups have maintained that Asian Americans are indeed minorities whose historical experiences include decades of racial discrimination and whose ongoing experiences of racial discrimination cannot be fully captured in quantitative terms. Challenging the standard statistical and ideological rationales for de-minoritizing Asian Americans, these advocates have argued that issues of Asian American representation are complex and not reducible to numerical parity measures. For one thing, Asian American communities are diverse, and policy makers must obtain and consider data disaggregated by sub-groups. More importantly, even for “at-parity” (or “over-parity”) Asian American groups, proportional representation does not necessarily signify fully equitable integration in educational or other social institutions.<sup>112</sup> To maintain the same narrow focus on parity that administrative and legal decision makers have exhibited, then, would be to preclude the adequate treatment of Asian American needs and interests, both in the affirmative action debate and in the broader public discourse.

Scholars, policymakers, university administrators, and judicial officials must not simply equate “minority status” with “statistical underrepresentation.” Although underrepresentation is a useful starting measure, a single-minded quest for numerical parity masks the complexities of race and racialization as experienced by Asian Americans. Granted, in affirmative action debates—as in any policy debate—political pressures and budget constraints push the focus toward quantifiable “bottom line” outcomes. However, if decision makers and their constituents can gain an informed appreciation of Asian American experiences, the public discourse may be enriched by the reintroduction of Asian Americans into the minority discussion. When this occurs and the diverse experiences of Asian American communities are recognized, we may begin collectively to clear the distorted representations that have fueled the de-minoritization of Asian Americans.

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112. For instance, while Asian Americans are numerically well-represented at U.S. colleges and universities, they also report high levels of social alienation on campus. See generally Christine Bennett & Alton M. Okinaka, *Factors Related to the Persistence Among Asian, Blacks, Hispanic, and White Undergraduates at a Predominantly White University: Comparisons Between First and Fourth Year Cohorts*, 22 URB. REV. 33 (1990); Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. HIGHER EDUC. 58 (1986).