

# Asian Americans and the Law: Sharing A Progressive Civil Rights Agenda During Uncertain Times

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## Asian Americans and the Law: Sharing A Progressive Civil Rights Agenda During Uncertain Times

*By Harvey Gee*<sup>1</sup>

### Introduction

The November election of Donald J. Trump as the 45<sup>th</sup> U.S. President heightened ever-growing concerns about a retrenchment of civil rights for Americans,<sup>2</sup> limiting voting rights, invoking tougher criminal penalties,<sup>3</sup> keeping Guantanamo Bay prison open and returning to aggressive interrogation techniques,<sup>4</sup> mass deportations<sup>5</sup> and stricter immigration laws.<sup>6</sup> Immigration holds particular relevance for Asian Americans because the majority of Asian Americans are foreign-born,<sup>7</sup> and they along with Latinos, are among

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<sup>2</sup> See Richard Fausset, *As Trump Rises, So Do Some Hands Waving Confederate Battle Flags*, N.Y. TIMES, Nov. 18, 2016, at A10.

<sup>3</sup> See *Donald Trump's Disturbing Picks: Michael Flynn, Too Hotheaded for a Sensitive Position*, N.Y. TIMES, Nov. 19, 2016, at A22.

<sup>4</sup> See Matt Apuzzo & Mark Landler, *Strident Team of Like Minds*, N.Y. TIMES, Nov. 19, 2016 at A1; Julie Hirschfeld Davis, *Trump Selects Loyalists on Right Flank to Fill National Security Posts*, N.Y. TIMES, Nov. 19, 2016, at A1; Mark Mazzetti, *Sharp Clinton Critic is Picker to Lead the C.I.A.*, N.Y. TIMES, Nov. 19, 2016, at A1; Nahal Toosi, *Bush Aides Could Get a Do-Over in Trump Administration*, POLITICO (Nov. 16, 2016, 1:49 PM), <http://www.politico.com/story/2016/11/george-w-bush-aides-trump-administration-231351>.

<sup>5</sup> See Kevin R. Johnson, *Trump's Immigration Promises Fraught with Obstacles*, THE SACRAMENTO BEE (Nov. 27, 2016, 3:00 AM), <http://www.sacbee.com/opinion/op-ed/soapbox/article116838763.html> (discussing Trump's characterization of immigrants from Mexico as "criminals" and his promises to remove undocumented immigrants from the country); Darlene Superville, *Obama Urges Asian-Americans to Stand Up to Bigotry*, AP (May 4, 2016, 10:39 PM), <http://bigstory.ap.org/article/92e2ff44c0184811923f2e3b4fb79095/obama-urges-asian-americans-stand-bigotry> ("Trump has called for barring Muslims from entering the country, and also has pledged to deport the estimated 11 million people living illegally in the U.S.").

<sup>6</sup> Jonathan Weisman, *Shifts on Immigration, Health, and Taxes*, N.Y. TIMES, Nov. 10, 2016, at P6; see Matthew Rosenberg, *Anti-Militant Former General Is Pick for National Security Adviser*, N.Y. TIMES, Nov. 19, 2016, at A15; see Eric Lichtblau, *Poised to Seek Change As Attorney General*, N.Y. TIMES, Nov. 19, 2016, at A15; see Julia Preston, et al., *Trump Win Has Blacks, Hispanics and Muslims Bracing for a Long 4 Years*, N.Y. TIMES, Nov. 10, 2016, at P8. See also JEFF CHANG, WE GON' BE ALRIGHT: NOTES ON RACE AND RESEGREGATION 2 (2016) ("Donald Trump focuses the anxieties loosed by white vulnerability—an inchoate, inescapable sense that the social and economic present and future of whites will only get worse—onto the bodies of migrants, Muslims, Blacks, women, and all those others who do not deserve the gift of America.")

<sup>7</sup> Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AMERICAN U.L. REV. 811, 819 (1996) (acknowledging that majority of Asian Americans in the U.S. are foreign born).

the fastest growing immigrant groups in America.<sup>8</sup> This immigration stream shows that immigration has never been a white/brown issue even though mainstream America tends to think of immigration as an issue only affecting Latino/a immigrants.<sup>9</sup> On the contrary, immigration law and historical exclusion have shaped the Asian American legal and political identity within the existing U.S. racial hierarchy: whites on top, African Americans on the bottom, and Asian Americans as somewhere in-between.

The majority of Asian Americans have been identified as immigrants or children of immigrants.<sup>10</sup> Asian immigrants from Asian countries face the longest backlogs for visas.<sup>11</sup> The perennial connection between race and immigration comes up often, historically and as seen and felt in last year's presidential election, race and immigration status have enhanced the unpopularity of immigrants who have become scapegoats for the nation's economic troubles.

Critical race theorist Ian Haney Lopez answers that the efforts to seal the borders allowing no one to come into this country combined with arguments about the issue of illegal immigration has nothing to do with an immigrant's racial background are disingenuous because they share "deep similarities with racial hysteria that accompanied the mass deportation of Mexican Americans during Operations Wetback in the 1950s, and the Asiatic Barred Zone that prohibited all Asian immigration through the first half of the twentieth century."<sup>12</sup>

Many citizens in the waiting, including 1.3 million Asian American undocumented immigrants<sup>13</sup> were hoping that that immigration reformers would happen during Obama's presidency, those hopes were dashed when a deadlocked Court last term in *United States v. Texas* left in place the nationwide injunction barring implementation of the Deferred Action of Parents of Americans and Lawful Permanent Residents (DAPA) and expansion of the 2012 Deferred Action for Childhood Arrivals (DACA) program, which would have provided deportation relief for up to four million unauthorized immigrants.<sup>14</sup>

As this past election cycle, along with continued debates over affirmative action, immigration, police brutality, and reports of hate crimes, demonstrate, this country is far

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<sup>8</sup> *Id.* at 811. (Observing that "Immigration...has become a predominately Asian and Latino phenomena as the numbers has increased greatly.")

<sup>9</sup> See Gene Denby, For Asian Americans, *Immigration Backlogs Are A Major Hurdle*, NPR (Jan. 31, 2013, 12:50 PM), [http://www.npr.org/sections/itsallpolitics/2013/01/31/170744897/for-asian-americans-immigration-backlogs-are-becoming-a-major-hurdle?utm\\_source=npr\\_newsletter&utm\\_content=20160729&utm\\_campaign=npr\\_email\\_a-friend&utm\\_term=storyshare](http://www.npr.org/sections/itsallpolitics/2013/01/31/170744897/for-asian-americans-immigration-backlogs-are-becoming-a-major-hurdle?utm_source=npr_newsletter&utm_content=20160729&utm_campaign=npr_email_a-friend&utm_term=storyshare) ("Although the national conversation about immigration policy tends to focus on Latinos, it is Asian-Americans who encounter some of the knottiest challenges facing immigrants and immigration reformers.")

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 162 (10th ed. 2006).

<sup>13</sup> See President Obama's Record with the Asian American and Pacific Islander Community 2 (May 2016), <https://obamawhitehouse.archives.gov/sites/default/files/docs/aapirecord.pdf>.

<sup>14</sup> See Lyle Denniston, *Opinion Analysis: Obama immigration plan all but doomed*, SCOTUSBLOG (Jun 23, 2016, 4:16PM), <http://www.scotusblog.com/2016/06/opinion-analysis-obama-immigration-plan-all-but-doomed/> ("President Obama's ambitious plan to overhaul U.S. immigration policy for millions of foreign nationals living in the U.S. came close to crashing down...If the policy is not yet entirely doomed. It could be after its formally returned to a federal judge in Brownsville, Texas, who is sure to be guided by any appeals court ruling that already has said, in essence, that the government probably will lose.")

from existing in the “post-racial era” that was proclaimed by some pundits when Obama, this country’s first African American President, was elected into office eight years ago.

Against this backdrop, it is imperative that social coalitions for justice continue to band together during these uncertain times. To be sure, despite the cultural and class differences and the potential conflicts and impediments that have arisen, African American, Latino, and Asian American civil rights groups have joined together to preserve affirmative action and immigration, to support lesbian, gay, bisexual, transgender (“LGBT”) issues; and to advocate for criminal justice reform and against mass incarceration. Perhaps not widely-known, these issues are key components of the Asian American civil rights agenda, which has gradually expanded to accommodate the most pressing issues that affect communities of color and subordinated individuals. As this Article discusses, the past few decades of coalition building between African Americans, Latinos, Asian Americans, and others offer reasons for some optimism about future possibilities notwithstanding a Trump Presidency, a Republican-controlled Congress, and Department of Justice led by Jeff Sessions which could translate into immigration policies and guidelines targeting immigration violations, speeding up deportations, and limiting federal funding to cities refusing to cooperate with the Department.<sup>15</sup>

This Article suggests that given the unique place that Asian Americans are situated in race relations in the U.S.—a racial group situated between black and white—they can inform the struggle for social justice, which has never been binary. This Article draws upon the interdisciplinary areas of social science, critical race theory, and Asian American legal scholarship to explore the manner in which Asian Americans are treated differently from other racial groups, which as seen in affirmative action, same-sex marriage, and criminal justice, can inform litigation and community activism strategy. Professor Eric Yamamoto calls this, “critical inquiry into the interplay between law and racial hierarchy.”<sup>16</sup>

Far from being a single monolithic voting block holding a particular perspective on important social issues. Asian Americans are a diverse community made up of many ethnicities, holding divergent opinions. For instance, there are Asian immigrants who are against affirmative action, same-sex marriage, and do not agree with the Black Lives Matter movement. These conservative Asian immigrants are deeply insular, and deny the existence of racism, unless it affects them. These Asian Americans act of self-interest, and do not work with other Asian groups or communities of color in fight for social justice. But there are also more assimilated Asian Americans, who may have familial ties span a generation or more in the U.S., willing to work together with others seeking fairness and social justice for all, regardless of skin color or sexual orientation.

While divergent views arise on the many social and political issues amongst Asian Americans, this Article is limited to a discussion of three topical issues: (1) affirmative action; (2) same-sex marriage; and (3) police brutality. I have chosen these issues because there have been recent Supreme Court decisions and recent litigation concerning them. This Article is distinguishable from existing scholarship about Asian Americans and the

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<sup>15</sup> See Seung Min Kim, *Immigration Hard-Liner Sessions Could Execute Crackdown as AG*, POLITICO (Nov. 29, 2016, 1:15 PM), <http://www.politico.com/story/2016/11/jeff-sessions-immigration-crackdown-231800>.

<sup>16</sup> See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 825-26 (1999).

law because it connects three areas of civil rights litigation that are rarely discussed together, or at least in relationship to Asian American advocacy. Far from being an academic discussion applying theories to hypothetical parties in the abstract, this Article anchors itself in Supreme Court cases, trial court litigation, and advocacy by real people at the grass roots level.

This Article is divided into four sections. Part I summarizes the process in which Asian Americans have become honorary whites in this country. Historically, Asian Americans were first perceived as foreigners and then were transformed as model minorities, and during all times, compared to African Americans, and other racial groups. The section discusses how this narrative of pitting of one minority groups against another continues to this day.

Part II briefly discusses the participation of Asian American in affirmative action in higher education litigation before the Supreme Court, and analyzes *Fisher v. University of Texas*<sup>17</sup> which upheld the University of Texas affirmative action program--designed to admit a bright and diverse entering class to alleviate the lingering effects of racial discrimination and graduate a diverse student body entering a professional workforce. Affirmative action supporters hailed *Fisher* as a major, and somewhat surprising, victory for fairness and racial diversity.<sup>18</sup> *Fisher* likely will result in more university affirmative action programs surviving court challenges in the lower courts and the decision offers universities more breathing room to design and implement their admissions policies. For those following Asian American issues, *Fisher* was the latest case backed by anti-civil rights attorney Edward Blum and conservative organizations opposing affirmative action where they have used Asian Americans, as innocent victims, to attack affirmative action.<sup>19</sup> Notably, it was the first Supreme Court decision to specifically address the impact of affirmative action on Asian Americans.<sup>20</sup>

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<sup>17</sup> *Fisher v. Univ. of Tex.*, 136 S.Ct. 2198 (2016).

<sup>18</sup> See John Paul Schnapper-Casteras, *Symposium: Moving Forward From Fisher II*, SCOTUSBLOG (Jun. 24, 2016, 5:13PM), <http://www.scotusblog.com/2016/06/symposium-moving-forward-from-fisher-ii/> (proclaiming that “The Court’s decision in *Fisher* marks a major victory for universities and students throughout the country, and reaffirms the commonsense proposition that diversity along various lines—including racial diversity—yields significant educational benefits on college campuses.”).

<sup>19</sup> Affirmative action is the only issue in which these conservative groups have professed to advocate on behalf of Asian American interests. See Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. Rev. DISC. 90, 91 (2016) (“The conservatives who oppose affirmative action have not generally speaking taken an interest in other issues affecting the well-being of Asian Americans, including voter redistricting, racial profiling, employment equality fair housing, poverty, and mental health services.”). Leong explains that affirmative action opponent’s professed concern for harm to Asian Americans is therefore strategic rather than sincere...If white people can say that Asian Americans also oppose affirmative action, it looks less as though white people are simply concerned with maintaining their place at the top of the racial hierarchy at the expense of non-white groups.” *Id.*

<sup>20</sup> Asian Americans and affirmative action in university admissions have been discussed in lower courts. A year after the University of Michigan rulings, in *Smith v. University of Washington Law School* 392 F.3d 367 (9th Cir. 2004), three unsuccessful white applicants brought a class action against the University of Washington Law School for racial discrimination in its admission polices. The Ninth Circuit, relying on *Grutter*, held that the Law School’s use of race and ethnicity in its admission programs furthered its compelling governmental interest in seeking a diverse student body withstood strict scrutiny. *Id.* at 381. The court declared, “The Law School did not establish any racial quotas, targets, or goals for admission or enrollment” or “exclude whites from consideration for seats offered to minority applicants” or “otherwise

Part II later focuses on Justice Alito's dissent, assailed by Asian American civil rights groups, where he arguably used the perception of Asian Americans as honorary whites to voice his opposition to affirmative action. It closely reviews the language of Justice Alito's dissent to reveal the implicit narrative of Asian Americans and whites as innocent victims of affirmative action. Interestingly, Alito's lumping together of Asian Americans with whites camouflages the concerns of whites. As Professor Alfred Yen notes, in an effort to disguise anti-blackness in some situations, Asian Americans are "given whites attributes makes it possible [to] argue about the interests of whites without ever mentioning whites."<sup>21</sup> This makes it less offensive, and more politically correct, to claim that affirmative action is anti-Asian American, than it is to argue that it is anti-white.

Part III discusses the participation of Asian Americans in the same-sex marriage litigation involving state and federal governments, who denied an entire and identifiable group of people important benefits based solely on their membership in a disfavored class. Gay and lesbian Asian Americans find themselves in a precarious place. While some of the hardships facing Asian Americans overlap with some of the struggles experienced by the LGBT community, Asian Americans who are also LGBT, may feel alienated by their ethnic community, other racial groups, and general interest advocacy groups.<sup>22</sup> Even so, as this section explains, Asian American support for LGBT issues were an opportunity to move beyond traditional conservative or religious beliefs for the sake of justice and the greater good. This section culminates with an analysis of the recent landmark case, *Obergefell v. Hodges*<sup>23</sup> which held that the right to same-sex marriage is a fundamental right under the Constitution.

Part IV carries over the familiar theme mentioned *supra* Parts One through Three: the divergent opinions held by Asian Americans can help or hinder efforts toward social justice. Part IV examines the possibilities of coalition building between

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applied significantly disparate standards to applicants of different races." *Id.* at 370-371.

Asian Americans played a central role in *Smith*, which was the first case that implicitly referred to the model minority myth. Plaintiffs argued that (1) the affirmative action program gave a slight "plus" for racial diversity to Asian American applicants; and (2) Asian Americans were not in need of affirmative Action from the law school because there were enough of them that could be admitted without preferences. *Id.* at 376-377. This argument against affirmative action for Asian Americans, because there was already a "critical mass" of them, was rejected by the Panel. *Id.* at 379.

The court concluded that the law school program was not unconstitutional because Asian Americans have comprised seven to nine percent of an entering class in the absence of a racial or ethnic plus. *Id.* at 381. The Ninth Circuit reasoned that the law school was seeking diversity among its Asian American students and thus, it would be error for plaintiffs to assume Asian Americans as being homogenous groups for the purpose of defining a "critical mass." *Id.* The court took care to recognize applicants whose families or who themselves came from the Philippines, Vietnam, Cambodia, Taiwan, and China, who were sought out by the law school because of their different cultures, backgrounds, and languages. *Id.*

<sup>21</sup> Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L. J.* 39, 52 (1996).

<sup>22</sup> *The Importance of Asian Americans? It's not What You Think: Future Directions in the Racial Justice Movement*, CHANGELAB (2015), [http://www.changelabinfo.com/reports/ChangeLab\\_The-Importance-of-Asian-Americans.pdf](http://www.changelabinfo.com/reports/ChangeLab_The-Importance-of-Asian-Americans.pdf).

<sup>23</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)

Asian Americans and African Americans and Latinos in the struggle against police brutality, police misconduct, and mass incarceration, and overcoming existing barriers in building interracial solidarity. This Article concludes by arguing that Asian Americans should not distance themselves from racial issues, or refraining from opportunities to work with other racial groups, and joint racial justice efforts, but should instead stand alongside other like-minded brethren in taking a principled stand against the politics of whiteness and subordination.

## I. On the Surface: How Asian Americans Became Honorary Whites

[S]ome Asians function as honorary Whites, an identity that contemplates both White status and a biologically non-White identity.<sup>24</sup>

Mainstream America may not be aware of Asian American social and racial history. Asian Americans represent four percent of the American population, but they are rarely discussed in depth in the legal literature. Asian Americans represent forty-eight ethnicities including Chinese American, Japanese American, Vietnamese American, Korean American, Indian American, and Filipino American.<sup>25</sup>

Looking through the lens of critical race studies, Asian Americans are racially positioned between the traditional, yet outmoded, black/white racial paradigm, and possess a racial experience showing that race is not a biological determination. As can be gleaned from this section, social and ideological constructions of Asian Americans as “model minorities” can be continually shaped and manipulated for political reasons depending on the circumstances.<sup>26</sup> Professor Claire Jean Kim writes, “Triangulated between black and white, Asian Americans have been granted provisional acceptance for specific purposes. But they have never been embraced as true Americans.”<sup>27</sup> Indeed, American law has marginalized Asian Americans, and American law has shaped the demographics and experiences of Asian Americans.<sup>28</sup> In turn, Asian Americans influenced American law in the areas of immigration<sup>29</sup> and naturalization,<sup>30</sup> alien land laws, internment<sup>31</sup> and

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<sup>24</sup> *Supra* note 12 at 152.

<sup>25</sup> An Unnoticed Struggle: A Concise History of Asian American Civil Rights Issues 14 (2008), <https://jacl.org/wordpress/wp-content/uploads/2015/01/Unnoticed-Struggle.pdf>.

<sup>26</sup> See Angelo Ancheta, et al., *The Asian American Nexus to Civil Rights*, 2 AAPI Nexus v (2004) (“Asian Americans are frequently absent from the largely black-white civil rights discourses, and when they are considered, they are often relative to secondary or tertiary roles.”).

<sup>27</sup> Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POLITICS & SOCIETY 105, 129 (1999).

<sup>28</sup> See Natsu Taylor Saito, *Model Minority Yellow Peril: Functions of “Foreignness” in the Construction of Asian Americans Legal Identity*, 4 ASIAN L. J. 71, 75 (1997) (exploring “social history of discrimination segregation, exclusion and race-based violence against Asian Americans”).

<sup>29</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>30</sup> See, e.g., *In re Charr*, 273 F. 207 (W.D. Mo. 1921); *Ozawa v. United States*, 260 U.S. 178 (1922) (discussing naturalization of Japanese individuals); *United States v. Thind*, 261 U.S. 204 (1923) (discussing naturalization of Indian individuals); *Toyota v. United States*, 268 U.S. 402 (1925) (discussing naturalization of Japanese individuals).

<sup>31</sup> See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (discussing an enforced curfew); *Yasui v. United States*, 320 U.S. 115 (1943) (same); *Korematsu v. United States*, 323 U.S. 214 (1944) (discussing the exclusion and detention of individuals); *Ex Parte Endo*, 323 U.S. 214 (1944) (same).

reparations,<sup>32</sup> miscegenation,<sup>33</sup> racial violence,<sup>34</sup> and affirmative action.<sup>35</sup> All told, the Asian American experience illuminates the politics of race and the complex dynamics of race and social justice jurisprudence.

As covered in most introductory Asian American studies classes, or in an upper division Asian Americans and the Law seminar in law school, the foundations of historical and social construction of whiteness can be traced to the identity created to enslave and suppress blacks and immigrant groups. Whiteness is a position of power created and crafted through colonialism, slavery, segregation, discrimination, and bigotry, and maintained and strengthened through inherited wealth and systematic inequities.<sup>36</sup> Within this regime, historically, Asian immigrants Asians Americans were racialized as foreign and “un-American.”<sup>37</sup> In addition, a racial hierarchy emerged among whites, blacks, and Asians as soon as Chinese migrants and blacks were forced to compete against one another as cheap labor which in turn, maintained white supremacy in the nineteenth century.<sup>38</sup>

Under the racial formation theory advanced by sociologists Michael Omi and Howard Winant, race is a dynamic socially constructed identity determined by social, economic, and political forces.<sup>39</sup> The internment of Japanese Americans without due process during World War II was a particular egregious example of this racialization of Asian Americans as foreign and unable to assimilate.<sup>40</sup> Critical race theorists point out that the anti-Japanese racism and racialization of Japanese Americans, even before Pearl Harbor, was a social construction that the dominant society conveniently maintained during

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<sup>32</sup> See Civil Liberties Act of 1988, Pub.L.No. 100-383,102 Stat.903-16(1988) (codified at 50 U.S.C. § 1989b); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998).

<sup>33</sup> See *Echevarria v. Warner Bros. Pictures, Inc.* 12 F. Supp. 632 (S.D. Cal. 1935); In the Opinion of the Justices, 94 N.E. 558 (Mass. 1911).

<sup>34</sup> See *Vietnamese Fishermen’s Ass’n v. Knights of the Klu Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981); *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986), *rev’d*, 654 Supp. 144 (E.D. Mich.1987); Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581 (1993); Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993).

<sup>35</sup> See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1023, 1023-24 (N.D. Ca. 1999); 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 (1996); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

<sup>36</sup> See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2152, 2154 (2013) (“Whiteness has been a source of value throughout our history, conferring power and privilege on the possessor”).

<sup>37</sup> See Natsu Taylor Saito, *Model Minority Yellow Peril: Functions of “foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 80-81 (1997).

<sup>38</sup> See GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIAN IN AMERICAN HISTORY AND CULTURE* 43-45 (1994) (discussing how Asian American and African Americans were utilized to maintain the political and economic supremacy of white persons).

<sup>39</sup> See MICHAEL OMI & HOWARD WINNANT, *RACIAL FORMATION IN THE UNITED STATES* 3-8 (1994); see also, Ian Haney Lopez, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003) (arguing race as a social construction nature ensures that racially identify is shaped at multiple levels constituting axes of racial construction which in turn, these axes encompass myriad criteria for determines racial identity).

<sup>40</sup> See *supra* note 39, at 244 n. 46.



that time because of the great intense disfavor against Japanese agricultural workers and businesses as economic competition.<sup>41</sup>

Approximately 80,000 of the 120,000 individuals of Japanese ancestry held indefinitely were U.S. citizens.<sup>42</sup> In the absence of even a single case of espionage on the west coast during World War II, or any declaration of martial law, Japanese men, women, the elderly, and children, were indefinitely detained, without being provided any due process. Race mattered because only individuals of Japanese descent, including American citizens who held no allegiance to Japan or its culture, but were assimilated into the mainstream American culture, were interned.<sup>43</sup> To the U.S. government, Japanese and Japanese Americans were all foreigners who could not be trusted.<sup>44</sup>

Upon their release at the end of the war, Japanese Americans worked hard to repair their lives after losing their homes, stores, farms, and personal property while they were interned.<sup>45</sup> Professor Lorraine Bannai, who was lead counsel with San Francisco Dale Minami in Fred Korematsu's *coram nobis* litigation, explains that the industriousness of Japanese Americans was reported by the press which magazines and newspapers to refer

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<sup>41</sup> See RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (2001) (the Japanese were demonized by whites who were jealous of the successes of Japanese farmers on the west coast. At the time, there were many Japanese who worked in agriculture and fishing); See ERIC K. YAMAMOTO, ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN 163 (2001) (reporting that White American businessmen perceived Japanese Americans as economic competition); see also Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 234 (1995) (“The productivity [of Japanese Americans] was especially visible on their farms, and they transformed agriculture on the West Coast.”) As a byproduct, resentment against Japanese industriousness manifested in alien land laws. Restricting real property ownership were designed to exclude Japanese immigrants. *Id.* at 234. The Japanese represented about one percent of the population and were perceived as a successful minority group. The Japanese represented more than a third of the agriculture labor force. Agriculture unions put pressure on President Roosevelt, and he passed an Executive Order.

<sup>42</sup> See MARGARET CHON & ERIC K. YAMAMOTO, *Resurrecting Korematsu: Post September 11 National Security Curtailment of Civil Liberties*, in RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN 36 (Eric K. Yamamoto, et al eds. 2001); see also Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 940 (2004) (“stating that “approximately 70 percent [of the internees] were U.S. citizens because of their birth in the United States”).

<sup>43</sup> See Eric K. Yamamoto, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN 104-20 (Eric K. Yamamoto, et al. eds. 2001); Geoffrey R. Stone, *Civil Liberties v. National Security in the Law Open Areas*, 86 B.U. L. REV. 1315, 1321 (2006) (asserting that in the weeks following Pearl Harbor “a demand for the mass evacuation of all persons of Japanese ancestry, including American citizens, exploded along the west coast.”).

<sup>44</sup> See Min Zhou, ARE ASIAN AMERICANS BECOMING “WHITE”?, *Contexts* 3, 35 (2004) (discussing that Asian Americans still suffer from being imagined as foreigners and immigrants even if they are born in this country).

<sup>45</sup> See LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 32 (2015); see also NOAH FELDMAN, SCORPIONS: THE BATTLE AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 236 (2010) (explaining that Japanese Americans were forced to close their businesses or sell their property at deeply discounted process because of the tight time constraints set forth by the government); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the Racing of Arab Americans as Terrorists*, 8 ASIAN L.J. 1, 4 (2001) (explaining that Japanese Americans were forced to sell their homes, businesses, and farms on short notice); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 533 (1945) (stating that “Japanese Americans suffered heavy property losses because of the internment”).

to Japanese Americans as the “model minority.”<sup>46</sup> A leading example was William Petersen’s 1966 *New York Times Magazine* article, “Success Story: Japanese-American Style”<sup>47</sup> which praised the ability and self-sufficiency of Japanese Americans to overcome prejudice to achieve success, and spurned similar articles linking Asian Americans to academic achievement and economic success, which culminated in white societal social values.<sup>48</sup> This portrayal was an intentional contrast to publications about the socio-economic failings of African Americans in this country.<sup>49</sup>

From the 1960s onward, mainstream American society began to see Asian Americans as the “model minority,” --the racial stereotype of Asian Americans as a monolithic ethnic group that have achieved economic success through education, personal responsibility, self-motivation, and hard work without any governmental assistance.<sup>50</sup> Of course, Asians were molded after the white as ideal archetype. In the next decade, conservative pundits pitted Chinese and Japanese American self-made success stories against African Americans calls for affirmative action in higher education, and argued that African Americans would not be admitted based on academic achievement or ability alone.<sup>51</sup> As the model minority myth endured, the stereotype and growing backlash against affirmative action became central themes in the magnet high school and higher education admissions controversies of the 1980s and 1990s.<sup>52</sup> Coinciding with this were Asian Americans scholars who voiced out against the misuse of Asian Americans by those seeking to abolish affirmative action.

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<sup>46</sup> See Bannai *supra* note 45, at 124.

<sup>47</sup> See William Petersen, *Success Story, Japanese-American Style*, THE N.Y. TIMES MAGAZINE, Jan. 9, 1966, at 180, available at [http://inside.sfuhs.org/dept/history/US\\_History\\_reader/Chapter14/modelminority.pdf](http://inside.sfuhs.org/dept/history/US_History_reader/Chapter14/modelminority.pdf).

<sup>48</sup> See Bannai *supra* note 45, at 124.

<sup>49</sup> See *Introduction in Asian/Americans, Education, and Crime: The Model Minority Myth as Victim and Perpetrator* 3 (Daily Ball & Nicholas D. Hartlep eds., 2016) (discussing Daniel Moynihan’s 1965 report that contrasted the successes of Asian Americans against the lack of success of African Americans).

<sup>50</sup> See DAISY BALL & NICHOLAS D. HARTLEP, *AMERICANS, EDUCATION AND CRIME: THE MODEL MINORITY MYTH AS VICTIM AND PERPETRATOR* 1 (2016) (“Asian Americans are the subject of so called positive stereotypes and hailed as model minorities, especially for overcoming discrimination, continue to fight back against unequal treatment, and far more diverse then is reflected in scholarly literature, media, coverage, and in the imagination of many Americans”); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 41(2002) (“From the 1960s to the 1990s, profiles of whiz kid Asian Americans became so common as to be clichés”); Natsu Taylor Saito, *Model Minority Yellow Peril: Functions of “Foreignness” in the Construction of Asian Americans Legal Identity*, 4 *ASIAN L.J.* 71, 71-72 (1997) (explaining how Asian individuals are portrayed as a “model minority” “succeeding in America despite their status as minorities by working and studying saving and sacrificing for the future”).

<sup>51</sup> Susan Koshy, *Morphing Race Into Ethnicity: Asian Americans and Critical Transformations of Whiteness*, 28 *BOUNDARY* 2, 154 (2001). See also Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 *J. GENDER RACE & JUST.* 177, 185 (1997) (arguing that the model minority myth was developed in the mid-1960s to provide a counter-example to politically active Asian Americans).

<sup>52</sup> On many prestigious universities and colleges, especially in California, Asian Americans are overrepresented in the student body and are not considered “minorities” for affirmative action programs because they are no longer underrepresented. See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 *B.C. THIRD WORLD L.J.* 225, 264 (1995); see also Andrea Guerrero, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 38-39 (2002).

Professor Robert Chang, in challenging the use of the model minority myth by conservatives argue that the use of the “model minority myth: as a disingenuous stereotype created to perpetuate the dominance of white America and sustain the existing racial hierarchy.”<sup>53</sup> By combining Asian American success with traditional conservative American values, Chang contends that “[t]he model minority myth plays a key role in establishing a racial hierarchy” that denies the reality of Asian American oppression, “while simultaneously legitimizing the oppression of other racial minorities and poor whites.”<sup>54</sup> His sentiment is echoed by Professor Nicholas Hartlep, who points out, “The model minority stereotypes is false, hegemonic, and self-empowering for whites.”<sup>55</sup>

The exaggerated stories of Asian American success have even manifested themselves to claims of “Asian privilege.” A recent example was pundit Bill O’Reilly’s use of Asian Americans to support his disingenuous claim that “Asian privilege” exists in America because of his premise that Asian Americans households have median incomes than other racial groups, including whites and that they are educated and “keep their families intact.”<sup>56</sup> According to O’Reilly, Asian Americans should be lauded for overcoming language barriers, and are “succeeding more than African-American and even more than white Americans.”<sup>57</sup> However, O’Reilly blurred important facts, just as he white washed discrimination and racism against Asian Americans.

The model minority myth creates the image that Asian Americans are threatening non-Asians seeking college admission; and obfuscates issues facing Asian Americans students: academic failure, bullying, poverty, mental and physical health problem, alcohol and drug use.”<sup>58</sup> Off campus, many Asian Americans who do experience success climbing the corporate ladder secure still encounter discrimination in the form of being perceived as perpetual foreigners.<sup>59</sup> No matter how long they or their families have lived in the country, that are still not seen as true Americans.

Further, Asian Americans subjected to racial stereotypes such as being perceived as passive and lacking leadership skills,<sup>60</sup> and glass-ceilings blocking their path to the

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<sup>53</sup> See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, in CRITICAL RACE THEORY: THE CUTTING EDGE 322, 326-29 (Richard Delgado ed., 1995) (asserting that the model minority myth harms racial minorities and poor whites).

<sup>54</sup> *Id.* at 327-29. See also Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 72 (2007) (“The model minority myth pits Asian Americans against other minority groups. Conservative groups often portray Asian Americans as brilliant success stories, thus using Asian Americans as mascots in their arguments against race-conscious policies.”).

<sup>55</sup> NICHOLAS D. HARTLEP, *THE MODEL MINORITY STEREOTYPE: DE MYSTIFYING ASIAN AMERICAN SUCCESS* xvii (2013).

<sup>56</sup> See Bill O’Reilly, *The Truth About White Privilege*, FOX NEWS (Aug. 26, 2014), <http://www.foxnews.com/transcript/2014/08/27/bill-oreilly-truth-about-white-privilege>.

<sup>57</sup> *Id.*

<sup>58</sup> See Hartlep *supra* note 55, at xvi..

<sup>59</sup> See ROSALIND S. CHOW & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* (2010) (discussing discrimination based on citizenship and foreign-status, and describing the perpetual foreigner stereotype placed on Asians in the country).

<sup>60</sup> See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 185 (1997) (alleging model minority myth makes Asian Americans appear apolitical and reluctant to challenge authority).

highest professional tiers.<sup>61</sup>

The 'glass ceiling' has created barriers which have prevented Asian Americans from equal opportunity and profession advancement... Compared to [whites], Asian Americans are overrepresented in lower paying, non-skilled positions. Although Asian Americans generally fare better than other minority groups, they still do not enjoy the same social opportunities that [whites] do... Repeatedly, statistics about median Asian American household incomes conceal the fact that they are usually comprised of more income earners than all other racial groups, including [whites.]<sup>62</sup>

The privilege that O'Reilly speaks about is actually white privilege.<sup>63</sup> White privilege allows whites to experience privileges benefiting them. These same benefits are not afforded non-whites, who are situated in the same social, political, and economic circumstances.<sup>64</sup> Whites are free to associate with anyone in society and go to anywhere without having to think about their skin color, and they can avoid microaggressions and

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<sup>61</sup>See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 51(2002) (“[Asian Americans] are underrepresented in management, and those who are managers earn less than white Americans in comparable positions”); see MARI J. MATSUDA, *We Will Not Be Used: Are Asian Americans the Racial Bourgeoisie?*, in *WHERE IS YOUR BODY? AND OTHER ARTICLES ON RACE GENDER AND THE LAW* 153 (1996) (remarking “We need affirmative action because there are still employers who see an Asian face and see a person who is unfit for a leadership position. In every field where [Asian Americans] have attained a measure of success, [they] are underrepresented in the real power positions.”); see Sharon S. Lee, *The De-Minorization of Asian Americans in Affirmative Action Admission Policies at the University of California*, 15 *ASIAN AM. L. J.* 129, 150 (2008) (noting that Asian Americans are underrepresented in Congress, corporate boards, and in top-level administrative positions in colleges and universities). See also, President Obama’s Record with the Asian American and Pacific Islander Community 2 (May 2016), <https://obamawhitehouse.archives.gov/sites/default/files/docs/aapirecord.pdf>. (regarding the efforts made by the Executive Branch, President Obama’s Justice Department worked with local community leaders and law enforcement to address discrimination, violence, and harassment against Asian Americans).

<sup>62</sup> See Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 *GONZ. L. REV.* 621, 638-639 (1997).

<sup>63</sup> See Marie Myung-Ok Lee, *Bill O’Reilly’s “Asian Privilege” Disgrace: The Fox News Host Needs Some Basic History Lessons*, SALON (Aug. 29, 2014, 11:15 AM) [http://www.salon.com/2014/08/29/bill\\_oreillys\\_asian\\_privilege\\_disgrace\\_the\\_fox\\_news\\_host\\_needs\\_some\\_basic\\_history\\_lessons/](http://www.salon.com/2014/08/29/bill_oreillys_asian_privilege_disgrace_the_fox_news_host_needs_some_basic_history_lessons/); see also, ROSALIND S. CHOW & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* 3 (2010) (explaining that the model minority myth maintains white privilege while also encouraging anti-Asian hatred animosity); Natsu Taylor Saito, *Model Minority Yellow Peril: Functions of “Foreignness” in the Construction of Asian Americans Legal Identity* 4 *ASIAN L.J.* 71, 93 (1997) (observing that “[T]he model minority myth divides minority groups from each other...[and] justifies subordinated position of each of these groups” and arguing that “[D]ebates on affirmative action illustrate how the purported success of Asian Americans has been used to justify the elimination of remedial programs.”). See also MIN ZHOU, *ARE ASIAN AMERICANS BECOMING “WHITE”?* *Contexts* 3 (1): 29-37 (2004) (providing a caveat, “Celebrating this model minority can, held thwart other racial minorities’ demands for social justice by putting minority groups against each other”).

<sup>64</sup> See Stephanie M. Wildman, *The Persistence of White Privilege*, 18 *J. L. & POL’Y* 245, 246-48 (2005).

slights based on race.<sup>65</sup> For the most part, these benefits are also accord to honorary whites. Professor Lopez suggests, “[H]onorary Whites are extended the status of Whiteness despite the public recognition that, from a bio-racial perspective, they are not fully white,”<sup>66</sup> and refers to this endowment of whiteness to some Asian Americans through their social-upward mobility:

Asians have long been racialized as non-White in the United States as a matter for law and social practice; given high levels of immigration, this negative racializations, tied as ever to xenophobia, continues...the continental theory places Asians securely among non-Whites, but despite these clear indicia of non-Whiteness, the model minority myth and professional success have combined to free some Asian Americans from the most pernicious negative beliefs regarding their racial character.<sup>67</sup>

Intermarriage also plays a role. A 2012 Pew Research Center Report relaying that more than a quarter of Asian American newlyweds, more than other racial groups, are intermarrying whites. The report indicates that white/Asian newlyweds, especially couples formed between an Asian husband and a white wife, have higher median combined annual earnings, and are more educated, compared to other racial pairings.<sup>68</sup>

With regard to this Asian American socio-racial shift to whiteness, Academic Min Zhou notes that it is merely a facade, “On a superficial level, Asian Americans seem to be on their way to becoming white through acculturation, education, achievement, intermarrying whites, and achieving professionally.”<sup>69</sup> Placed in the affirmative action context, Professor Frank Wu suggests that “Asian Americans are now being positioned, are being presented as the new angry white male.”<sup>70</sup>

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<sup>65</sup> See Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999).

<sup>66</sup> See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 162 (10th ed. 2006).

<sup>67</sup> *Id.* at 152.

<sup>68</sup> See Paul Taylor, et al., *The Rise of Intermarriage: Rates, Characteristics Vary by Race and Gender*, PEW RESEARCH CENTER (Feb. 16, 2012), <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/> (analyzing the demographic and economic characteristics of newlywed spouses from a difference race or ethnicity).

<sup>69</sup> Min Zhou, *Are Asian Americans Becoming “White”?*, CONTEXT 3, 4 (2004); See also ERIC K. YAMAMOTO, et al, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 11 (2001) (describing the viewpoint of [neoconservative legal scholars who “view law as neutral and objective” and claims ‘present inequality is not the result of discrimination because society no longer discriminates against people of color.’); see also Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM.U. L. REV. 811, 814 (1996) (arguing that Asian Americans have only been successful on a superficial level).

<sup>70</sup> Frank H. Wu, *Are Asian Americans Now White?*, 23 ASIAN AM. L. J. 201, 205 (2016). This ideal stands in contrast to the classical quip of “anti-affirmative action forces...[characterizing] affirmative action as reverse discrimination or reverse racism, and tell the story of the innocent white male.” See Robert S.Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1117 (1996); see Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 658 (2015) (“Asian Americans have become the new face of affirmative action”).

## II. The Long Journey of Asian Americans and Affirmative Action

Go to any western college campus and you'll find that Asian students have a reputation for being in the library long after everyone else has left.<sup>71</sup>

Perhaps not widely-known, historically, Asian Americans have benefited from affirmative action in contracting and employment.<sup>72</sup> Asian Americans were also involved in the litigation of three affirmative action higher education cases leading to *Fisher*. To begin, in *Regents of the University of California v. Bakke* (“*Bakke*”), the Court applied the Equal Protection Clause to affirmative action for the first time.<sup>73</sup> In *Bakke*, the University of California at Davis (“*Davis*”) rejected the medical school application of Allan Bakke, a white male. Bakke filed suit against the university, claiming that the school's admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act. The Court affirmed the unconstitutionality of the ‘special admissions’ program, but reversed the lower court's prohibition of using race as an admission criterion.<sup>74</sup> Asian Americans were included as beneficiaries of the special admissions programs, and discussed at length in *amicus* briefs filed by the Asian Americans Bar Association of the Greater Bay Area supporting affirmative action, but they were only cursorily discussed during oral arguments.<sup>75</sup>

In a splintered decision, four justices found affirmative action programs to be constitutional.<sup>76</sup> The other four justices voted with Justice Lewis Powell to strike down the affirmative action plan as unconstitutional.<sup>77</sup> Justice Powell concluded that the *Davis* special admissions program unconstitutionally denied Bakke equal protection.<sup>78</sup> Despite the deep division among the Justices in *Bakke*, Justice Powell's diversity rationale became the only defense of affirmative action.<sup>79</sup> But Professor Gabriel Chin points out, “A central defect of Justice Powell’s decision is its failure to identify reason for diversity which is sufficiently clear and specific that it can be used to design a program for diversity admissions. Although Justice Powell told us that diversity was good he did not explain

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<sup>71</sup> MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 105 (2012).

<sup>72</sup> See Harvey Gee, *From Bakke to Grutter and Beyond: Asian Americans and Diversity in America*, 9 TEX. J. C.L. & C.R. 129, 143-44 (2004).

<sup>73</sup> *Regents of the Univ. of Cal v. Bakke*, 438 U.S. 265, 270 (1978).

<sup>74</sup> *Id.* at 319.

<sup>75</sup> See Sharon S. Lee, *The De-Minoritization of Asian Americans in Affirmative Action Admission Policies at the University of California*, 15 ASIAN AM. L. J. 129, 137 (2008) (describing Asian American involvement in the *Bakke* litigation),

<sup>76</sup> *Supra* note 73, at 324 (Brennan, J., dissenting).

<sup>77</sup> *Id.* at 271.

<sup>78</sup> *Id.* at 311-20.

<sup>79</sup> See Devon Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1154-60 (2003) (book review) (since *Bakke*, academics have studied diversity’s benefits in (1) facilitating racial inclusion; (2) shattering racial stereotypes; (3) creating diverse campuses; (4) promoting a sense of belonging; (5) promoting eventual color-blindness by making racial identity less salient; and (6) encouraging different viewpoints).

what characteristics would contribute to achieving diversity.”<sup>80</sup>

As the debate about affirmative action continued onward on university campuses and through state ballot initiatives after *Bakke*, through attrition the diversity rationale became the only justification able to survive the Court’s stringent strict scrutiny analysis.<sup>81</sup>

Next, it was not until *Grutter v. Bollinger*<sup>82</sup> when the debate was explicitly expanded beyond the black-white paradigm to include African Americans, Latinos, Asian Americans, and Arab Americans. The Court was given the opportunity to decide whether diversity is a compelling state interest when it considered a challenge to the University of Michigan Law School’s admissions policy, which affirmed the law school’s commitment to racial and ethnic diversity which specifically included students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans.

Writing for the 5-4 majority, Justice O’Connor said that, in upholding the Michigan race-conscious admission policy, the Court was endorsing Justice Powell’s view in *Bakke* that student body diversity is a compelling state interest justifying the use of race in university admissions as part of a holistic process.<sup>83</sup> Affirmative action programs were also to be narrowly tailored and of limited duration. Justice O’Connor referred to Asian Americans in summarizing the district court’s testimony about the exclusion of Asians and Jews who were members of groups that experienced discrimination, “but were already admitted to the law school in significant numbers.”<sup>84</sup> Though Asian Americans were not

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<sup>80</sup> Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM & MARY BILL RTS. J. 881, 890 (1996). Chin questions the Bakke rationale as applied to Asian Americans, “If the Bakke standard would consider a fourth generation Japanese American in Sacramento to be much the same as the freshly neutralized Vietnamese American in Texas, it is wrong. If this is the rationale behind Bakke, it is more than erroneous – it is racist; such a rationale takes the old slur that minority racial groups “all look alike” one step further: it maintains that they actually are all alike.” *Id.* at 900.

<sup>81</sup> See Nancy Leong, Racial Capitalism, 126 Harv. L. Rev. 2152, 2162-2163 (2013). In cases involving minority contractors, the Court struck down affirmative action using the strict scrutiny standard. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989)(plurality opinion)(dictating that a state actor must present a compelling governmental interest that is narrowly tailored to remedy the effects of past discrimination); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995)(extending the holding of *Croson* from state and local governments to the federal government).

<sup>82</sup> 539 U.S. 306 (2003).

<sup>83</sup> O’Connor determined that “Under the policy, the law school presented evidence that the goal of the policy is not to remedy past discrimination, but to admit students who may bring a different perspective to the classroom as compared to students who are not members of underrepresented minority groups.” *Id.* at 306. In his *Grutter* dissent, Justice Kennedy found significant flaws with the university’s affirmative action program and criticized the manner in which the university implemented its admissions policy. In particular, he was not persuaded that the Law School was adequately assessing the individuals applicants throughout the process. 539 U.S. 306, 391 (2003)(JJ. Kennedy Dissenting). To the contrary, Kennedy believed that the policy lacked guidelines for admission personnel to “reconcile individual assessment with the directive to admit a critical mass of minority students.” *Id.* at 392. He insisted that a strict scrutiny analysis must show that “An educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision-making.” *Id.* at 392-393.

<sup>84</sup> *Id.* at 319. While previous high court cases excluded Asian Americans from the affirmative action dialogue, Asian Americans and other minorities have been considered in cases concerning affirmative action programs in minority contracting. See e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995) (indicating class of disadvantaged contractors including “Asian Pacific Americans”); *City of*

included as beneficiaries in the Michigan admissions policy, Asian Americans law professors provided expert testimony, and two *amicus* briefs were filed by Asian American organizations holding opposing views, spotlighted significant tensions within the Asian American communities and between Asian American and other minority groups, that will simmer to a boil in *Fisher*.<sup>85</sup>

During that same term, the Court also considered a challenge to the University of Michigan's admissions guidelines for undergraduates. Chief Justice Rehnquist, writing the majority opinion in *Gratz v. Bollinger*,<sup>86</sup> struck down Michigan's undergraduate admission program as “not narrowly tailored” in part because it gives an automatic twenty points for minorities toward the hundred points needed for admission.<sup>87</sup> The Court in *Gratz* required that race only be used as part of an ‘individualized review’ of applicants. Both of the Michigan cases were framed as a limited debate over whether the educational benefits of a racially diverse student body are sufficiently compelling to justify affirmative action.<sup>88</sup>

Notably in the years following *Grutter* and *Gratz*, the ideological composition of the Court changed with the retirement of Justice Sandra Day O’Connor, the death of Chief Justice William Rehnquist, the subsequent confirmation of John Roberts as Chief Justice, and the nominations of Sonya Sotomayor and Elena Kagen by President Obama.<sup>89</sup> The stage was set for another showdown over affirmative action.

### III. *Fisher v. Texas* and the Inclusion of Asian Americans in the Affirmative Action Debate

The constitutionality of affirmative action in higher education was again challenged in *Fisher v. University of Texas*.<sup>90</sup> The facts were as follows. In 1996, the Fifth Circuit in *Hopwood v. Texas* (“*Hopwood*”)<sup>91</sup> prohibited the University of Texas (“UT”) from

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Richmond v. J.A. Croson Co. 488 U.S. 469 (1989) (discussing minority contracting including African Americans, Hispanic Americans, and Asian Americans).

<sup>85</sup> On the one hand, the Asian American Legal Foundation (“AALF”) sided with the white plaintiffs and urged the Court to end race-based admissions policies. From their perspective, eliminating affirmative action would increase the Asian American admission rate. See Brief for National Asian Pacific American Legal Consortium et al. as Amici Curiae Supporting Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (nos. 02-241 & 02-516), 2003 WL 4000140. They cite instances of Asian American achievement and integration into the mainstream of American society as proof that affirmative action programs are no longer needed, and that these in fact, hinder opportunities for qualified Asian Americans. These Asian American critics claim that affirmative action allows colleges and universities to put ceilings on the number of Asian American students. *Id.* On the other hand, nearly thirty Asian American political and legal organizations filed *amicus* briefs in support of the University of Michigan's race-based admissions program. *Id.*

<sup>86</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>87</sup> *Id.* at 249.

<sup>88</sup> *Id.*

<sup>89</sup> See JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 194-95 (2014).

<sup>90</sup> *Fisher v. Texas*, 133 S. Ct. 2411 (2013) (Fisher I).

<sup>91</sup> *Hopwood v. Texas*, 78 F. 3d 932, 936 (5th Cir. 1996), cert. denied 78 F.3d 932 (1996). In *Hopwood*, four plaintiffs, all white residents of Texas, applied for admission to the University of Texas School of Law. *Id.* Only African Americans and Hispanic Americans were given preferential treatment in the admissions process, and were considered “minorities” whereas “whites” were Texas residents who were white and non-preferred minorities Asian Americans were considered non-minorities, and excluded from



considering race in their admissions process. The Texas Legislature passed a law requiring UT to admit all in-state students who graduated in the top ten percent of their high school classes (“Top Ten Plan”). In 2008, Abigail Fisher, a white female, applied for undergraduate admission to the UT’s flagship campus in Austin. Because she was not in the top ten percent of her class, Fisher competed for admission with other non-top ten percent in-state applicants. Her application was rejected.<sup>92</sup> After UT denied Fisher’s application, she filed suit claiming that UT’s use of race as a consideration in admission decisions was in violation of the Equal Protection Clause of the Fourteenth Amendment. UT argued that its use of race was a narrowly tailored means of pursuing greater diversity.<sup>93</sup> The district court decided for UT, and the Fifth Circuit affirmed the district court’s decision. Fisher appealed the court of appeal’s decision.<sup>94</sup>

The Court had two chances to review the case. When *Fisher I*<sup>95</sup> first reached the Court, Justice Kennedy wrote for the 7-1 majority holding that the Fifth Circuit erred in failing to hold the University’s admissions policies to a standard of strict scrutiny, and as such, it could not verify whether University policy in question was necessary to achieve the benefits of diversity and that no race-neutral alternative would provide the same benefits.<sup>96</sup>

Interestingly, there is conjecture about the intense divisions amongst the justices in conference meetings about *Fisher* which devolved into an ideological battle which eventually end when majority altered its decision, fearing a fiery dissent to be written and read on the bench by Justice Sotomayor.<sup>97</sup> As Supreme Court commentator Joan Biskupic explains in her book about Sotomayor, there were extensive deliberations between eight justices divided between two ideological camps though a series of draft opinions over nine-months. On the left, Sotomayor vigorously defended the university’s attempt to generate a “critical mass” of minority students to make them feel welcome on campus and improve the classroom experience, she lobbied the other three liberal justices for their votes.<sup>98</sup> On the right were Roberts and the other conservative justices who pushed back with their contention: UT offered insufficient information about the definition of critical mass, thereby hindering any analysis of its constitutionality.<sup>99</sup> All the while, Justice Kennedy voiced skepticism for UT’s program and was inclined to side with Roberts, Scalia, and Thomas in ruling against UT and limiting *Grutter*.

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the law school affirmative action program. *Id.* at 936 n.4. The Fifth Circuit conducted a color-blind analysis and held that the University of Texas could not use race as a factor in deciding which applicants to admit to its law school. *Id.* at 932.

<sup>92</sup> *Fisher v. Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Supra* note 90.

<sup>96</sup> To determine whether an affirmative action program violates the Constitution, the Court utilizes a strict scrutiny level of review. See *Fullilove v. Klutznick*, 440 U.S. 448 (1980). Such a standard is employed in case involving “suspect classification” such as race, religion, or ethnicity. See Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 836 (1994).

<sup>97</sup> THE RISE OF SONIA SOTOMAYOR, *supra* note 89, at 191 (2014).

<sup>98</sup> *Id.* at 200-01.

<sup>99</sup> *Id.* at 200.

With an initial 5-3 lineup striking down UT's policy with a Court still concerned about the public witnessing a potential vitriolic defense of affirmative action by Sotomayor.<sup>100</sup> Justice Stephen Breyer, coming to the rescue, brokered a compromise between the two camps.<sup>101</sup> With that, the Court vacated the judgment in *Fisher I* and remanded the case to the Fifth Circuit so that the University's program could be evaluated under the proper strict scrutiny standard, and the case was removed from the Court's docket, at least for the time being.<sup>102</sup>

On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University.<sup>103</sup> By the time *Fisher II* returned to the Court, Fisher had since graduated from Louisiana State University and the case had already gone and forth between courts for eight years. Although the Court was aware that the case could have been dismissed based on standing alone because Fisher, who was not eligible under the Top Ten Plan was not seeking injunctive relief, only sought money damages, and suffered no injury. In its discretion the Court went ahead and addressed the merits of the case.

### ***A. The Majority Opinion in Black/White/Brown***

Justice Kennedy who until *Fisher II* never before voted in support of any

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<sup>100</sup> *Id.* at 206. Portions of the dissent that Sotomayor intended to write in *Fisher I* appeared in *Schutte. v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), a case upholding a Michigan state ban on racial affirmative action, including at public universities. The justices again were contentiously divided across ideological lines. Justice Kennedy won a majority. In her fifty-eight-page dissent, Sotomayor condemned the majority stance, "Today's decision eviscerates an important stand of our equal protection jurisprudence." *Id.* at 1683 (Sotomayor, J., dissenting). She also elaborated on the barriers facing racial minorities today, and argues that "race matters" because: (1) race has been used to prevent access to the political process; (2) race has produced stark socioeconomic disparities; (3) society reacts to a person based on their race. *Id.* at 1676. Sotomayor further argued that "Race matters because of the slights, the snickers, the silent judgments that reinforce that most chilling of thoughts: "I do not belong here." *Id.* She asserts that "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." *Id.* Further, Sotomayor posits that "diversity in education is paramount" and colleges and universities "must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible.... We should not turn a blind eye to something we cannot help but see." *Id.* at 1682-83.

<sup>101</sup> Amy Howe discussed Breyer's role in the *Fisher* deliberations at a D.C. Bar presentation. District of Columbia Bar Conference Center: U.S. Supreme Court in Focus (August 4, 2016): *Fisher v. University of Texas*.

<sup>102</sup> *Supra* note 97, at 201.

<sup>103</sup> Upon remand, the Fifth Circuit again upheld the constitutionality of UT's race-conscious admissions program. The court of appeals concluded that the record showed that: (1) race-conscious holistic review was focused upon the individual applicants and did not function as a racial quota; (2) the holistic review program was a necessary and enabling component of the Top Ten Percent Plan; and (3) holistic review was necessary to "achieve the rich diversity that contributes to its academic mission" *Fisher v. Texas*, 758 F.3d 633, 646, 653-57 (2014). Dissenting, Judge Garza opined that UT failed to meaningfully define its goal of "critical mass." *Id.* (Garza, J., dissenting). Without knowing what "critical mass" means, the court cannot determine whether UT's use of racial classification in its review is narrowly tailored to its goal. *Id.* at 666. The district court entered summary judgment in the university's favor and the Fifth Circuit affirmed.

affirmative action program, wrote for four of the nine members of the Court, and ruled in favor of UT.<sup>104</sup> With regards to Kennedy's turnaround, Amy Howe, editor and reporter for SCOTUSblog, speculated about Kennedy's turnaround on his new view of affirmative action, and suggested that his change in position was probably influenced by the social and political climate.<sup>105</sup> Howe speculated that there could have been another political bargain struck ala *Fisher I* and another compromise was made between the conservative and liberal blocs so that the Court could avoid becoming a special master in the case<sup>106</sup>

As for the text of the majority opinion, the first quarter of the opinion summarizes the lengthy efforts ways in which UT altered its admission policies in good faith after *Hopwood* and then modified them repeatedly after *Grutter* and *Gratz*. Kennedy then painstakingly outlined the significant evidence showing the need to alter their admission policies when their goal of increasing the diversity of its student body could not be achieved with race-neutral policies, or with enhanced consideration of socioeconomic factors.

The second quarter of Kennedy's opinion described UT's holistic review admissions process and explained how applicants' files are reviewed. Applying subtle and varied factors, admission decisions were based on an applicant's admissions index ("AI") which is a calculation of scholastic aptitude test score and high school performance and grades and "Personal Achievement Index" ("PDI"), a numerical score based on a holistic review of an application considering personal essays, leadership and work experience, extracurricular activities, community service, and other "special circumstances" such as the socioeconomic status of the family, and any family obligations. Race is only later introduced as subfactor within the PAI and a "factor of an factor of a factor" in the holistic-review calculus.<sup>107</sup> The "[c]onsideration of race is contextual and does not operated as a mechanical plus factor for underrepresented minorities."<sup>108</sup>

Kennedy made three findings. First, the university's diversity goals were defined sufficiently to satisfy the strict scrutiny standard requiring government racial classifications to advance a compelling interest. Kennedy announced that under strict scrutiny, UT is burdened with clearly demonstrating that its purpose is a "constitutionally permissible and substantial, and its use of the classification is necessary to the accomplishment of its purpose."<sup>109</sup> From the majority's viewpoint, UT met this burden in showing that it tried but failed to achieve the educational benefits of diversity before proceed to implement a race-conscious plan.<sup>110</sup>

Kennedy was seemingly persuaded by extensive statistical and anecdotal evidence provided by UT illustrating its great efforts to increase the number of minority students

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<sup>104</sup> Joining in concurrence were Breyer, Ginsburg, and Sotomayor. Justice Kagan was recused from the case because she was involved in the litigation as solicitor general.

<sup>105</sup> District of Columbia Bar Conference Center: U.S. Supreme Court in Focus (August 4, 2016): *Fisher v. University of Texas*.

<sup>106</sup> *Id.*

<sup>107</sup> *Fisher*, 136 S.Ct. 2198, at 2207.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 208.

<sup>110</sup> *But see* Stuart Taylor, *Symposium: Extrapolating from Fisher—Racial Preferences Forever*, SCOTUSBLOG (Jun. 23, 2016, 4:42 PM), <http://www.scotusblog.com/2016/06/symposium-extrapolating-from-fisher-racial-preferences-forever/> (criticizing Kennedy for his [acceptance of] every argument made by the university, no matter how implausible or inconsistent with the same university's previous arguments in the same case).

without the consideration of race through outreach efforts, scholarship programs, and recruitment events, and concluded that UT could not diversify its student body without having to using race.<sup>111</sup> Kennedy especially focused on the statistical and demographic data showing a “consistent stagnation” in the anemic percentage of minority freshman students enrolling at the UT from 1996 to 2002, and citing that “Only 21 percent of undergraduate classes with five or more students in them had more than one African American students enrolled.”<sup>112</sup>

Second, Kennedy found that the university was justified in finding that the Top Ten Percent plan by itself was not enough to produce sufficient diversity. Here, Kennedy stressed the importance of an educational benefits derived from a diverse student body, which was articulated by UT went beyond class rank alone: [T]he “concrete and precise goals” of “ending stereotypes, promoting ‘cross-racial’ American leaders with “legitimacy in the eyes of the citizenry.”<sup>113</sup> Apparently, the majority found UT’s showing that African Americans and Hispanic students felt lonely and isolated due to the lack of other minority students in the classroom and on campus to be persuasive.<sup>114</sup>

Third, Kennedy concluded that the addition of the holistic part of the admission program had a meaningful effect on the diversity of the university’s freshman class, and UT could not reach its goals without it. Critical mass, the University argued, was an evolving definition that will be reached when UT reaches its goal when the number of African American and Hispanic student do not feel like spokespersons for their race and when cross-racial understanding is promoted; and when educational benefits are achieved.<sup>115</sup>

### ***B. A Touch of Yellow: An Asian American Cameo in the Majority Opinion***

Interestingly, Kennedy’s opinion, like O’Connor’s opinion in *Grutter*, included Asian Americans in its discussion of how Asian Americans are affected by affirmative action admission policies. However, Kennedy’s opinion only makes a single reference to Asian Americans when he declared that the consideration of race may benefit all UT applicants including whites or Asian Americans, and that Fisher’ failed to prove that the University discriminated against Asian Americans.<sup>116</sup>

Kennedy’s cursory mentioning of Asian Americans seems odd given the arguments presented by Fisher. In Fisher’s brief, she referred to Asian Americans in arguing that Texas’s use of race in admission decision was detrimental to Asian Americans, and subjected them to the same inequality as white applicants, thereby exacerbating the classroom diversity problems.<sup>117</sup> UT’s response brief did not mention Asian Americans at

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<sup>111</sup> *Id.* at 2213.

<sup>112</sup> *Id.* at 2212.

<sup>113</sup> *Id.* at 2203.

<sup>114</sup> *Id.* at 2224.

<sup>115</sup> *Id.* at 2227.

<sup>116</sup> *Id.* at 2207. *But see* Stuart Taylor, *Symposium: Extrapolating from Fisher—Racial Preferences Forever*, SCOTUSBLOG (Jun. 23, 2016, 4:42 PM), <http://www.scotusblog.com/2016/06/symposium-extrapolating-from-fisher-racial-preferences-forever/> (arguing that the “Texas preferences... discriminates flagrantly against Asian Americans”).

<sup>117</sup> *See* Brief for Petitioner at 8, *Fisher v. Texas* 136 S. Ct. 2198 (2016) No. 14-98.

all because they were not beneficiaries of its admission plan, and were not underrepresented minorities.<sup>118</sup> Filling in the gaps was the wealth of information presented in the *amicus* briefs filed on behalf of Asian American organizations whoever divided on the issues. First there were Asian American interest groups who loudly opposed affirmative action, and who received more media attention than Asian American groups that supported them. In their *amicus* brief, the Asian American Legal Foundation (“AALF”) and the Asian American Coalition for Education argued that the university’s admission program worked as impermissible racial balancing because Hispanics are included in the program but Asian Americans are not.<sup>119</sup> AALF argued, Asian Americans are harmed the most by the university affirmative action program, and the exclusion of Asian Americans as beneficiaries diminishes their value.<sup>120</sup>

As a counter, in their brief, Asian Americans Advancing Justice (“AAAJ”), joined by 150 civil rights groups advocacy organizations, bar associations, and business organization argued that Fisher used Asian Americans as pawns to strengthen her arguments. They took issue with Fisher’s characterization of Asian Americans as innocent victims burdened by affirmative action programs.<sup>121</sup> AAAJ voiced their support for affirmative action by arguing that Asian Americans have historically benefited from affirmative action, and certain economically disadvantaged Asian American subgroups such as Hmong, Cambodian, and Laotian individuals continue to need and benefit from such programs create a diverse student body benefiting all students, including Asian Americans, AAAJ further argued that the UT policy did not cause any drop in Asian American enrollment. In fact, “the percentage of Asian American students enrolled at UT has exceeded the percentage of Asian Americans in Texas by more than a factor of five.”<sup>122</sup> While not mentioned, bolstering AAAJ’s point is the surging Asian population in Austin, which has grown 60 percent since 2000, representing the largest Asian population in the state, and about 6.3 percent off Austin’s nearly 800,000 residents.<sup>123</sup>

As was the case in *Grutter*, *amicus* briefs were extremely helpful in assist the Justice to become more fully informed about interests impacted by the Courts’ decision on affirmative action. If Asian Americans both sides did not became involved in *Fisher*, would Asian Americans have been ignored completely? Absent these *amicus* briefs about the viewpoints held by Asian Americans about UT’s admissions program, what else would Justice Alito have to talk about?

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<sup>118</sup> See Brief for Respondents, *Fisher v. Texas* 136 S. Ct. 2198 (2016) No. 14-98.

<sup>119</sup> See Brief for Asian American Legal Foundation et al. as Amici Curiae in Support of Respondents, *Fisher v. Texas*, 136 S. Ct. 2198 (2016).

<sup>120</sup> *Id.*

<sup>121</sup> See Brief for Members of Asian Americans Advancing Justice et al., as Amici Curiae in Support of Respondents, *Fisher v. Texas*, 136 S. Ct. 2198 (2016).

<sup>122</sup> *Id.*

<sup>123</sup> See American Statesmen Staff, *Asian Population Surges in Austin*, AUSTIN AMERICAN-STATESMAN (May 7, 2011, 12: 47 AM), <http://www.statesman.com/news/local/asian-population-surges-austin/BnazKF1O3dGIGEYKQIzSrK/>.

#### IV. Alito's Dissent and "The Curious Case of Asian American Students" at the University of Texas<sup>124</sup>

"Justice Alito takes pains during a period of significant racial conflict in our society, to look outside the record to irresponsibly pit Asian Americans against other communities of color."<sup>125</sup>

This section examines Justice Alito's dissent, and explores portions of his dissent suggests that Alito misuses Asian American as honorary whites in arguing against the consideration of race in university admissions programs.<sup>126</sup> Early indicators that Alito was going to use Asian Americans as the centerpiece of his dissent, materialized four years before in a series of robust questions during oral arguments in *Fisher I*. At the time, Alito was particularly interested in the UT's program impact on Asian Americans. When asked if Asian Americans were treated fairly in the admission process, he insinuated that UT lumped together all Asian groups to support its decision to exclude Asian Americans as beneficiaries, and then grilled Gregory Garre, counsel for UT, about how the university determined if there was a critical mass of Asian subgroups such as Cambodian and Filipino Americans.<sup>127</sup>

Alito's festering concerns about UT's discrimination against Asian Americans manifested into a boisterous fifty-one-page dissent was joined by Chief Justice Roberts and Justice Thomas.<sup>128</sup> Alito's dissent began with a detailed critique of UT's policies, and then

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<sup>124</sup> *Fisher v. Texas*, 136 S. Ct. 2198 (2016) (Alito, J., dissenting). Alito's remarks is reminiscent of Justice Powell's observations about the inclusion of Asian Americans as beneficiaries in the affirmative action program at the Davis Medical School in *Bakke* almost forty years ago. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 n.45 ("The inclusion of Orientals is especially curious in light of the substantial numbers of Asians admitted through the regular admission process").

<sup>125</sup> See Stewart Koh & Mee Moua, *Affirmative Action, Asian Americans 'Are Not Your Wedge,'* NBC NEWS (Jul. 19, 2016), <http://www.nbcnews.com/news/asian-america/opinion-affirmative-action-asian-americans-are-no-your-wedge-n610596>.

<sup>126</sup> See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD. WORLD L. J. 225, 272 (1995) ("Functionally, the injection of Asian Americans into the affirmative action debate transforms formally non-cognizable harm to the white majority into arguably cognizable harm against a colored minority. It completes the 'Divide and conquer' tactic by then turning affirmative action for African Americans into discrimination against Asian Americans. Asian Americans become the 'innocent victims' in place of whites.").

<sup>127</sup> See Josh Gerstein, *Alito Speaks Up for Asian Americans*, Politico (Oct. 11, 2012, 12:26 AM), <http://www.politico.com/blogs/under-the-radar/2012/10/alito-speaks-up-for-asian-americans-138099>.

<sup>128</sup> In his separate dissent in *Fisher*, Justice Thomas, preferring a color-blind approach to affirmative action, claimed that the Court was making policy and creating new rules. In denouncing the state's use of racial classifications, Thomas repeated the same arguments he made in *Grutter* by claiming that the majority opinion is "irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents." 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting). *But see* Mario L. Barnes, et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 302 (2015) (analyzing *Fisher I* and arguing that "Justice Thomas believes racial classifications are never benign and that history is pertinent to exposing the dangers of state considerations of race in education...he ignores his personal history and uses history more generally to suggest that justifications as for considering race that were once advanced by segregationists share some commonalty with arguments of proponents of affirmative action"). Thomas' interpretation is the kind of vision of colorblindness, that Professor Lopez asserts as taking the ideal of racial equality to use

argued that UT failed to define the term “critical mass” and explain how the use of race and ethnicity were used to achieve that goal.<sup>129</sup> Alito made his arguments in the face of voluminous details and information provided by UT about the administration and goals of its admissions policies which withstood the stringent strict scrutiny analysis. Instead, Alito insisted that the UT program could not satisfy strict scrutiny because the university merely made vague amorphous definitions of critical mass and how it measures diversity on campus, and that the majority decision gives too much deference to UT.<sup>130</sup> Alito, unsatisfied, contemplated, “Neither UT nor the majority has demonstrated that the four goals of demographic parity classroom diversity, interracial diversity, and avoiding racial isolation provides a sufficient basis for satisfying strict scrutiny.”<sup>131</sup>

Alito makes three additional points to support his claim that affirmative action has “gone wild.”<sup>132</sup> First, he disagreed with UT’s belief that an African American from an affluent background and an African American from a working class family can both contribute to diversity in the classroom because that conflicts with the original purpose of affirmative action programs were originally created to help disadvantaged students.<sup>133</sup> Second, Alito cited to the failure of UT and the majority to be clear about the relationship between Texas demographics and UT’s critical mass target.<sup>134</sup> Third, despite a deep record and two rounds of oral arguments, Alito steadfastly criticized UT for not providing evidence that the admission plan admitted, or will admit, more African American, Hispanic and Asian American students.<sup>135</sup>

Moving on, Alito displayed favoritism for race neutral admissions policies, when he professed, “A race-neutral alternative could accomplish UT’s objectives without gratuitously branding the cover of terms of thousands of applications with a bare racial stamp and telling each student he or she is defined by race.”<sup>136</sup>

Noticeably, throughout his dissent, Alito effectively functions as a self-anointed advocate for Asian Americans opposing affirmative action. This is especially audible when Alito pointed to the majority’s single mentioning of Asian Americans once outside of a parenthetical. “[The majority] act almost if Asian-American students do not exist.”<sup>137</sup> His venom extended to the Fifth Circuit. In a lengthy textual footnote, Alito was especially critical of the Fifth Circuit’s omission of any discussion of Asian Americans admitted through UT’s holistic review, who had the highest average SAT scores of all other groups, when it compared the SAT scores gaps between whites and African American and Hispanics, and reasoned that racial preferences were necessary to recruit more African Americans and Hispanics students.<sup>138</sup> To Alito, “[T]he Fifth Circuit’s willful blindness to

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as “a tool for preserving a racial status quo of continued White dominance.” See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 119 (10th ed. 2006)

<sup>129</sup> *Fisher v. Texas*, 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting)

<sup>130</sup> *Id.* at 2223.

<sup>131</sup> *Id.* at 2224.

<sup>132</sup> *Id.* at 2232.

<sup>133</sup> *Id.* at 2215-43.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 2238.

<sup>137</sup> *Id.* at 2227.

<sup>138</sup> *Id.* Alito quipped, “The reality of how UT treats Asian-American applicants apparently does not fit into the neat story the Fifth Circuit wanted to tell.” *Id.* at 2227 n.5. Similar arguments about the exclusion of

Asian American students is absolutely shameless.”<sup>139</sup>

Next, as a rejoinder to the majority’s sparse mention of Asian Americans, Alito did the reverse, and over-relied on Asian Americans to avoid talking about white interests and white victimhood. Alito purposefully minimized references to Fisher as being a white woman. This avoidance of white identity was noticed by one academic arguing that Asian Americans were used as a proxy for whites since “Justice Alito mentions white people only ten times..., and not once does he use the word in reference to Fisher herself. Yet the words “Asian Americans” appear sixty-two times in his dissent. If it were not for the ubiquity of Abigail Fisher’s image in the media today, one might think that Justice Alito were examining the petition of a person like me a Chinese American.”<sup>140</sup>

In effect, Alito used Asian Americans to argue that affirmative action discriminates against whites. This becomes apparent when Alito critiques the Fifth Circuit’s reasoning, “[T]he assumption behind the Fifth Circuit’s reasoning is that most of the African-American and Hispanic students admitted under the race-neutral component of UT’s plan were able to rank in the top percentile of their high school classes only because they did not have to compete against whites and Asian-American students.”<sup>141</sup> These kinds of arguments are the type that Professor Alfred Yen warns, when Asian Americans are assigned the model minority stereotype and they are “given whites attributes mak[ing] it possible [to] argue about the interests of whites without ever mentioning whites.”<sup>142</sup> While Professor Nancy Leong suggests that, “Asian Americans are currently being used as a defense against accusations of racism. If affirmative action opponents can frame their concern about affirmative action as concern for Asian Americans, then they’ve succeeded in distracting everyone from the reality that where they truly want to preserve a racial status so that benefits white people.”<sup>143</sup>

There is additional support for a claim that Alito’s reliance on Asian Americans and the model minority stereotype was done for analytical and rhetorical purposes. As one commentator notes, “Valorizing Asian Americans relative to Blacks via the model minority myth permits conservatives to pursue racial retrenchment without appearing racist. When whites then side with Asian Americans in an effort to push back Black

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Asian Americans from affirmative action programs have been made by critics of affirmative action. See Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L. J.* 39, 52 (1996) (reporting that opponents of affirmative action disingenuously “argue that affirmative action which excludes Asian Americans unfairly benefits other people of color over qualified Asian Americans”).

<sup>139</sup> *Supra* note 137, at n.5.

<sup>140</sup> David Shih, *Abigail Fisher Isn’t an Asian American*, (Jul. 1, 2016),

<http://professorshih.blogspot.com/2016/07/abigail-fisher-isnt-asian-american.html>.

<sup>141</sup> *Fisher v. Texas*, 136 S. Ct. 2198, 2217 (2016) (Alito, J., dissenting)..

<sup>142</sup> Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L.J.* 39, 52 (1996). Whiteness status is not based solely on skin color since it can be achieved based on socio-economic success and upward mobility. As Professor Ian Haney Lopez points out in reference to Cubans and Asians, “Growing numbers of minority individuals, those with fair skin, wealth, political connections or high athletic artistic or professional accomplishments –can virtually achieve a white identity. [This] racial designation... like others...operates on a sliding scale.” See Ian Haney Lopez, *White Latinos*, 6 *HARV. LATINO L. REV.* 1, 5 (2003).

<sup>143</sup> Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 *UCLA L. REV.* 90, 97-98 (2016).



political demands they can come across as antiracist champions of the underdog rather than as acutely self-interested actors.”<sup>144</sup>

Further, Alito’s conflation of Asians and whites continue in the second paragraph of his dissent, Alito is quick to assert that UT discriminates against Asian Americans, “Nor has UT explained why the underrepresentation of Asian American students in many classes justifies its plan which discriminates against those students.”<sup>145</sup> This theme is reiterated midway through the dissent, when Alito, after chastising UT for their belief that any discrimination against Asian American students was benign because of their overrepresentation of Asian Americans at UT, writes, and with no pun intended, ‘The majority’s assertion that UT’s race-based policy does not discriminate against Asian Americans defies the law of mathematics.’<sup>146</sup>

Arguably, Alito’s use of the racial identify of Asian Americans was used to further anti-blackness reached a high point when Alito embraced the model minority stereotype to separate Asian Americans from African Americans and Hispanics. Alito asserted that the majority opinion helped affluent African Americans students and hurt Asian Americans students, and used the perennial trope of pitting African Americans and Hispanics against Asian Americans, “[P]roviding a boost to African Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission.”<sup>147</sup> Alito commented that “If [...] state demographics are not driving UT’s interest in avoiding racial isolation, then its treatment of Asian American students is hard to understand,” and followed-up with:

UT never explains why the Hispanic students-but not the Asian American students-are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian Americans.<sup>148</sup>

Alito later cited to extra record material to support his contention that UT’s plan discriminated against Asian American students.<sup>149</sup> Alito specifically argued that UT’s study reflected that classroom diversity was more lacking for Asian Americans than

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<sup>144</sup> Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *POLITICS & SOCIETY* 105, 122 (1999).

<sup>145</sup> See *supra* note 141, at 2216.

<sup>146</sup> *Id.* at 2227 n.4.

<sup>147</sup> *Id.* This is an example of what Frank Wu articulates as “[Asian Americans] placed in the awkward position of buffer or intermediary, elevated as the preferred racial minority at the expense of denigrating African Americans.” See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 38 (2002). The topic of Asian Americans as a buffer minority was also considered by Professor Mari Matsuda who quips, “I hope we will not be used to deny educational opportunities to the disadvantaged and to preserve success for only the privileged.” See MARI J. MATSUDA, *We Will Not Be Used: Are Asian Americans the Racial Bourgeoisie?*, in *WHERE IS YOUR BODY? AND OTHER ARTICLES ON RACE GENDER AND THE LAW* 154 (1996).

<sup>148</sup> *Supra* note 146, at 2236.

<sup>149</sup> *Id.* at 2216.

Hispanics, and this served as an example of how the university discriminated against Asian Americans. Alito claimed that UT failed to explain “why the underrepresentation of Asian-American students in many classes justifies its plan, which discriminated *against* those students.”<sup>150</sup> According to Alito, UT paid attention to feelings of isolation by Hispanic students yet neglected Asian Americans who may feel even more isolated in classrooms. However, the AAAJ, *amici* in the case, argued that Alito made “racially-charged, inflammatory claims that the consideration of race at UT Austin harms Asian Americans, and whites as well. Yet [Alito’s dissent] selectively ignores the evidence in the records...showing that such claims” are supported by the record or empirical data.”<sup>151</sup>

If nothing else, the concerns about the admission rates for Asian subgroups, raised by Alito at oral argument, are now memorialized as *dicta* available to affirmative action opponents to cite as persuasive authority in future litigation. In his dissent, Justice Alito’s skepticism about whether the Texas plan appropriately accounts for determining the admission rates for Asian Americans subgroups such as Filipino Americans, Vietnamese, Cambodian, Hmong, Indian, and other backgrounds even though the admissions forms asks for such self-identification by applicants.<sup>152</sup> Alito is partly right. While he correctly intimates that many universities perceive Asian Americans as not needing affirmative action to compensate for past discrimination, or that Asian American students are over-represented on campus, even though members from Asian subgroups such as Filipinos, Vietnamese, Cambodians, and the Hmong remain underrepresented.<sup>153</sup> However, as the majority determined, this was not the case with UT.

Despite UT’s university’s assurances that this self-identification process was an accurate measure for Asian American students, Alito claimed that Asian Americans are considered “overrepresented” due to the lumping together of the major and subgroups of Asian Americans: Chinese, Japanese, Korean, Vietnamese, Hmong, and Indians on campus.<sup>154</sup> From Alito’s perspective, Asian Americans are not overrepresented based on state demographics, and pointed out to the unfairness to Asian Americans.<sup>155</sup>

Doubling down, he cited to data showing that Hispanics are better represented than Asian Americans in UT classrooms and refers to UT’s own study showing that there were

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<sup>150</sup> *Id.*

<sup>151</sup> See Stewart Koh & Mee Moua, *Affirmative Action, Asian Americans ‘Are Not Your Wedge,’* NBC NEWS (Jul. 19, 2016), <http://www.nbcnews.com/news/asian-america/opinion-affirmative-action-asian-americans-are-no-your-wedge-n610596>.

<sup>152</sup> *Supra* note 150, at 2229.

<sup>153</sup> While Japanese, Chinese, and Korean American have made inroads into white-collar professions, such as engineering, law, and medicine, the masks the economic and educational challenges facing Asian subgroups, including but Hmong, Laotian, Cambodian, and Filipino Americans continue to directly benefit from affirmative action. See Nicholas D. Hartlep, et al. *Asian Pacific American College Freshman: Attitudes Toward the Abolishment of Affirmative Action in College Admissions*, 4 CRITICAL QUESTIONS IN EDUCATION 1 (analyzing how the model minority stereotype conceals subgroups that actually are underrepresented); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 623 (2006) (explaining that “some underrepresented APA groups (e.g., Filipinos, Southeast Asians, Pacific Islanders, can directly benefit from affirmative action in higher education”); see Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 641 (2015) (same).

<sup>154</sup> *Fisher v. Texas*, 136 S. Ct. 2198, 2216 (2016).

<sup>155</sup> *Id.*

fewer Asian American students than Hispanic students in most classrooms.<sup>156</sup> Alito also cited to the Amicus Brief filed by the Asian American Legal Foundation, and suggested that ignoring of Asian Americans is a commentary that UT valued the classroom contributions of Hispanics, in promoting cross-racial understanding and shattering stereotype, more than Asian American students.<sup>157</sup> But here, as pointed out by AAAJ, Alito fails to acknowledge that UT's holistic admission programs have benefited more underrepresented Cambodian, Hmong and Samoan applicants.<sup>158</sup>

Finally, Alito's concerns about the plight of Asian American applicants continued when he announced his dissent from the bench and offered queries about a hypothetical applicant (straw man), who has one Asian grandparent, self-selecting his or her ethnic background on their application and asked whether such an applicant bring a different diversity perspective to UT.<sup>159</sup> He rhetorically asked whether UT would have the presumption that the Asian applicant bring a distinctive "Asian viewpoint" to the classroom. To Alito, given the many diverse ethnic backgrounds of Asian students, "It would be ludicrous to believe that the student will have the same viewpoint to share in class."<sup>160</sup> In characterizing affirmative action as having "gone berserk" because it went from helping disadvantaged student to assign wealthy students, Alito asserts that Hispanic students from affluent backgrounds are pitted against lower income Asian immigrants, whose primary language is not English and working-class whites.<sup>161</sup> This is another instance where Alito's obsession with discussing the academic performance of Asian Americans overshadowed any meaningful discussions about the real needs of African Americans and Hispanics, and what can be done to admit more African Americans and Hispanics.

Interestingly, Alito's dissent conveniently ignores the immense body of extant Asian American legal scholarship that diminish, if not destroy, Alito's arguments. First, Alito's grouping of Asian Americans with whites to imply that affirmative action is unfair to whites and "honorary whites" obfuscates the real motive of affirmative action opponents: abolishing "racial preferences," which would maintain the status quo--whereby more whites would be admitted to prestigious universities allowing them all of the social and economic opportunities.<sup>162</sup> In reality, Professor Jerry Kang explains that whites and Asian Americans are not similarly situated. In debunking of misperceptions about affirmative action's "reverse discrimination" effect caused to whites do not carry the burdens of a "legacy of racial oppression," and Kang explains that "affirmative action was not adopted to subjugate or ignore Whites."<sup>163</sup> Second, former law professor, now Associate California

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<sup>156</sup> *Id.* at 2227.

<sup>157</sup> *Id.*

<sup>158</sup> See Stewart Koh & Mee Moua, *Affirmative Action, Asian Americans 'Are Not Your Wedge,'* NBC NEWS (Jul. 19, 2016), <http://www.nbcnews.com/news/asian-america/opinion-affirmative-action-asian-americans-are-no-your-wedge-n610596>.

<sup>159</sup> *Supra* note 157, at 2229-30.

<sup>160</sup> *Id.* at 2229.

<sup>161</sup> *Id.* at 2232.

<sup>162</sup> See Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L. J. 39, 53 (1996).

<sup>163</sup> See Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action* 31 Harv. Civ. Rights-Civil Liberties 1, 44 (1996).

Supreme Court Justice, Goodwin Liu says that, “[T]he average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-natural.”<sup>164</sup> Abolishing affirmative action will likely allow more whites than Asian Americans being admitted.<sup>165</sup> Third, universities can craft their admissions programs depending on the unique needs of their campus, which could include or exclude Asian Americans, and treat whites and Asian Americans similarly.<sup>166</sup> Fourth, legal scholar Frank Wu recommends changing the affirmative action framework from a story about African Americans and Latinos competing against Asian Americans to a “story about equity, and fairness, and access, and support for public higher education.”<sup>167</sup>

Despite the public perception that Asian Americans do not need affirmative action, if Asian Americans and other non-whites are included in the debate, the validity of affirmative action becomes even clearer. A majority of Asian Americans continue to support affirmative action even when they are not expressly included as beneficiaries of particular programs. The number of Asian Americans supporting affirmative action has remained consistent. According to 1996 national survey of Asian American voters, 57% of Asian American voters supported affirmative action, and only 23% opposed it.<sup>168</sup> A 2016 national poll conducted by Asian American social justice groups showed that 64 percent of Asian American voters support affirmative action.<sup>169</sup> Reacting to the *Fisher* ruling, the National Asian Pacific Americans Bar Association President Jin Hwang said, “As lawyers of color, we see the beneficial impacts of these policies everyday in the legal workforce and we recognize that diversity in higher education is critical in ensuring we have pipeline of talented lawyers and judges able to serve their communities.”<sup>170</sup> Likewise, Chinese For Affirmative Action expressed their support for the decision, “Race conscious admissions can look at the individual circumstances of these candidates and contextualize their future

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<sup>164</sup> Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1078 (2002).

<sup>165</sup> See JEFF CHANG, WE GON’ BE ALRIGHT: NOTES ON RACE AND RESEGREGATION 148 (2016) (contending “Whites were still three times as likely to be admitted to selective universities as Asians with a similar academic record”); see Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 71 (2007) (arguing that whites benefit mores than Asian American in law school after the passage of the California Civil Rights Initiative in 1996 and admissions without affirmative action and explaining that “Asian applicants... were the main beneficiaries of the ban on race-conscious affirmative action in the [University of California] system” while the enrollments were “essentially unchanged for Asians, and plummeted for African Americans, Latinos, and Native Americans”).

<sup>166</sup> These types of programs invoke ‘neutral action’ as opposed to “negative action” against Asian Americans. See GABRIEL CHIN, et. al., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE 23-24 (1996) (explaining “when it is reasonable to exclude APAs from the affirmative action program and treat them no difference from everyone else excluded, such as whites and Asian Americans treated the same: they do not warrant affirmative action. Burden of affirmative action is distributed broadly”).

<sup>167</sup> Frank H. Wu, *The Moral Dilemma of Honorary Whiteness: A Comment on Asian Americans and Affirmative Action*, 20 UCLA ASIAN PAC. AM. L. J. 25, 28 (2015).

<sup>168</sup> See Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 640 n.120 (1997).

<sup>169</sup> See *supra* note 158.

<sup>170</sup> *National Coalition of Bar Associations of Color Encouraged by Ruling in Affirmative Action Case*, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION (Jun. 23, 2016), [http://www.napaba.org/page/fisher\\_cbac\\_release](http://www.napaba.org/page/fisher_cbac_release).

potential to succeed and this would greatly benefit [Asian Pacific Islander] community members underrepresented in higher education.”<sup>171</sup>

As the *Fisher* majority has shown, properly designed and implemented affirmative action programs are a constitutionally valid tool to remedy past discrimination and address present discrimination.<sup>172</sup> Although, diversity promotes cross-racial understanding by helping to break down racial stereotypes,<sup>173</sup> the concept has generated criticism. Jeff Chang, Executive Director of the Institute for Diversity in the Arts at Stanford University, argues that the concept of diversity has been “exploited and rendered meaningless” and because of its common use as a corporate marketing tool.<sup>174</sup> Instead, companies, colleges, and neighborhoods boast about their diversity, which is often serves as a mere token gesture, doing little to assist the marginalized, address insularity, or alleviate the educational divide.<sup>175</sup> On the distinction between “thin” and “thick” versions of diversity, Nancy Leong argues, there is a “social preoccupation with diversity” and superficial appearances of inclusiveness mean little, if anything, however “thick” version of diversity actually “fosters inclusivity and improves cross-racial relationships.”<sup>176</sup>

This section revealed that as much as discrimination against Asian Americans should be recognized and addressed by mainstream America, Asian Americans themselves should not succumb to pressures to assimilate with whites by distancing themselves from African Americans and other racial groups in order to assimilate with whites.<sup>177</sup> By supporting affirmative action, Asian Americans can the reject the honorary white status. As seen in *Fisher*, Asian Americans civil rights groups have joined with African Americans

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<sup>171</sup> *Asian and Pacific Islanders Stand to Benefit from Supreme Court Decision to Uphold Race Conscious Policies for College Admissions*, CHINESE FOR AFFIRMATIVE ACTION (Jun. 24, 2016), <http://www.caasf.org/2016/06/asian-and-pacific-islanders-stand-to-benefit-from-supreme-court-decision-to-uphold-race-conscious-policies-for-college-admissions>.

<sup>172</sup> See Mario L. Barnes, et al. *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 305 (2015) (“Affirmative action programs in higher education are one of very few legal means for fighting injustice against certain racial groups”).

<sup>173</sup> See Angelo Ancheta, *Revisiting Bakke and Diversity-Based Admissions: Constitutional Law, Social Science Research and the University of Michigan Affirmative Action Cases* 18, The Civil Rights Project at Harvard University (May 2013) (“Regent studies show that student body diversity can produce a wide variety of positive educational outcomes, including a greater variety of intellectual opinions among students, richer classroom environment, improved thinking ability, higher self-confidence, and improved interpersonal and leadership skills”).

<sup>174</sup> See JEFF CHANG, *WE GON’ BE ALRIGHT: NOTES ON RACE AND RESEGREGATION* 18 (2016).

<sup>175</sup> *Id.* at 17.

<sup>176</sup> See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2152, 2169 (2013).

<sup>177</sup> *The Importance of Asian Americans? It’s not What You Think: Future Directions in the Racial Justice Movement*, CHANGLAB (2015), [http://www.changelabinfo.com/reports/ChangeLab\\_The-Importance-of-Asian-Americans.pdf](http://www.changelabinfo.com/reports/ChangeLab_The-Importance-of-Asian-Americans.pdf); see FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 66 (2002) (observing “[T]he ability of Asian Americans to pass into whiteness depends on their ability to distance themselves from blackness.”). Professor Neil Gotanda challenges the notions of model color-blindness and rejects laws that subordinate communities of color. See NEIL GOTANDA, *A Critique of “Our Constitution Is Color-Blind,”* in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 257, 257 (Kimberle Crenshaw et al. eds., 1995). Gotanda argues that the courts should utilize a revised approach to race by recognizing the “systematic nature of subordination in American society.” *Id.* at 272. Gotanda insists that the notion of constitutional color-blindness is “inadequate to deal with today’s racially stratified, culturally diverse, and economically divided nation.” *Id.* at 274.

and Latino civil rights groups to preserve affirmative action and address disparities in education, employment, wealth and structural inequality. Still, the debate is not over. Asian Americans will again be placed under the spotlight in pending affirmative action litigation pending in federal court. For example, three Asian American applicants sued Harvard in 2014, arguing that the University's race-conscious admissions policy amounts to an Asian quota.<sup>178</sup>

#### IV. Love, Marriage, and Equal Rights: The New Civil Rights Frontier

This section examines the role that Asian Americans played as active participants in the litigation over the right to same-sex marriage, another issue implicating the Equal Protection Clause.<sup>179</sup> *Obergefell* was the culmination of carefully crafted litigation and activism advanced by gay rights advocates spanning several decades.

In *Obergefell* the Court ruled by a 5-to-4 vote that the right to same-sex marriage is a fundamental right under the Constitution.<sup>180</sup> Married same-sex couples are entitled to the same legal rights as opposite sex couples. *Obergefell* is another case showing that the justices are not immune to changing culture and evolving public attitudes about same-sex marriage.

Before the ruling, same-sex couples could only lawfully marry in thirty-five states and the District of Columbia.<sup>181</sup> *Obergefell* mirrored public approval of same-sex marriage in America which has grown considerable over the past decade.<sup>182</sup> Public opinion has also gradually moved away from supporting efforts to outlaw same-sex marriage.<sup>183</sup> A 2014 Gallup Poll reflected that fifty-five percent of the American public, and seventy-eight

<sup>178</sup> See Elizabeth Slattery, *Symposium: A Disappointing Decision, But More Lawsuits are on the Way*, SCOTUSBLOG (Jun. 24, 2016, 1:13PM), <http://www.scotusblog.com/2016/06/symposium-a-disappointing-decision-but-more-lawsuits-are-on-the-way> ("Lawsuits are currently pending in federal district courts that challenge the racially discriminatory admissions policies of Harvard and the University of North Carolina-Chapel Hill. The Harvard suit was brought by Asian American applicants who claim they were denied admission because the university has put limits on the number of Asian Americans it will admit, similar to the racist quotas and caps that Ivy League schools put on the number of Jewish students they would admit in the 1920s. The plaintiffs in the North Carolina case highlight the fact that the university conducted a study showing that if the school dropped as racial preference policy and switched to a "top ten percent plan" like Texas, its minority enrollment would soar"). Asian Americans Advancing Justice-Los Angeles have joined the Harvard lawsuit as amici to express their support of affirmative action. See Asian Americans Defending Affirmative Action File Papers to Join Harvard Lawsuit, ASIAN AMERICANS ADVANCING JUSTICE-LA (Dec. 13, 2016), <http://advancingjustice-la.org/Harvard%20affirmative%20action#.WHpHMYzVD4>.

<sup>179</sup> The landscape of the contemporary debate over same-sex marriage was carved out during several generations of litigation and grassroots activism by established gay rights movement lawyers from the American Civil Liberties Union, Gay American Advocates and Defenders, Lambda Legal, and the National Center for Lesbian Rights, whom successfully framed the issue as a campaign for equality based on the Equal Protection Clause of the Fourteenth Amendment. See KENJI YOSHINO, *SPEAK NOW-MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY* 34-50, 118-19 (2015).

<sup>180</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>181</sup> See *Winning in the States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states>.

<sup>182</sup> See Adam Liptak, *Gay Marriage Backers Win Supreme Court Victory*, N.Y. TIMES (Jun. 26, 2015), <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

<sup>183</sup> See Stephanie Coontz, *Why America Changed Its Mind on Gay Marriage*, CNN (Oct. 13, 2014, 9:03 AM), <http://www.cnn.com/2014/10/13/opinion/coontz-same-sex-marriage/index.html>.

percent of individuals aged eighteen to twenty-nine, support same-sex marriage.<sup>184</sup> On the legal front, gay rights leaders have reframed the concept of gay marriage as a “right” into ideals about love and commitment in litigation, legislation referenda, and discussion which divided the states on the issue of same-sex marriage.<sup>185</sup> These factors, taken as whole, encouraged greater public support for marriage equality.<sup>186</sup>

### A. Asian Americans and Same-Sex Marriage Advocacy

Mirroring affirmative action, marriage equality has gone through decades of litigation, activism, and political, and academic debate. As much as conservative groups have sought the passage of ballot initiatives ending affirmative action, they have also fought to ban same-sex marriage. Once again, Asian Americans found themselves divided. In 2008, Asian Americans rallied against the passage of California’s Proposition 8 (“Prop 8”) which read “Only marriage between a man and a woman is valid or recognized in California” and was passed by 52.3 percent of California voters.<sup>187</sup> Before election day, polling by the Asian American Legal Defense and Education Fund (AALDEF) showed that almost half of the Asian Americans surveyed failed to support same-sex marriage.<sup>188</sup> Counted among the opposition were older Asians who were primarily foreign-born with limited English proficiency.<sup>189</sup> In contrast, most of the Asian Americans who supported same-sex marriage were native-born, younger, and highly educated.<sup>190</sup> Compared to whites, it was harder for Asian Americans to be as vocal as they could have been on this issue. Understandably, there is an inherent difficulty for gay Asian Americans to come out

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<sup>184</sup> See Justin McCarthy, *Same Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/same-sex-marriage-support-reaches-new-high.aspx>.

<sup>185</sup> See *supra* note 181.

<sup>186</sup> See Carrie Wofford, *Why Equality Is Winning*, U.S. NEWS & WORLD REPORT (Mar. 26, 2014), <https://www.usnews.com/opinion/blogs/carrie-wofford/2014/03/26/how-did-public-opinion-on-gay-marriage-shift-so-quickly>.

<sup>187</sup> See *supra* note 175, at 20. Proposition 22, the precursor to Proposition 8, passed with 51 percent of the vote in 2000, amended the California Family Code to reflect that only marriage between a man and woman as a valid or recognized in the state. *Id.* at 16-17. The same-sex controversy began in San Francisco on February 10, 2004 when Mayor Gavin Newsom issued marriage licenses to same-sex couples in the City before the California Supreme Court ordered a cessation of the issue of marriage licenses to same-sex couples. *Id.* at 19. Andrew Pugno, a solo practitioner in Sacramento, challenged Mayor Newsom’s issuance of marriage licenses and ultimately prevailing at the California Supreme Court in 2004. *Id.* at 52. Before the advent of Proposition 8, there was great conflict over the recognition of same-sex marriage. When the California legislature passed a bill legalizing same-sex marriage, Governor Arnold Schwarzenegger vetoed the bill. *Id.* at 26. The California Supreme Court initially upheld Proposition 8 against a procedural challenge, but on May 15, 2008, the California Supreme Court ruled 4-3 that barring same-sex couples from marrying violated the state’s constitution. *Id.* at 31.

<sup>188</sup> See Glenn D. Magpantay, *How Do We Gain Asian American Support for Marriage?*, THE BILERICO PROJECT (Jun. 19, 2013), [http://www.bilerco.com/2013/06/how\\_do\\_we\\_gain\\_asian\\_american\\_support\\_for\\_marriage](http://www.bilerco.com/2013/06/how_do_we_gain_asian_american_support_for_marriage).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

because of the nature of family-based communities, and their family's lack of familiarity with the LGBT lifestyle.<sup>191</sup>

Attempting to gain backing from the Asians American community to support marriage equality, progressive community activists created Asian Pacific Islander coalitions in San Francisco and Los Angeles.<sup>192</sup> These activists recruited and identified supporters at ethnic community festivals and launched media campaigns to channel their message.<sup>193</sup> Sixty-three Asian American organizations aimed to educate social justice-centered community-based organizations.<sup>194</sup> These Asian American organizations also endorsed a brief supporting marriage equality,<sup>195</sup> which was a response to the thousands of Chinese Americans who gathered in San Francisco, California and Alhambra, California, to protesting gay marriage in 2004 following the City of San Francisco's issuance of marriage licenses to same sex marriages.<sup>196</sup>

The *amicus* briefs summarized the state-level anti-miscegenation laws that existed in this country,<sup>197</sup> and argued that:(1) marriage is of critical important to individuals and to society; (2) the experience of Asian Americans in California illustrated the important rule of marriage in fostering integration into society;<sup>198</sup> and (3) the discriminatory denial of marriage impedes integration of an extended group.<sup>199</sup> Through grass roots educational efforts, opinions swayed and more Asian Americans became supportive. Eventually, fifty-two percent of Asian Americans in California voted against Prop 8.<sup>200</sup>

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<sup>191</sup> *The Importance of Asian Americans? It's not What You Think: Future Directions in the Racial Justice Movement*, CHANGELAB (2015), [http://www.changelabinfo.com/reports/ChangeLab\\_The-Importance-of-Asian-Americans.pdf](http://www.changelabinfo.com/reports/ChangeLab_The-Importance-of-Asian-Americans.pdf).

<sup>192</sup> See Robert S. Chang & Karin Wang, *Democratizing the Courts: How An Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 ASIAN PAC. AM. L.J. 22, 23 (2008); see KARIN WANG, WHEN LITIGATION COLLIDES WITH GRASSROOTS ORGANIZING: THE IMPACT OF THE PERRY LAWSUIT THROUGH THE EYES OF ASIAN AMERICANS ORGANIZING FOR MARRIAGE EQUALITY 120 (2013).

<sup>193</sup> *Id.* There are parallels between the educational efforts targeted at Asians on the same-sex issue and affirmative action litigation. The California Civil Rights Initiative (CCRI) campaign, in 1996, forced Asian Americans into the affirmative action debate. As demonstrated during the CCRI campaign, In 1996 Californians passed, by a slim majority, CCRI, was the first state wide ban on all racial, ethnic, and gender-based preferences in state employment, education and contracting in the history of affirmative action. In the months leading up to its passage, Asian Americans decided for themselves that they must support affirmative action. Cal. Const. art. 1§ 31.

<sup>194</sup> See Robert S. Chang & Karin Wang, *Democratizing the Courts: How An Amicus Brief Helped Organize the Asian American Community Community to Support Marriage Equality*, 14 ASIAN PAC. AM. L.J. 22, 22 (2008).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 22-23.

<sup>197</sup> See Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws: Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587, 587 (2007).

<sup>198</sup> See Brief for Asian American Bar Association of the Greater Bay Area et al., as Amici Curiae Supporting Respondents, 14 Asian Pac. Am. L.J. 33, 33 (2008).

<sup>199</sup> See Brief for Asian American Bar Association of the Greater Bay Area et al., as Amici Curiae Supporting Respondents, 14 Asian Pac. Am. L.J. 33, 33 (2008).

<sup>200</sup> See Erwin de Leon, *Do Asian Americans Hate Gay Marriage?*, WASHINGTON BLADE (Jul. 23, 2010), <http://www.washingtonblade.com/2010/07/23/do-asian-americans-hate-gay-marriage/>. Interestingly, there are parallels between the educational efforts targeted at Asians on the same-sex issue and affirmative action litigation. The California Civil Rights Initiative (CCRI) campaign, in 1996, forced Asian Americans into the affirmative action debate. As demonstrated during the CCRI campaign, in 1996 Californians passed, by a slim majority, CCRI, was the first state wide ban on all racial, ethnic, and gender-based preferences in



Momentum for social justice sustained as Asian American participation continued afterwards in *Perry v. Schwarzenegger*<sup>201</sup>- a challenge against the constitutionality of California's Prop 8.<sup>202</sup> Asian Americans were witnesses on both sides of the issue in the lawsuit. As told by Kenji Yoshino in *Speak Now-Marriage Equality on Trial: The Story of Hollingsworth v. Perry*,<sup>203</sup> during the *Perry* trial, author and journalist Helen Zia offered lay testimony on behalf of the plaintiffs.<sup>204</sup> Zia, a first generation Chinese American lesbian, and married her partner Lia Shigemura in California.<sup>205</sup> Zia's testimony highlighted the diversity inherent in the coalitions supporting same-sex marriage and its international reach. In contrast, Prop 8 proponents offered the testimony of Hak-Shing "Bill" Tam, a strong opponent of same-sex marriage.<sup>206</sup> Tam, a Tam immigrant to the U.S. was a Chinese evangelical community leader,<sup>207</sup> campaigned full-time for the passage of Prop 8 and conducted outreach in the Chinese community through Chinese language articles and speeches.<sup>208</sup> In his efforts, Tam relayed extreme, and inflammatory messages referring to homosexuals as child molesters, and alleged that homosexuals ran San Francisco city government.<sup>209</sup>

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state employment, education and contracting in the history of affirmative action. In the months leading up to its passage, Asian Americans decided for themselves that they must support affirmative action. Cal. Const. art. 1§ 31. *See also* ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 118 (1999). Prior to the strong stand made by Asian Americans in opposing CCRI, both liberal progressives, who supported affirmative action, and their conservative opponents, utilized Asian Americans in their CCRI rhetoric.

<sup>201</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The trial gained additional attention because it was the first time that super lawyers David Boies and Theodore Olson teamed up behind the same cause. Boies is Chairman of Boies, Schiller & Flexner LLP and served as Chief Counsel and Staff Director of the United States Senate Antitrust Subcommittee, and Chief Counsel and Staff Director of the United States Senate Judiciary Committee. *See* Boies, Schiller & Flexner LLP, <http://www.bsflp.com/lawyers/data/0001>. Olson is a partner in Gibson, Dunn & Crutcher. Both Boies and Olson were named as two of the 100 Most Influential People in the World by Time Magazine in 2010. Liberal Boies and conservative Olson were initially thought as an odd pairing because of their respective Democratic and Republican lineage, and their prior litigation against each other in *Bush v. Gore*. *See* Gibson, Dunn & Crutcher, <http://www.gibsondunn.com/lawyers/tolson>. After winning that case, Olson was appointed Solicitor General of the United States by President George W. Bush. *See* Boies, Schiller & Flexner LLP, <http://www.bsflp.com/lawyers/data/0001>; *see* Gibson, Dunn & Crutcher, <http://www.gibsondunn.com/lawyers/tolson>. Olson, sympathetic to gay rights issues, was troubled by the passage of Proposition 8. *See* KENJI YOSHINO, SPEAK NOW-EQUALITY ON TRIAL: THE STORY OF *HOLLINGSWORTH V. PERRY* 31 (2015).

<sup>202</sup> The group consisted of Paul Katami, a fitness expert, Jeffrey Zarillo, a member of the film industry were men in their thirties, while Kristin Perry and Sandra Stier, both were women in their forties who were raising four sons together. The official Proposition 8 proponents were Martin Gutierrez, Dennis Hollingsworth, Mark Jansen, Gail Knight, and Hak-Shing "Bill" Tam. *See* KENJI YOSHINO, SPEAK NOW-MARRIAGE EQUALITY ON TRIAL: THE STORY OF *HOLLINGSWORTH V. PERRY* 11 (2015).

<sup>203</sup> KENJI YOSHINO, SPEAK NOW-MARRIAGE EQUALITY ON TRIAL: THE STORY OF *HOLLINGSWORTH V. PERRY* (2015).

<sup>204</sup> *Id.* at 115-16.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 20.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 195.

<sup>209</sup> *Id.* at 196.

Federal District Judge Vaughn Walker issued a one-hundred and thirty-six page ruling, issued on August 4, 2010, striking down California's state ban on same-sex marriage as violative of the Due Process and Equal Protection Clauses of the U.S. Constitution's Fourteenth Amendment.<sup>210</sup> Judge Walker reasoned that: (1) because Prop 8 discriminated on the basis of sex and sexual orientation, it was unconstitutional; (2) same-sex and opposite-sex partners to be of equal quality; (3) the tradition of restricting marriage to opposite-sex couples, based on outmoded ideals about genders, does not further any state interest since it treats men and women differently; and (4) trial evidence would show that allowing same-sex couples to marry would have a neutral or positive effect on the institution of marriage.<sup>211</sup>

Same-sex marriage advocates were successful from that point forward. First, on appeal, in a 2-1 decision, a Ninth Circuit panel held that Prop 8 was unconstitutional, and dodged any assessment of the factual findings at trial.<sup>212</sup> Instead, the panel analyzed the case solely on the narrowest Equal Protection grounds possible,<sup>213</sup> allowing it to avoid the thorny issues of whether sexual orientation deserved heightened scrutiny, or whether Prop 8 was a form of sex discrimination.<sup>214</sup> Second, on June 20, 2013, the Supreme Court, ruled the proponents of Prop 8 lacked standing to appeal. There, the plaintiffs urged the Court to adopt the district court's reasoning which would have legalized same-sex marriage in all fifty states.<sup>215</sup> The plaintiffs emphasized the extensive evidence and detailed

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<sup>210</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010). *See also* KENJI YOSHINO, *SPEAK NOW-MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY* 6 (2015). Presently, there is no consensus about whether sexual orientation is suspect classification, a quasi-suspect classification, or a non-suspect classification, The Supreme Court's reluctance to apply heightened judicial review to classifications based on sexual orientation, and an impact on *Perry*. Nevertheless, the Ninth Circuit has already applied heightened scrutiny to classifications based on sexual orientation in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014). There, the Ninth Circuit held that heightened scrutiny applies to classifications based on sexual orientation and that *Batson v. Kentucky*, 476 U.S. 79 (1986) applies to peremptory strikes on that basis. *Id.* at 488. The decision came fourteen years after California barred the removal of gays from jury pools without justification. *SmithKline* was an antitrust trial involving GlaxoSmithKline (GSK) and Abbott Laboratories over the pricing of HIV medication. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 477 (2014). During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the jury panel. *Id.* During the course of the judge's colloquy with Juror B, the juror revealed that his "partner" studied economics and investments. *See People v. Garcia*, 77 Cal. App. 4th 1269 (Cal. App. Dep't Super Ct. 2000). Abbott declined to provide any justification for its strike when offered the opportunity to do so by the district court. *Id.* GSK challenged the strike under *Batson*, however, the trial judge denied GSK's challenge. 740 F.3d at 477. Writing for the panel, Judge Reinhardt first determined that classifications based on sexual orientation are subject to heightened scrutiny rather than rational basis review. Second, Reinhardt considered the history of exclusion of gays and lesbians from democratic institutions and the perverseness of stereotypes about the group. *Id.* at 487.

<sup>211</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993-97 (N.D. Cal. 2010).

<sup>212</sup> KENJI YOSHINO, *SPEAK NOW-MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY* 241 (2015).

<sup>213</sup> *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

<sup>214</sup> *See supra* note 212, at 243.

<sup>215</sup> *Id.* at 252.

factual findings of the district court.<sup>216</sup> While Prop 8 proponents argued that the trial court's factual findings were irrelevant under rational basis review.<sup>217</sup>

Third, on that same day, in *Windsor*,<sup>218</sup> the Court struck down the provision of the Defense of Marriage Act ("DOMA") limiting federal marriage benefits to opposite sex couple. The Court concluded that "[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity."<sup>219</sup>

### ***B. Obergefell v. Hodges***

*Obergefell* was the latest decision in a quartet of opinions favoring gay rights authored by Justice Kennedy over the past two decades: *Romer v. Evans*,<sup>220</sup> *Lawrence v. Texas*,<sup>221</sup> *Hollingsworth v. Perry*,<sup>222</sup> and *U.S. v. Windsor*.<sup>223</sup> Collectively, these opinions have solidified Kennedy's reputation as "the leading spokesperson on the Court for protecting the constitutional and privacy rights for gays and lesbians."<sup>224</sup>

In 1996, applying a rational basis standard of review, the Court in *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexual, lesbian, or bisexual either by "orientation, conduct, practices or relationships" as a violation of the Equal Protection Clause.<sup>225</sup>

In 2003, in *Lawrence* presented the question: was the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct?<sup>226</sup> In striking down the anti-sodomy law as unconstitutional, the Court reversed

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>219</sup> *Id.* at 2696. *Windsor* affects immigration. With the overturning of DOMA, same-sex partners may avail themselves of federal immigration benefits, including visas and permanent residency. Even though *Windsor* and *Obergefell* opinion do not mention it, presumably same-sex marriages entered into overseas will have to be recognized by immigration authorities. See Geoffrey A. Hoffman, *The Immigration Consequences of Obergefell v. Hodges*, ILW.COM (Jul. 1, 2015), <http://discuss.ilw.com/content.php?4627-Article-The-Immigration-Consequences-of-Obergefell-v-Hodges-By-George-A-Hoffman>.

<sup>220</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>221</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>222</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>223</sup> *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>224</sup> BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 233 (2014).

<sup>225</sup> See *supra* note 220, at 624. Kennedy wrote, "[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional...invalid form of legislation...its sheer breadth is so discontinuous with the reasons offered for its that the amendment seems inexplicable by anything but animus toward the class it affects, it lacks a rational relationship to legitimate state interests." *Id.* Kennedy's majority opinion concluded that the provision was "born of animosity toward the class of persons affected" and it had no rational relationship to a legitimate governmental purpose. *Id.* See also BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 233 (2014) (reporting that "Kennedy was persuaded by a legal brief from Harvard professor Laurence Tribe that the Equal Protection Clause of the Constitution prevented states from denying gays the protection of the law").

<sup>226</sup> See *supra* note 220, at 562.

the state court's judgment on account of the statute's violation of the fundamental right of consenting adults to engage in private sexual activity, irrespective of sexual orientation.<sup>227</sup>

*Obergefell* ended the debate over same sex marriage and permitted same-sex couples to marry in all fifty states. Writing for the 6-3 majority, Justice Kennedy referred to the earlier 6-3 majority opinion written by Justice Bryon White in *Bowers*, and argued that the rationale of *Bowers* did not withstand careful analysis since the case does not involve minors, or persons who might be injured or coerced, or persons who cannot easily refuse consent.<sup>228</sup> While White justified his opinion on his belief that it was a matter of adhering to historical and societal norm, Justice Kennedy instead embraced the ideal of equality, and argued that because the petitioners were entitled to respect for their private lives, the states should not criminalize their private sexual conduct.<sup>229</sup>

*Obergefell* arose from the Sixth Circuit's consolidated appeals from Kentucky, Michigan, Ohio, and Tennessee raising two issues: (1) whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex; and (2) whether the Fourteenth Amendment requires a State to recognize lawfully licensed marriages between the people of the same sex performed out of the state.<sup>230</sup> In *Obergefell*, the four litigating states defined marriage as a union between one man and one woman.<sup>231</sup> The Court answered in the affirmative on both of the issues, and held that the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The fourteen petitioners were same-sex couples and two men whose same-sex partners are deceased who sought marriage for its privileges and responsibilities, claimed that their Fourteenth Amendments rights were violated when their home states denied them the right to marry or to have marriages lawfully performed in another State.<sup>232</sup> Respondents counter-argued that it would demean a timeless institution if marriage were extended to same sex couples.<sup>233</sup>

Justice Kennedy wrote the majority opinion, joined by Ginsburg, Breyer, Sotomayor, and Kagan. He characterized the history of marriage as one of both continuity and change, and remarked that the Constitution evolved over time to reflect the changing public attitude about same-sex marriage.<sup>234</sup> Historically, same-sex marriages was considered as being immoral, but Kennedy explained that due to substantial cultural and

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<sup>227</sup> See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 192 (2006). That watershed decision overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to homosexuals, and finding that there was no fundamental right provided by the Constitution to engage in homosexual sodomy.

<sup>228</sup> See *supra* note 226, at 575.

<sup>229</sup> Under an expanded version of the rational basis test applied to the state's justification for the law, Kennedy insisted that: "[T]he Due Process Clause gives them the full right to engage in their conduct without intervention of the government. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

<sup>230</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584.

<sup>231</sup> See, e.g., Mich. Const. Art. I, §25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01; Tenn. Const. Art. XI, § 18.

<sup>232</sup> See *supra* note 230.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 2588.

political developments, same-sex couples have been allowed to have more open and public lives, and to establish families in the later half of the twentieth century.<sup>235</sup>

Embracing a vision of a living and evolving Constitution, Kennedy acknowledged that essential attributes of the right to marry was based in history, tradition, and other constitutional liberties inherent in this intimate bond.<sup>236</sup> He opined that such an analysis compels the conclusion that same-sex couples may exercise the right to marry.<sup>237</sup> Justice Kennedy stressed that by denying same-sex couples from marrying, they are denied “the constellation of benefits” states afford and this exclusion effectively teaches that gays and lesbians are unequal.<sup>238</sup> Consequently, same-sex couples are subjected them to demeaning treatment, stigma, and injury.<sup>239</sup>

In this section, Justice Kennedy’s echoes his earlier reasoning in *Lawrence v. Texas*.<sup>240</sup> In *Lawrence*, Justice Kennedy concluded that “[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>241</sup> In *Obergefell*, Kennedy discussed the limitation of marriage to opposite-sex couples as being inconsistent with the central meaning of the fundamental right to marry.<sup>242</sup> Kennedy observed that: [S]ame-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right... an unequal protection of the laws.<sup>243</sup>

Kennedy found respondents’ arguments that allowing same-sex marriage would reduce the number of opposite-sex marriages, and sever the connection between natural procreation and marriage.<sup>244</sup> Rather, he found these arguments to lack any foundation.<sup>245</sup> In closing, Kennedy assured that religious groups will still have ability to express their religiously grounded objections.<sup>246</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 2599 Accordingly, Kennedy presented four principles and traditions demonstrating that the reasons marriage is fundamental under the Constitution to all couples: (1) the right to personal choice is inherent in the concept of individual autonomy; (2) the right to marry is fundamental because it supports the significant a two-person union to the committed individuals; (3) the right to marry safeguards children and facilities and is related to childrearing, procreation, and education and (4) “marriage is a keystone of our social order.” *Id.* at 2599-2601.

<sup>238</sup> *Id.* at 2601.

<sup>239</sup> *Id.* at 2602.

<sup>240</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>241</sup> *Id.* at 564.

<sup>242</sup> *Obergefell*, 135 S.Ct. at 2601.

<sup>243</sup> *Id.* at 2602. In addition, Justice Kennedy professed that “The Constitution... does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.” *Id.* at 2607. Kennedy then robustly proclaimed that marriage embodies the highest ideals of love, fidelity, devotion, sacrifice, and family...two people become something grater than once they were...marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage.” *Id.* at 2608.

<sup>244</sup> *Id.* at 2607.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* In his dissent, Chief Justice Roberts passionately argued that there is no constitutional basis for the majority decision, and the Court should not have acted as a legislature. *Id.* at 2611. Adhering to judicial deference ideals, Roberts then discussed the impropriety of compelling a State change its definition of marriage, and to issue licenses recognizing same-sex marriages. *Id.* at 2612. Roberts argued that “Stealing

It what serves as a reminder that racial groups are linked together, and civil rights is a universal cause, in dissent, Justice Thomas disagreed with the importance of dignity stressed by the majority. To Justice Thomas, the Constitution does not contain a “dignity” clause.<sup>247</sup> According to Thomas, “[H]uman dignity cannot be taken away by the government. Slaves did not lose their dignity...because the government allowed them to be enslaved. Those, held in internment camps did not lose their dignity because the government confined them.”<sup>248</sup> Thomas’ reference to the Japanese American internment was met with immediate criticism from the Japanese American Citizens League, the first non-LGBTQ civil rights organization to support marriage equality.<sup>249</sup>

Considered together, *Obergefell* and *Fisher* show that the fight for racial equality can work in tandem with the struggle for sex equality. As states implement *Obergefell*, gay rights activists are making inroads in seeking social justice on this new civil rights frontier by focusing their efforts on obtaining federal, state, and local legal protections in employment and housing, which are now available to protect against harassment and discrimination based on race, religion, sex, and national origin.<sup>250</sup> Not surprisingly, after

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this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept. “*Id.* at 2612. Similar sentiments were shared by Justice Scalia and Alito in their separate dissents. Justice Antonin Scalia argued that there was no constitutional basis for the majority decision in his dissent, and he opined that “the public debate over same-sex marriage must be allowed to continue.” *Id.* at 2628. Favoring judicial restraint, Justice Alito asserted that there was no constitutional basis for recognizing a right to same-sex marriage. *Id.* at 2640.

<sup>247</sup> *Id.* at 2639. (Thomas, J., dissenting).

<sup>248</sup> *Id.*

<sup>249</sup> See Emil Guillermo, *Japanese-American Group to Justice: ‘No Dignity in Inequality,’* NBC NEWS (Jul. 1, 2015, 11:45 AM), <http://www.nbcnews.com/news/asian-america/japanese-american-civil-rights-group-clarence-thomas-theres-no-dignity-n385091>.

<sup>250</sup> See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 28, 2015, at A1. The Williams Institute at UCLA studies evidence of sexual orientation and gender identity employment discrimination nationwide, and reports employment discrimination against LGBT people have been well-documented in court cases, state and local administrative complaints, and in books, newspapers, and other media. Specifically, LGBT employees who have been mistreated at work, subjected to pay inequities, have reported of incidents of discrimination in hiring, promotion, and job retention because of their sexual identity. See Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Montana*, The Williams Institute UCLA School of Law 1 (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/MT-Nondiscrimination-March-2015.pdf>. Unfortunately, many states, including Alaska, Texas, and Montana, do not have statewide law that prohibits dissemination based on sexual orientation or gender identity in employment. See e.g., Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Alaska*, The Williams Institute UCLA School of Law 2-3, (Jul. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Alaska-ND-July-2015.pdf>; Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Texas*, The Williams Institute UCLA School of Law 3-4, (Apr. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TX-Nondiscrimination-May-2015.pdf>; Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Montana*, The Williams Institute UCLA School of Law 1 (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/MT-Nondiscrimination-March-2015.pdf>. Steven Bender argues gay stereotypes facilitate this kind of discrimination:

[A] compelling relationship exists between stereotype and legal treatment of gays and lesbians, who are constructed in American society as promiscuous and subhuman... The FDA prohibits most gay men from donating blood. Gay and lesbian single parents are often denied custody of their children on assumptions the children will be raised in an immoral environment... On the basis

*Obergefell*, cultural debates and discrimination against LGBT people continue. Given this reality, the recent legal triumphs for gays in this country may not mean Americans have fully accepted homosexuality, though many have learned to just tolerate it.

## V. Asian Americans, Mass Incarceration, and Police Misconduct

[W]e cannot deny the legacy of racism that continues to drive inequality in how the justice system is experienced by so many Americans.<sup>251</sup>

Section Five covers the expansion of the Asian American civil rights agenda in standing in solidarity against racial profiling, disparate sentencing, the militarization of the nation's law enforcement agencies, and support reforms in the American justice systems. The tendency to have conversations about criminal justice reform restricted to a black/white schema, parallels the limitations of the traditional black/white binary racial framework of the affirmative action debate.<sup>252</sup> This section explains why everyone, as stakeholders, should be included in the conversation about criminal justice reform.<sup>253</sup>

### A. Mass Incarceration and Racial Disparity in American Criminal Justice

A few years ago, in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,<sup>254</sup> Professor Michelle Alexander examined the intersection of racial justice and criminal justice, and offered her thesis: a racial caste system exists in this country because of harsh sentencing law aimed at African Americans, leading to their mass incarceration. She asserted that the racial biased criminal justice system has created mass racial disparities at every stage of the criminal justice process—from initial stop and search, and arrest to the plea bargaining and sentencing phases.<sup>255</sup> Upon their release after serving lengthy prison sentences, African American men with criminal record for non-serious drug convictions, are marginalized as a permanent racial subclass facing barriers in employment, housing education, access to drug treatment programs, and are denied the right to serve on a

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of their social construction, gays and lesbians are routinely subjected to subordinate private treatment that ranges from housing and employment discrimination to vigilante savagery. See STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* 21-22 (2003).

<sup>251</sup> Barrack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 819 (2017).

<sup>252</sup> See Dana Y. Takagi, *THE RETREAT FROM RACE: ASIAN-AMERICANS ADMISSIONS AND RACIAL POLITICS* 10 (1992) (suggesting that Asian American students were relegated to the periphery in the racial discourse in higher education and outside of the larger black/white narrative).

<sup>253</sup> Sumi Cho, *From Massive Resistance to Passive Resistance to Righteous Resistance: Understanding the Culture Wars From Brown to Grutter*, 7 J. OF CONST. L. 809, 833-834 (2005) (suggesting that “the defense of affirmative action and broader vision of racial justice must be linked to other forms of social justice, whether it is to gay marriage or to critiques of racial profiling”).

<sup>254</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>255</sup> *Id.* at 17.

jury and to vote.<sup>256</sup> Further, the so-called “war on drugs,” draconian repeat offender laws,<sup>257</sup> and racial disparities in drug sentencing, especially federal mandatory minimum crack cocaine sentences, have had a devastating impact on communities of color caused by racial injustice.<sup>258</sup>

While Alexander’s book focused on African Americans, I would suggest that analyses of the treatment of Asian Americans strengthen her argument about this country’s racially biased criminal justice system where much of the discussion about race and police and policing has been largely confined to a black/white racial paradigm. To begin, little has been written about the approximately 10,000 Asian American offenders in prison, representing one of the fastest growing segments of the prison population.<sup>259</sup> It is as another reminder that race is fluid, Asian American defendants are treated as functionally white in criminal sentencing because courts can perceive Asian American defendants as non-serious criminal offenders and issue lenient sentences in some cases, yet when some Asian American defendants are treated as constructively black, especially Hmong and Vietnamese defendants, they often face lengthy criminal sentences just like African Americans.

Social science studies about Asian Americans and criminal sentencing in state and federal courts is especially instructive here. First, in their research of state cases, scholars Travis Franklin and Noelle Fearn studied the sentencing of Asian defendants in comparison to whites, African Americans, and Hispanic offenders, and conclude that Asian American offenders are treated more leniently than other racial/ethnic groups, including whites, at the time of sentencing.<sup>260</sup> Attentive to the model minority myth, and the dangerous and threatening stereotype assigned to other racial groups, these scholars examine the sentencing of Asians in a large sampling of felony offenders adjudicated in state courts.<sup>261</sup> According to Franklin and Fearn, “Asians were treated with more leniency than whites, Blacks, and Hispanics during the incarceration decision, even after controlling for important offense, criminal history, and case characteristics.”<sup>262</sup>

Travis and Fearn hypothesize that judges may sentence Asian offenders leniently based on the perception that Asian offenders, consistent with the model minority stereotype, not as needing the formal social control of incarceration even when they commit violent offenses.<sup>263</sup> Their study shows that: (1) Asian offenders are least likely to be incarcerated followed by whites, African Americans, and Hispanic offenders; (2) Asian offenders were sentenced to shorter sentences than African Americans and Hispanics, but longer than whites; (3) Asians were twice as likely to be convicted of property crimes such

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<sup>256</sup> *Id.* at 17, 187-88.

<sup>257</sup> See Harvey Gee, *Punishment and Democracy: Three Strikes and You’re Out in California*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 360-65 (2004) (book review).

<sup>258</sup> See Harvey Gee, *Striving for Equal Justice: Applying the Fair Sentencing Act of 2010 Retroactively*, 49 WAKE FOREST L. REV. 207, 207-12 (2014).

<sup>259</sup> See Brian D. Johnson & Sara Betsinger, *Punishing the “Model Minority”: Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045, 1046 (2009).

<sup>260</sup> See Travis W. Franklin & Noelle E. Fearn, *Sentencing Asian Offenders in State Courts: The Influence of a Prevalent Stereotype*, 61 CRIME & DELINQUENCY 96, 109 (2015).

<sup>261</sup> *Id.* at 116.

<sup>262</sup> *Id.* at 112.

<sup>263</sup> *Id.* at 109-10.



as burglary, theft, and auto theft; (4) Asian offenders were more frequently convicted of violent offenses such as robbery, assault, than African American and whites, but not Hispanic offenders;<sup>264</sup> and (5) Asians were more likely to be released on bail and to have retained private counsel compared to other groups.<sup>265</sup>

Second, ambitious research on the treatment of Asian American offenders in the federal justice system conducted by social scientists Brian Johnson and Sara Betsinger, supports the argument that the model minority myth in the context of criminal sentencing, has elevated Asian Americans to an honorary white status.<sup>266</sup> Their study concludes that Asian Americans are more likely to be college educated<sup>267</sup> and are slightly less likely to be incarcerated when compared with African Americans and Latinos, who are more likely to be incarcerated than both Asian Americans and whites.<sup>268</sup> Their data confirms that Asian Americans experience sentencing leniency for fraud crime and drug cases where African Americans are punished more severely.<sup>269</sup>

The model minority myth, in the context of criminal sentencing, has elevated Asian Americans to constructively or honorary white status. Possibly, the myth in criminal sentencing represents the belief that the more a person is considered “white” and possessing the virtues of handwork, motivation, and diligence, the more likely he or she will fall under the blanket of this “positive” stereotype. One example of an Asian American defendant who has fared better because of the model minority myth is the well-publicized Latasha Harlins case, which preceded the L.A. Riots highlights the possible evidence supporting the argument the stereotypes of Asians as model minorities or diligent immigrants can result in favorable criminal sentences.<sup>270</sup> Soo Ja Du, a Korean American grocery owner, was convicted of voluntary manslaughter by the L.A. Superior Court for shooting a customer.<sup>271</sup> The shooting was based on Du’s belief that Harlins was stealing an orange

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<sup>264</sup> *Id.* at 105. Another study of sentencing disparities in incarceration rates in Oregon, Washington, and Utah reflects that Asian and white defendants were more likely to receive probation, rather than incarceration, than were African American and Latino defendants. See Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS. 17, 29-30 (2003).

<sup>265</sup> See *supra* note 260, at 107.

<sup>266</sup> See Brian D. Johnson & Sara Betsinger, *Punishing the “Model Minority”: Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045, 1047 (2009).

<sup>267</sup> *Id.* at 1066.

<sup>268</sup> *Id.* at 1064.

<sup>269</sup> *Id.* at 1049 (Asian American offenders were punished similarly to white offenders for all offenses examined, except immigration, an area where Asian Americans were punished more severely. The study offers no possible explanation for this; the authors only briefly mention this fact in passing).

<sup>270</sup> *People v. Du*, 5 Cal. App. 4th 822 (Cal. App. Dep’t Super Ct. 1992). Tensions between African Americans and Asian Americans communities has been exasperated by the model minority myth and the stereotype of Asian Americans as representing fierce economic competition. 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 305, 306-07 (Richard Delgado ed., 1995). Ikemoto cites to the example of violence that erupted during the 1991 Los Angeles Riots following the Rodney King verdict and asserts that Korean Americans storekeepers were construed as the “out-group” and African American looters as the “in-group” fighting against one another in all or nothing struggle for a piece of the shrinking “economic pie” in America. *Id.* at 309. Korean Americans considered themselves more “white” than “black” and perceived African Americans as threats against their economic livelihoods. *Id.*

<sup>271</sup> *Id.* at 828.

juice bottle.<sup>272</sup> During a confrontation, Du and Harlins scuffed and Du was struck twice in the eye. Du threw a stool at Harlins but missed.<sup>273</sup> Du then pulled out a .38 caliber revolver under the counter and shot Harlins in the back of the head as she tried to leave the store.<sup>274</sup> The jury rejected Du's defense that it was an unintentional killing, and Du was convicted of voluntary manslaughter with the use of a firearm.<sup>275</sup>

At sentencing, Du's life story fit the model minority trope.<sup>276</sup> The Probation Report indicated she was a Korean-born naturalized American citizen who arrived in the United States in 1976.<sup>277</sup> She worked as a seamstress and her husband was repairman.<sup>278</sup> Du and her husband saved money to purchase their liquor store. Du could have been sentenced to the maximum penalty of up to sixteen years in prison, Judge Joyce Karlin instead sentenced her to time served, plus three hundred hours of community served and five-years' probation, one of the most lenient sentences handed down for a gun-related crime in Los Angeles County that year.<sup>279</sup> She was afforded honorary white status because "Within this narrative Du begins as an outsider to American culture but is able to get 'inside' by moving up the socioeconomic ladder; meanwhile Harlins continues to be excluded from the process of assimilation and denied socioeconomic mobility."<sup>280</sup> The State appealed what it perceived as too lenient of a sentence; however the California Court of Appeals held that the trial judge did not abuse his broad discretion in sentencing Du.<sup>281</sup>

Finally, Asian Americans can also be treated as foreign or black when they are punished more severely. To begin, Asian Americans sometimes are not "white enough" and are perceived as foreigners in immigration cases where the heavy policing of immigration in the form of mass deportations and anti-immigrant sentiment.<sup>282</sup> Southeast Asian refugee youths from low income communities have been swept up, and deported

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<sup>272</sup> *Id.* at 826.

<sup>273</sup> *Id.* at 826-27.

<sup>274</sup> *Id.* at 827.

<sup>275</sup> *Id.* at 828.

<sup>276</sup> There are also cases where the Asian American defendants, who can fit under the model minority umbrella, were prosecuted based on their race and perceived foreignness, and the courts were not lenient. See HARVEY GEE, *Asian/Americans as Criminal Defendants: The End of the Model Minority Myth?*, in ASIAN/AMERICANS, EDUCATION, AND CRIME 37-39 (Daisy Ball & Nicholas Daniel Hartlep, eds., 2017) (analyzing the prosecutions of nuclear scientist Wen Ho Lee and Army Chaplain James Yee).

<sup>277</sup> See *supra* note 275.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 837.

<sup>280</sup> Jennifer Lee, *Binary Determination of Guilt or Innocence: Reading Between the Lines of People v. Du*, 37 COLUM. J. L. & SOC. PROBS. 181 (2003).

<sup>281</sup> *Du*, 5 Cal. App. 4th at 837

<sup>282</sup> See SAENZ et al., GOVERNING IMMIGRATION THROUGH CRIME: A READER 195 (Dowling & Inda eds., 2013). Cf. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 51 (1996) (discussing the connection between immigration and civil rights and suggesting that "immigration issues should be viewed as integral to the civil rights movements").

because of low-level criminal activity.<sup>283</sup> Southeast Asian American communities are more likely to be deported for such convictions than other immigrant groups.<sup>284</sup>

The preceding analysis of the lenient treatment of Asian American defendants because of a perceived honorary white status should not obfuscate cases wherein Asian American defendants are punished severely. Next, Asian American defendant may be considered black if they firth the dangerous and menacing criminal image. 42 of the approximately 3,251 inmates currently on death row in the U.S. are Asian.<sup>285</sup> Many of the Asian American inmates awaiting execution are immigrants, with diverse cultural backgrounds, including East Asians, Southeast Asians, South Asians, and those of Pacific Island ancestry.<sup>286</sup> Additionally, violent crimes committed by Asian defendants in the past decade or so have reminded mainstream America that Asian Americans can be perpetrated and defendant just like an other racial group. In 2004, Chai Sousa Vang killed six and wounded two white victims in Wisconsin. In 2007, Chon Seung-Hui, a Korean American student killed 32 people at Virginia Tech, the deadliest shooting in modern U.S. history. Two years later, Jiverly Wong killed three people before killing himself in Binghamton, New York. In 2010, James Jae Lee brusted into the Discovery Channel headquarter in Silver Springs, Maryland with explosives on his body, and took hostages at gunpoint before the police shot and killed him. Perhaps this cultural awareness and knowledge about Asian Americans in the context of criminal justice and seeing beyond the model minority stereotype could eventually end the myth.<sup>287</sup>

### ***B. Asian Americans, the Black Lives Matter Movement, and the Peter Liang Case***

As most American learned from the media, Black Lives Matter activists, led by Alicia Garza, Patrisse Cullors, and Opal Tometi, have been involved in street demonstrations against violence and racism toward African Americans since the acquittal of George Zimmerman in the shooting death of African American teen Trayvon Martin,<sup>288</sup>

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<sup>283</sup> CHANGELAB, THE IMPORTANCE OF ASIAN AMERICANS? IT'S NOT WHAT YOU THINK: FUTURE DIRECTIONS IN THE RACIAL JUSTICE MOVEMENT 16 (2013), *available at* [http://www.changelabinfo.com/reports/ChangeLab\\_The-Importance-of-Asian-Americans.pdf](http://www.changelabinfo.com/reports/ChangeLab_The-Importance-of-Asian-Americans.pdf). *See also* SOUTHEAST ASIA RESOURCE ACTION CENTER, AUTOMATIC INJUSTICE: A REPORT ON PROSECUTORIAL DISCRETION IN THE SOUTHEAST ASIAN AMERICAN COMMUNITY 3 (Oct. 2016) (discussing the disproportionate impact criminal laws have had on immigrants in the U.S. and noting the double punishment suffered by immigrants with criminal convictions).

<sup>284</sup> *See* SOUTHEAST ASIAN RESOURCE ACTION CENTER, ASIAN AMERICANS & PACIFIC ISLANDERS BEHIND BARS: EXPOSING THE SCHOOL TO PRISON TO DEPORTATION PIPELINE (Dec. 2015).

<sup>285</sup> DEBORAH FINS, DEATH ROW USA, NAACP LEGAL DEF. & EDUC. FUND. (Winter 2011), *available at* [www.naacpldf.org/files/publications/DRUSA\\_winter\\_2011.pdf](http://www.naacpldf.org/files/publications/DRUSA_winter_2011.pdf).

<sup>286</sup> *Id.*

<sup>287</sup> *See* Harvey Gee, *Asian Americans and Criminal Law and Criminal Procedure: A Missing Chapter from the Race Jurisprudence Anthology*, 2 GEO. J. OF L. MOD. CRITICAL RACE PERSP. 185, 192-194 (2011).

<sup>288</sup> *See* JEFF CHANG, WE GON' BE ALRIGHT: NOTES ON RACE AND RESEGREGATION 108 (2016); Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015) <http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/index.html-n2560001>.

and following the shooting death of 18-year-old Michael Brown in Ferguson Missouri which resulted in protests and unrests,<sup>289</sup> and the death of Eric Garner in New York.<sup>290</sup>

But less known are the actions of which Asian Americans joined African Americans in calling for nationwide accountability against excessive and unjust policing. Emma Chen, president of American Citizens for Justice/Asian Americans Center for Justice declared, “More than three decades after Vincent Chin’s death, the decision not to indict Darren Wilson reminds us that our justice system is still broken.”<sup>291</sup> Likewise, the Japanese American Citizens League, Chinese for Affirmative Action, the National Korean American Service & Education Consortium, South Asian Americans Leading Together, and other Asian Pacific Islander American organizations expressed support for Ferguson October’s African American community and protesters.<sup>292</sup> Asian Americans Advancing Justice-Atlanta condemned that same jury decision and called for “answers and justice for Michael Brown’s death” while pledging solidarity with African Americans and other impacted communities.<sup>293</sup>

In a three-year span following Ferguson, media across the country regularly reported on young unarmed African American men being shot by white police officers.<sup>294</sup> With the Peter Liang shooting case in New York, Asian Americans were further drawn into the national debate on violence against young African American men. But unlike the other cases involving the death of African Americans, Liang’s case did not involve any confrontation. Liang’s defense was that the gun accidentally went off. Rookie New York Police Department (“N.Y.P.D”) Officer Peter Liang was prosecuted for the shooting death of 28-year-old Akai Gurley in dark stairway in the Louis H. Pink Houses in the Bronx.<sup>295</sup>

<sup>289</sup> See e.g., CHANG, at 86-90 (probing the police shooting of Michael Brown Jr. in Ferguson, Missouri and the incidents of Black people killed that led to national justice movement called Black Lives Matter).

<sup>290</sup> See Ray Sanchez, *Thousands Protest NYPD Officer’s Conviction*, CNN (Feb. 20, 2016), <http://www.cnn.com/2016/02/20/us/nypd-officer-protests/index.html>.

<sup>291</sup> See Frances Kai-Hwa Wang, *Asian Americans Show Solidarity, Support for Ferguson*, NBC NEWS (Nov. 25, 2014), <http://nbcnews.com/news/asian-america/asian-americans-show-solidarity-support-ferguson> (reporting on the response of Asian American activist groups in supporting Ferguson and protesting Michael Brown’s death).

<sup>292</sup> See *Asian Americans Show Solidarity with Ferguson, Mo. After Grand Jury Decision*, NICHIBEI (Dec. 4, 2014), <http://www.nichibe.org/2014/12/asian-americans-show-solidarity-with-ferguson-mo-after-grand-jury-decision/>.

<sup>293</sup> Press Release, Asian Americans Advancing Justice-Atlanta, *Asian Americans Advancing Justice Condemns Grand Jury’s Failure to Bring Charges Against Darren Wilson in Michael Brown Shooting Death* (Nov. 26, 2014), available at <http://www.advancingjustice-la.org/media-and-publications/press-releases/asian-americans-advancing-justice-condemns-grand-jurys-failure#.WNVM6hLyvVq>.

<sup>294</sup> Sanchez, *supra* note 290; Andy Newman, *Jury Deadlocks in Trial Over Police Killing of Unarmed Black Driver*, N.Y. TIMES (Nov. 13, 2016), [https://www.nytimes.com/2016/11/13/us/ray-tensing-samuel-dubose-trial-deadlock.html?\\_r=0](https://www.nytimes.com/2016/11/13/us/ray-tensing-samuel-dubose-trial-deadlock.html?_r=0); *Police Killing of Unarmed Black Driver*, N.Y. TIMES, Nov. 13, 2016, at 23; Alan Blinder, *Trial of Officer Starts in South Carolina With Focus on Victim*, N.Y. TIMES, Nov. 4, 2016, at 23; George Yaney & Judith Butler, *What’s Wrong With “All Lives Matter”?*, N.Y. TIMES (Jan. 12, 2015), <http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrongericans>; Kevin Rector, *Mosby Proposes Reforms in Probing Police Misconduct*, BALTIMORE SUN, Oct. 21, 2016, at 2.

<sup>295</sup> See e.g., Jay Caspian Kang, *How Should Asian-Americans Feel About the Peter Liang Protests?*, N.Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/2016/02/23/magazine/how-should-asian-americans-feel-about-the-peter-liang-protests.html>; ASIAN AMERICAN ALLIANCE, *Asian America: We Cannot Support Peter Liang*, COLUMBIA DAILY SPECTATOR (Feb. 25, 2016), <http://spc.columbiaspectator.com/opinion/2016/02/25/asian-america-we-cannot-support-peter-liang>; Jenna

Liang and his partner were conducting a “vertical patrol” of the housing project, and consistent with police policy, had their guns drawn when Liang opened a door and his gun went off.<sup>296</sup> The bullet ricocheted off a wall, and struck Gurley in the heart.<sup>297</sup> Instead of helping Gurley as he laid down in a pool of blood, Liang called his union representative concerned with losing his job.<sup>298</sup> Gurley later died at a hospital.<sup>299</sup> In this case that did not involve a confrontation, the defense argued at trial that the gun accidentally went off.

Reminiscent of the outcry by Pan-Asian American coalition groups responding after the violent murder of Chinese American Vincent Chin by two white male laid off autoworkers in 1982 in Detroit,<sup>300</sup> Liang’s prosecution generated massive Asian American activism, which was highlighted in a rally of 10,000 in April 2016.<sup>301</sup> The racial choice was presented to Asian Americans: are you on the white side or the black side? The answer depended on their viewpoint. On the one hand, Liang received nationwide support from the Chinatown community, composed of immigrants, who believed that the 28 eight-year-old officer scapegoated during a climate of African American involved in ongoing protests against police violence.<sup>302</sup> Liang, the son of Chinese immigrants, was raised in Chinatown. Exacerbating the misperception that culture and race are the same thing which encourages non-Asians to perceive all Asians and Asian Americans as foreign, many of the foreign-born Chinese protesters considered Liang as Chinese and not American. Jeff Chang suggests that “Chinese American protests claiming that Liang was a scapegoat, wanted

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Peng, *The (Asian American) People v. Peter Liang*, AC VOICE (Feb. 26, 2016), <https://acvoice.com/2016/02/26/-the-asian-american-people-v-peter-liang>; Susan Chang, *Why Many Asian Americans Support Conviction of Peter Liang*, ASIAN AMERICANS, ASAM NEWS (Feb. 20, 2016), <http://www.asamnews.com/2016/02/20/why-many-asian-am-support-conviction-of-peter-liang/>; Yanan Wang, *N.Y. Police Shooting That Has Divided Chinese Americans Will Be Tried by Jury*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/08/n-y-police-shooting-that-has-divided-chinese-americans-will-be-tried-by-jury/>; J. Weston Phippen, *Sentencing for Peter Liang*, THE ATLANTIC (Apr. 19, 2016), <https://www.theatlantic.com/national/archive/2016/04/peter-liang-sentenced/478248/>.

<sup>296</sup> See Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html>.

<sup>297</sup> See Sanchez, *supra* note 290.

<sup>298</sup> CHANG, *supra* note 288, at 152.

<sup>299</sup> See Sanchez, *supra* note 290.

<sup>300</sup> See ANDREW CHO & TANYA VELASQUEZ, “NOT IN MY HOOD”: IDENTITY, POLICING IN SEATTLE’S INTERNATIONAL DISTRICT IN ASIAN/AMERICANS, EDUCATION, AND CRIME: THE MODEL MINORITY AS VICTIM AND PERPETRATOR 167 (Daisy Ball & Nicholas Daniel Hartlep eds. 2017); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 70 (2002); Robert S. Chang, *Closing Article: Developing A Collective Memory to Imagine a Better Future*, 49 UCLA L. REV. 1601, 1608 (2002). I have previously discussed the Vincent Chin case in detail, including the injustice of his death at the hands of two white men who were fined \$3,000 and ordered to pay \$780 in court fees, but served no jail time; See Gee, *supra* note 287 at 191.

<sup>301</sup> See Hansi Lo Wang, ‘Awoken’ By N.Y. Cop Shooting, *Asian-American Activists Chart Way Forward*, NPR (Apr. 23, 2016), <http://www.npr.org/sections/codeswitch/2016/04/23/475369524/awoken-by-n-y-cop-shooting-asian-american-activists-chart-way-forward>.

<sup>302</sup> See CAROL HUANG, FORWARD IN ASIAN/AMERICANS, EDUCATION, AND CRIME: THE MODEL MINORITY MYTH AS VICTIM AND PERPETRATOR 3 (Daily Ball & Nicholas D. Hartlep eds., 2016) (“More than 10,000 people rallied before the sentencing of Officer Peter Liang, an Asian American man, who was convicted of killing Akai Gurley, an African American man, in Brooklyn, New York, in April 2016.”)

Liang to be seen as white and to be afforded the privileges of whiteness.”<sup>303</sup> As with the affirmative debate, much of the media attention was placed on these Asian immigrants and conservative Asian groups loudly supporting Liang, while the overwhelming majority of Asian Americans supporting racial justice projects was downplayed.

On the other hand, assimilated Asian Americans, supporting the Black Lives Matter movement, sought solidarity and police accountability, and were against any special treatment for Liang because of his race.<sup>304</sup> These Asian Americans argued that Liang should not be afforded white privilege and immunity from prosecution which has been frequently granted to white officers who shot unarmed African Americans.<sup>305</sup>

What explains the different positions held by the two opposing Asian American groups? A possible theory is that Asian immigrants who insisted that Liang was scapegoated were not familiar with the U.S. ugly racial history, and therefore they did not fully understand the African Americans experience or the Black Lives Matter movement. Nor did not realize that Asian Americans are beneficiaries of the civil rights struggles during the 1960s,<sup>306</sup> or recall that African Americans and Asian American communities worked together in seeking institutional reform of the NYPD stop and frisk practice. For the most part, these Asian immigrant inherited American racial stereotypes as depicted in the media, and were influenced by racial stereotypes. Unfortunately, for self-preservation purposes, Asian American separated themselves from African Americans in embracing the model minority myth and distancing themselves from blackness and accepted whiteness.

Liang was found guilty of manslaughter, and official misconduct for failing to assist Gurley. Liang was facing up to 15 years prison, but at sentencing, Justice Danny Chun reduced Liang’s manslaughter charged to criminal negligence homicide, and he was sentenced to five years of probation and 800 hours of community service. The prosecution and Liang appealed.<sup>307</sup>

Unpacking the facts of the Liang case reveal the role whiteness played, and the limitations of honorary whiteness. Liang as a police officer seeming acquired the status of conditional whiteness because he represented law enforcement, yet he was not afforded the protections of white supremacy. Liang was the first N.Y.P.D. Officer convicted in a line-of-duty shooting in over a decade, while white officers in other misconduct cases were not prosecuted or received nominal punishment.<sup>308</sup> Take for example the officer involved altercation involving Eric Garner, who died as a result of an officer’s chokehold as police

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<sup>303</sup> CHANG, *supra* note 288, at 153.

<sup>304</sup> See Frank H. Wu, *The Dilemma of Peter Liang*, HUFFINGTON POST (Feb. 24, 2016), [http://www.huffingtonpost.com/frank-h-wu/the-dilemma-of-peter-lian-b\\_9305938.html](http://www.huffingtonpost.com/frank-h-wu/the-dilemma-of-peter-lian-b_9305938.html).

<sup>305</sup> See *id.*

<sup>306</sup> See Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 641 (2015); Chris Punongbayan, *What Asian Americans Owe African Americans*, ASIAN AMERICANS ADVANCING JUSTICE (Oct. 5, 2016), [http://www.advancingjustice-alc.org/news\\_and\\_media/what-asian-americans-owe-african-americans](http://www.advancingjustice-alc.org/news_and_media/what-asian-americans-owe-african-americans) (“The untold story is that Asian America is what it is today because of the African American-led civil rights movement. ... In 2015, when police brutality is a daily news headline and African Americans are senselessly murdered by law enforcement, Asian Americans must stand as allies to the Black Lives Matter movement.”).

<sup>307</sup> See Wang, *supra* note 301.

<sup>308</sup> See Frank H. Wu, *Peter Liang, An Asian American Scapegoat?*, HUFFINGTON POST (Feb. 13, 2016), [http://www.huffingtonpost.com/frank-h-wu/peter-liang-an-asian-amer\\_b-9225996.html](http://www.huffingtonpost.com/frank-h-wu/peter-liang-an-asian-amer_b-9225996.html).

to arrest him on Staten Island.<sup>309</sup> That officer was not prosecuted.<sup>310</sup> In another case, N.Y.P.D. Officer Richard S. Neri Jr., on patrol, shot and killed Timothy Stansbury, Jr., an unarmed 19-year-old in the stairway in the Louis Armstrong Houses in the Bedford-Stuyvesant neighborhood with guns drawn.<sup>311</sup> Neri claimed that he fired his pistol unintentionally when he was startled by Stansbury pushing open the door leading to the roof, as he was pulling it from the other side.<sup>312</sup> The grand jury found the shooting to be accidental and Neri was not charged.<sup>313</sup> Neri was permanently removed of his gun, given a their-day suspension without pay, and reassigned to property.<sup>314</sup>

In the end, the Liang case, like Ferguson, Missouri can be a turning point for the social justice reform movement. Asian Americans on both sides of the Liang case can come together to understand that a broader coalition could be created to advocate for police accountability, more transparency, and better practices and training for the patrolling of housing developments.<sup>315</sup> Where do Asian Americans, African Americans, and others interested in social justice reform go from here? As seen after the death of Michael Brown and what we have learned from the *Fisher* litigation and the affirmative action debate, Asian Americans can continue to be part of collations for fairness advocating for racial justice rather than serving as wedge dividing communities of color.<sup>316</sup>

Asian Americans can play a major role in transforming and advancing race relations in this country and fighting against the perpetuating white dominance. Jeff Chang observes, “[T]he days are over when Asian Americans should think only in terms of their self-interest, that Asian Americans ought to think about what it means to fight for justice and equity for all.”<sup>317</sup> With education and more dialogue, Asian Americans who are currently uninitiated to the racial reality in the country can learn to work alongside other racial groups towards achieving social reform and racial justice.

Moreover, police departments must also do their part, and cease to act as an occupying force in black communities, and rethink their official policies as it relates to patrolling housing projects. The Task Force on 21<sup>st</sup> Century Policing, commissioned by former President Obama, recommended that better policies and oversight is needed in to improve policing practices to promote crime reduction while building public trust and

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<sup>309</sup> See Sanchez, *supra* note 290.

<sup>310</sup> See *id.*

<sup>311</sup> See Robert D. McFadden & Ian Urbina, *Fatal Shooting Not Justified, The Police Say*, N.Y. TIMES (Jan. 25, 2004), <http://www.nytimes.com/2004/01/25/nyregion/fatal-shooting-not-justified-the-police-say.html>.

<sup>312</sup> See Daryl Khan, *Officer in 2004 Fatal Shooting Is Given a 30-Day Suspension*, N.Y. TIMES (Dec. 31, 2016), <http://www.nytimes.com/2006/12/31/nyregion/31suspend.html>.

<sup>313</sup> See Shaila K. Dewan & William Rashbaum, *Officer Avoids Indictment in Killing on Brooklyn Rooftop*, N.Y. TIMES (Feb. 18, 2004), <http://www.nytimes.com/2004/02/18/nyregopm/officer-avoids-indictent-in-kiilling-on-brooklyn-rooftop.html>.

<sup>314</sup> *Id.*

<sup>315</sup> See HUANG, *supra* note 302.

<sup>316</sup> See also ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION 41-42 (2002); Chanbonpin, *supra* note 306, at 641 (contending that Asian Americans in the debate must make a decision “to join the ranks of Whites to engage in anti-subordination work through interracial coalition.”).

<sup>317</sup> CHANG, *supra* note 288, at 155.

preserving dignity for all.<sup>318</sup> Obama remarked, “If we are to chart honestly the path for criminal justice reform, we must confront the role of race and bias in shaping the policies that lead us to this point.”<sup>319</sup>

In the same direction, the police and community should understand one another. Members of the community can participate in ride-along to better understand that officers must make quick judgments in the street, just as police officer could spend more time wading in African American neighborhoods.

### Conclusion

Hopefully, this Article has demonstrated that race, whiteness, and honorary whiteness are social constructions that have been historically and modernly deployed for socio-political reasons against minority groups and others subjugated and excluded from being full members of American society. Using the examples of affirmative action, equality litigation, and the repeated calls for criminal justice reform, the discussions presented have further shown that these issues involve everyone seeking social justice. More so than ever, it is imperative for coalitions standing up for justice, along with all civil rights advocates, to see beyond short-sighted cultural, racial, gender, and class differences given these uncertain times.

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<sup>318</sup> See Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing, (May 2015) at 1-4, [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

<sup>319</sup> Barrack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 819 (2017).