Michigan Journal of Race and Law

Volume 11

2006

Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire

William C. Kidder
University of California, Davis

NEGATIVE ACTION VERSUS AFFIRMATIVE ACTION: ASIAN PACIFIC AMERICANS ARE STILL CAUGHT IN THE CROSSFIRE

*William C. Kidder**

> [E]liminating affirmative action would reduce acceptance rates for African American and Hispanic applicants by as much as one-half to two-thirds and have an equivalent impact on the proportion of underrepresented minority students in the admitted class. White applicants would benefit very little by removing racial and ethnic preferences; the White acceptance rate would increase by roughly 0.5 percentage points. Asian applicants would gain the most. They would occupy four out of every five seats created by accepting fewer African American and Hispanic students.
>
> —Thomas Espenshade & Chang Chung, in Social Science Quarterly (2005)[1]

At some elite colleges and universities, Asian Pacific American (APA) applicants have a lesser chance of being admitted than equally qualified White applicants. This practice, termed "negative action," is distinct from affirmative action policies that give a plus factor to some African American, Latino, and American Indian applicants.[2] In this critique of Espenshade and

---

* Senior Policy Analyst, University of California, Davis; J.D., UC Berkeley School of Law (Boalt Hall). The views expressed in this Essay are solely those of the author, and not necessarily those of the UC Davis administration. I thank the following scholars for their helpful reviews of this Essay: Jack Chin, Richard Delgado, Bill Hing, Evelyn Hu-DeHart, Helen Hyun, Jerry Kang, David Oppenheimer, Anita Poon, and John Torok. I also thank Amrita Mallik of the *Michigan Journal of Race & Law* for her helpful editorial suggestions.

1. Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI Q. 293, 303–04 (2005). Much of their methodology is described in a companion study, Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI Q. 1422 (2004).

2. In short, negative action occurs when a "minus factor" is applied to APA candidates relative to White candidates, a practice that is separate and apart from any affirmative action "plus factor" given to African Americans and Latinos in the admissions process. *See* Kang, *infra* note 22 and accompanying text.

Chung's study, I show that ignoring the distinction between negative action against APAs and affirmative action for underrepresented minorities leads to the false conclusion that APAs would be the overwhelming beneficiaries of ending affirmative action. In fact, at the institutions in the study, ending negative action would result in far greater admission opportunities for APAs than would ending affirmative action.

I conclude that Espenshade and Chung's inattention to the distinction between negative action and affirmative action effectively marginalizes APAs and contributes to a skewed and divisive public discourse about affirmative action, one in which APAs are falsely portrayed as conspicuous adversaries of diversity in higher education. I will also argue that there is ample reason to be concerned about the harmful effects of divisive and empirically unsupported claims about APAs influencing the public debate over affirmative action, particularly in Michigan, where an anti-affirmative action initiative nearly identical to California's Proposition 209 will appear on the November 2006 ballot.[3] For example, in commenting to the press about Espenshade and Chung's study, Roger Clegg of the Center for Equal Opportunity—a leading advocacy group working to dismantle affirmative action[4]—cast the issue in starkly (and falsely) divisive terms: "If eliminating race-based admissions results in more Asian students or fewer African American students being admitted to top schools, so be it."[5]

INTRODUCTION

Several years ago I wrote an article attempting to situate APAs in the debate over law school affirmative action; much of the article refuted claims by conservative historian Stephan Thernstrom that at law schools in the University of California (UC) system, APAs were the primary beneficiaries of Proposition 209 and the UC Regents' resolution banning affirmative

---

3. *See e.g.*, Gov. Jennifer Granholm, *Affirmative Action Ban Would Hurt State's Future*, DETROIT FREE PRESS, March 9, 2006, *available at* http://www.freep.com/apps/pbcs.dll/article?AID=/20060309/OPINION02/603090484/1070/OPINION; Michigan Civil Rights Initiative v. State Bd. of Canvassers, 268 Mich. App. 506 (Mich. Ct. App. 2005) (quoting MCRI language and describing unsuccessful challenge alleging fraudulent signature gathering by MCRI campaign); John Flesher, *Public Closely Divided on Affirmative Action, Definition of Life*, ASSOCIATED PRESS, March 9, 2006 (first poll in using actual language that will appear on the Michigan ballot reports 47% opposed, 45% in favor) *available at* http://www.mlive.com/newsflash/regional/index.ssf?/base/politics-0/1141951161116280.xml&storylist=newsmichigan#continue.

4. *See* Roger Clegg, *UnKingly Statutes*, NAT'L REV. ONLINE, Jan. 16, 2006, http://www.nationalreview.com/ (arguing that the Michigan anti-affirmative action "measure will pass, but its needed not just in Michigan, but all over the nation."); Brief of the Center for Equal Opportunity et al. in *Grutter v. Bollinger* and *Gratz v. Bollinger* (Jan. 2003), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/ceo-both.pdf.

5. Kelly Heyboer, *Colorblindness Could Transform U.S. Colleges*, NEW ORLEANS TIMES-PICAYUNE, June 12, 2005, at 10.

action.[6] Here, using Espenshade and Chung's study as a example, I make the complementary point that supporters of affirmative action can make similarly unfounded arguments that marginalize APAs. Such marginalization of APAs comes at a steep political price, as exaggerated claims about the benefits for APAs of ending affirmative action foster a divisive public discourse in which APAs are falsely portrayed as natural adversaries of affirmative action and the interests of African Americans and Latinos in particular.[7]

The above quoted article by a Princeton University sociologist and researcher, a study using the rich National Study of College Experience (NSCE) dataset and funded by the Andrew W. Mellon Foundation, is an example of the robust social science on higher education admissions that has emerged in the build-up to and the aftermath of the Supreme Court rulings in the Michigan affirmative action cases.[8] Espenshade and Chung's article, *The Opportunity Cost of Admission Preferences at Elite Universities*,[9] is slated to become part of a book and received a fair amount of press coverage.[10] Yet, as I demonstrate in this Essay, access to data and the use of advanced statistical methods hardly assure sound policy analysis with respect to APAs.

---

6. William C. Kidder, *Situating APAs in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 30–31, 34–45 (2000). As I note *infra* note 30 and accompanying text, using the umbrella term "APA" for purposes of this Essay is not intended to lend credence to the "model minority" myth that erases important differences between Asian American groups. *See, e.g.*, Mari Matsuda, *We Will Not Be Used*, 1 ASIAN PAC. AM. L.J. 79, 80 (1993); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 25–28 (1994); Annette B. Almazan, *Looking at Diversity and Affirmative Action Through the Lens of Pilipino/a American Students' Experience at UCLA and Berkeley*, 9 ASIAN PAC. AM. L.J. 44 (2004).

7. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 151 (1996) ("Whatever else APAs decide about affirmative action, we should not allow ourselves to be used to attack other people of color. Pitting racial minority groups against one another represents the worst form of divide-and-conquer political strategy.") One example in which I became personally involved is that prior to working for UC Davis, I collaborated with several APA civil rights groups and individuals in challenging an unwarranted claim by one of the UC Regents that UC Berkeley was discriminating against APAs in favor of African Americans and Latinos. *See* William C. Kidder et al., *In California, A Misguided Battle Over Race*, CHRON. HIGHER EDUC., May 21, 2004, at B16; Goodwin Liu et al., *Regent's Stand on UC Admissions is on Shaky Ground*, SACRAMENTO BEE, April 1, 2004, at B7; Eleanor Yang, *UC Regent's Discrimination Stance Stirs Ire—Asian Americans Say Moores' Comments are Irresponsible*, SAN DIEGO UNION-TRIB., April 7, 2004, at A3.

8. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

9. Espenshade and Chung's APA cost-benefit analysis is restricted to the question of who would gain or lose admission offers assuming a fixed number of seats. In the Conclusion, I review some of the important considerations for APAs outside of this zero-sum admissions framework.

10. *See, e.g.*, Eric Hoover, *What Would Ending Affirmative Action Do?*, CHRON. HIGHER EDUC., June 17, 2005, at A28; Heyboer, *supra* note 5, at 10; Rosalinda DeJesus-Staples, *Affirmative Action: By Any Means Necessary?*, HISP. OUTLOOK IN HIGHER EDUC., Sept. 26, 2005, at 23; Scott Jaschik, *Demographic Dislocation*, INSIDE HIGHER EDUC., June 7, 2005, *available at* http://insidehighered.com/news/2005/06/07/affirm; Donald MacLeod, *Research Shows*

In particular, Espenshade and Chung make the following claim about APAs being the "biggest winners" without affirmative action: "They would occupy four out of every five seats created by accepting fewer African American and Hispanic students."[11] In fact, I will show that this conclusion does not (indeed, cannot) follow from their evidence. It is clear from Espenshade and Chung's article and press release that they are sympathetic to affirmative action policies and believe they are contributing to the debate by documenting how the end of affirmative action at highly selective colleges would have a devastating effect on African American and Latino admissions while having only a very small effect on White admission rates. They positioned their study as refuting a key claim of the White plaintiffs represented by the Center for Individual Rights (CIR) in the 2003 *Grutter v. Bollinger* and *Gratz v. Bollinger* affirmative action rulings.[12] To be sure, I certainly agree with Espenshade and Chung that in both policy and legal contexts, it is important to empirically document the extent to which ending affirmative action would close doors to many African Americans and Latinos (though that will not be the focus of this Essay).[13]

However, while the individual plaintiffs in *Grutter* and *Gratz* were all White, their counsel at CIR successfully obtained class action status with APAs included among individuals alleged to have suffered racial discrimination.[14] Thus, with respect to APAs, Espenshade and Chung's empirical argument is actually quite consistent with CIR's argument before the Supreme Court that affirmative action harms not only Whites but "especially Asian Americans."[15] In part, it was the troubling prospect of CIR purporting to carry the mantle of civil rights on behalf of APAs in the Michigan cases that led the intervenors to call professor Frank Wu to

---

Benefits of Affirmative Action, THE GUARDIAN, June 7, 2005, *available at* http://education.guardian.co.uk/higher/worldwide/story/0,9959,1501216,00.html?gusrc=rss.

11. Espenshade & Chung, *supra* note 1, at 298, 304.

12. Princeton University Press Release, *Ending affirmative action would devastate most minority college enrollment—Study finds virtually no gain for White students* (June 6, 2005), *available at* http://www.princeton.edu/main/news/archive/S11/80/78Q19/index.xml?section=newsreleases. Irrespective of the legal filings by CIR in the Michigan cases, the notion that affirmative action substantially harms White applicants is empirically questionable, but nonetheless a stubbornly persistent theme in the public discourse on affirmative action. Goodwin Liu calls this popular misperception the "causation fallacy." Liu, *infra* note 33 and accompanying text.

13. *See, e.g.*, David L. Chambers et al., *The Real Impact of Ending Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter: *A History of African American, Latino, and Native American Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1 (2003).

14. *Grutter*, 539 U.S. at 317; *Gratz*, 539. U.S. at 252.

15. Petitioner's Supreme Court Brief in *Grutter v. Bollinger* 39 (Jan. 16, 2003), *available at* http://www.umich.edu/~urel/admissions/legal/grutter/grupet-supct.pdf.

testify as an expert in the *Grutter* trial,[16] as well as prompting the National Asian Pacific American Legal Consortium and 27 other public interest and civil rights organizations in the APA community to file a brief defending the benefits of affirmative action generally and for APAs specifically.[17] The public comments of the National Association of Scholars[18] and the Center for Equal Opportunity[19] in response to Espensade and Chung's study provide additional confirmation of this overlap between Espenshade and Chung's conclusion and conservatives' narrative of APAs as victims of affirmative action.[20]

Michael Omi and Dana Takagi have astutely observed that in the public debate over affirmative action, the position of APAs is much more fluid than that of other racial/ethnic groups, a fluidity that "can be manipulated in particular ways to suit particular positions."[21] This fluidity is evident when Espenshade and Chung at times blur two conceptually distinct issues: (1) affirmative action consideration for African Americans and Latinos in the admissions process; and (2) the lower admission rates of APAs compared to Whites with similar credentials—what Jerry Kang calls "negative action."

Kang defines negative action as "unfavorable treatment based on race, using the treatment of Whites as a basis for comparison. In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted

---

16. Trial Transcript in *Grutter v. Bollinger* (E.D. Mich. Feb. 12, 2001), *available at* http://www.umich.edu/~urel/admissions/legal/grutter/gru.trans/gru2.12.01.html.

17. Brief of Amici Curiae National Asian Pac. Am. Legal Consortium et al. in *Grutter v. Bollinger* and *Gratz v. Bollinger* (Feb. 15, 2003), *reprinted in* 10 ASIAN L.J. 295, 295 (2003) ("*Amici* include Japanese, Chinese, Filipino, Korean, Hmong, South Asian, Pacific Islander, Cambodian, Laotian, and Vietnamese American public-interest groups. *Amici* also include some of the largest and oldest APA organizations in this country that are involved in challenging racial discrimination . . . .").

18. Hoover, *supra* note 10, at A28 (quoting Stephen Balch, president of NAS: "That it's Asian students who bear the brunt of affirmative-action policies at elite institutions strikes me as an interesting finding in and of itself. . . . One of the dirty little secrets in all of this is that one of the chief losers is a minority group.").

19. *Quoted* in Heyboer, *supra* note 5, at 10.

20. *See, e.g.*, Janine Young Kim, *Are Asians Black?: The Asian American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2409 (1999) ("Asian Americans play a strange and contorted role in the affirmative action debate. Those who would eliminate affirmative action use the Asian American population to exemplify how affirmative action disadvantages non-Whites as well as Whites.").

21. Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 REPRESENTATIONS 155, 156 (Summer 1996). *See also* Dana Y. Takagi, *From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy*, 37 SOC. PROBS. 578, 590 (1990) ("What makes Asian admissions a particularly interesting case to consider here is the juxtaposition of the enormous amount of quantitative information and the importance of facts, on the one hand, and the ease with which these facts are used to construct quite different interpretations of reality on the other.").

had that person been White."[22] Many APA scholars in fields including law, ethnic studies, and sociology emphasize the importance of distinguishing between negative action and affirmative action,[23] but it is a distinction that is still too often overlooked by journalists and commentators[24] and, as I will show, some social scientists as well. Unlike the University of Michigan Law School's affirmative action policy upheld in *Grutter*, which set a goal of attaining a "critical mass" of underrepresented minority students in order to enhance the learning environment of all students, negative action policies at elite universities can stem from less laudable goals and practices, such as an interest in preserving the traditional White character of an elite institution,[25]

---

22. 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, 3 (1996).

23. *See, e.g.*, Chin et al., *Beyond Self-Interest*, *supra* note 7, at 159 ("What APAs must understand is that negative action against us does not result from affirmative action for other minorities."); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996) ("Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for White students."); Takagi, *From Discrimination to Affirmative Action*, *supra* note 21, at 578–79 ("Although Asian American organizations were quick to denounce the neoconservative claim that discrimination against Asian Americans was the result of affirmative action policy, blaming discrimination against Asian Americans on affirmative action policy seems to be a promising venue for additional neoconservative claims.").

24. *See, e.g.*, Jay Matthews, *Should Colleges Have Quotas for Asian Americans?*, WASH. POST, Oct 12, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A26499-2004Oct12.html; Jay Matthews, *Quotas for Asian Americans? Yes and No*, WASH. POST, Jan. 25, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A35075-2005Jan25.html; Jacques Steinberg, *The New Calculus of Diversity on Campus*, N.Y. TIMES, Feb. 2, 2003, at Week in Review 3; Nat Hentoff, *A Secret Quota—But not All Minorities are Created Equal*, WASH. TIMES, March 17, 2003, at A17.

25. Espenshade and Chung discuss how one of the methods for better understanding the empirical effects of affirmative action is to consult expert opinion, and they note the APA negative action admissions controversy in the 1980s. Espenshade & Chung, *supra* note 1, at 295; Espenshade et al., *supra* note 1, at 1423 n.1. In this context, it is noteworthy that one of the "smoking gun" memos by the admissions director at a nationally renowned public university, which someone leaked to the press in the 1980s, stated, "The campus will endeavor to curb the decline of Caucasian students. . . . A rising concern will come from Asian students." Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 675–76 n.117 (1989). *See also* Matsuda, *supra* note 6, at 81 ("When university administrators have secret quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university."). Concern with the relationship between White enrollment levels and institutional sensibility is arguably a larger issue at the most elite private universities, where exclusionary policies toward many groups, including Jews, immigrants, African Americans, and women, have deeper roots. *See, e.g.*, JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON (2005). In terms of Espenshade and Chung's study of the 1997 admission cycle at three elite universities, Karabel reports that public scrutiny and the Office for Civil Rights investigation in the late-1980s led to a closing of the gap in APA-White admission rates at Harvard and Princeton, but the gap widened again in the years since 1990. *Id.* at 503, 510, 531. *See also*

or unwitting stereotyping of APA applicants in the admissions process.[26]

I. UNRAVELING THE "YELLOW PERIL CAUSATION FALLACY"

Using a database of 45,500 freshmen applications to the 1997 entering class at three of the most selective research universities in America, Espenshade and Chung set out to answer this key research question: "First, what is the impact of affirmative action on the profile of students admitted to elite universities? In other words, who gains and who loses as a result of admission preferences for underrepresented minority students?"[27] Espenshade and Chung test this research question by employing a logistic regression model to predict a probability of admission[28], first confirming that their simulation was in close agreement with the actual admission decisions made at the three institutions.[29] The authors then operationalized their research question by "setting all regression coefficients on racial background to zero or, equivalently, by assuming that all applicants are white (the reference category)."[30] Espenshade and Chung's logistic regression model included the following predictor variables: sex, citizenship status, SAT scores, race/ethnicity, recruited athlete status and legacy status (i.e., a plus factor for relatives of alumni).[31] They ran other simulations in which athlete and legacy coefficients were set to zero, but being a recruited athlete or a legacy had a smaller net effect on the racial/ethnic

---

DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN AMERICAN ADMISSIONS AND RACIAL POLITICS (1992) (reviewing allegations of negative action at Brown, Stanford, Princeton, and other universities in the 1980s).

26. *Cf. Chin v. Runnels*, 343 F. Supp. 2d 891, 905–08 (N.D. Cal. 2004) (discussing social science on stereotyping of APAs in the context of zero Chinese Americans, Filipino Americans and Latinos being selected as jury forepersons in San Francisco Superior Court over a 36-year span); KARABEL, *supra* note 25, at 503–05 (discussing allegations that Harvard engaged in subtle, non-intentional discrimination in the 1980s); Tsuang, *supra* note 25, at 663–65 (discussing questionable stereotypes about APA applicants at elite schools).

27. Espenshade & Chung, *supra* note 1, at 294.

28. The authors started with models that are additive (in the logistic scale) and then investigated interaction terms. *See* Espenshade et al., *supra* note 1, at 1427–32.

29. Espenshade & Chung, *supra* note 1, at 296. In particular, the authors found that for the 45,549 applicants included in their Table 1 data, the actual probability of admission and the simulated probability of admission were identical (0.219280). *Id.* at 297 n.4.

30. *Id.* at 296.

31. *Id.* The authors did not have information on extracurricular activities, personal statements, and letters of recommendation; factors they concede "surely play a role in determining which applicants to accept." Espenshade et al., *supra* note 1, at 1427 n.6. On the other hand, the fact that for APAs there is a difference of several hundred admission offers between a simple rank ordering of applicants by SAT scores versus Espenshade and Chung's race-neutral simulations suggests that, to some extent, they are indirectly capturing the way in which other factors in the admissions process influence the racial/ethnic distribution of admission offers. *Cf.* Espenshade & Chung, *supra* note 1, at 297 tbl.1, 301 n.5.

composition of admission offers because these two categories only applied to a small subset of the applicant pool.[32]

Goodwin Liu has written extensively about the "causation fallacy" underlying the affirmative action debate; i.e., the empirically unrealistic presumption on the part of many Whites denied admission at selective institutions that they surely would have been admitted but for affirmative action.[33] Given that Espenshade and Chung comment specifically on that phenomenon,[34] it is more than a little surprising that they fall prey to what might be called a "yellow peril causation fallacy"[35]—the dramatically overstated claim that if affirmative action ended, APAs would be poised to grab four out of every five seats resulting from the exclusion of African Americans and Latinos.

Chart 1 displays Espenshade and Chung's key findings. Looking at the third set of bars in Chart 1 (the difference for each racial/ethnic group) helps provide an intuitive sense of how Espenshade and Chung arrived at a demonstrably false conclusion. There were 984 fewer admission offers to Blacks/Latinos and 952 more admission offers to Whites/APAs/others. Since 772 of the 952 offers under the "race-neutral" simulation went to APAs, Espenshade and Chung conclude that (Wow!) four out of five (81%) admission offers taken away from African Americans and Latinos were redistributed to APAs.[36] Similarly, they con-

---

32. *Id.* The authors found, at least for the three elite institutions in their study, that "preferences for legacies and athletes do little to displace minority applicants . . . ." *Id.* at 304. *See also id.* at 299 tbl.2 (comparing Simulations 1, 2 and 3).

33. Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002).

34. Espenshade & Chung, *supra* note 1, at 298 ("Many rejected White applicants may feel they would have been accepted had it not been for affirmative action, but such perceptions probably exaggerate the reality.").

35. *See* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda & Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 16 (1996) ("With only a slight shift of emphasis, the 'yellow peril' becomes the 'model minority' or vice versa."); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 71–72 (1997). Saito writes:

> Those of Asian descent are sometimes portrayed as the "model minority," people who are succeeding in America despite their status as minorities by working and studying, saving and sacrificing for the future. However, as the "yellow peril," Asians and Asian Americans are also depicted as . . . unfair competitors for education and jobs.

Id.

36. If one could disaggregate APAs in Espenshade and Chung's dataset, considerable differences in admission rates between subgroups would be expected because of differences between APA ethnic groups with respect to socioeconomic status, immigration history, parental education level, labor market opportunities, and so on. My current institution (UC Davis) is not quite as highly selective as the colleges in Espenshade and Chung's dataset, but it provides an instructive example. *See* UC Davis Office of Student Affairs Fact Sheet, *Diversity Among Asian Americans and Pacific Islanders at UC Davis*, (Aug. 2005). Over-

clude that since Whites only had a net gain of 122 admission offers (from a starting point of 5,134), ending affirmative action would have only a minimal effect on admission offers to Whites (Wow again!).[37] While Espenshade and Chung did not control for every variable that an admissions office might take into account (e.g., a plus factor for students from rural backgrounds),[38] the fact that 2,369 APAs were actually admitted compared to 3,141 under their "race-neutral" simulation (an increase of nearly one-third) is a sufficiently large difference to suggest that APAs are in fact being penalized in the admissions process at some of America's top private universities. The question I pose in the next section is whether the primary cause is in fact negative action against APAs or affirmative action for African Americans and Latinos.

---

all, for the 1998 entering class (admitted under Proposition 209), the six-year graduation rate for APAs was 80.7% (n = 1318), nearly the same as the 81.4% rate for Whites (n = 1395). At the same time, the differences in graduation rates between some APA ethnic groups (e.g., Chinese Americans compared to Vietnamese or Korean Americans) were greater than the difference between African Americans (74.7%, n = 95, 1040 SAT average) and Whites (1200 SAT average).

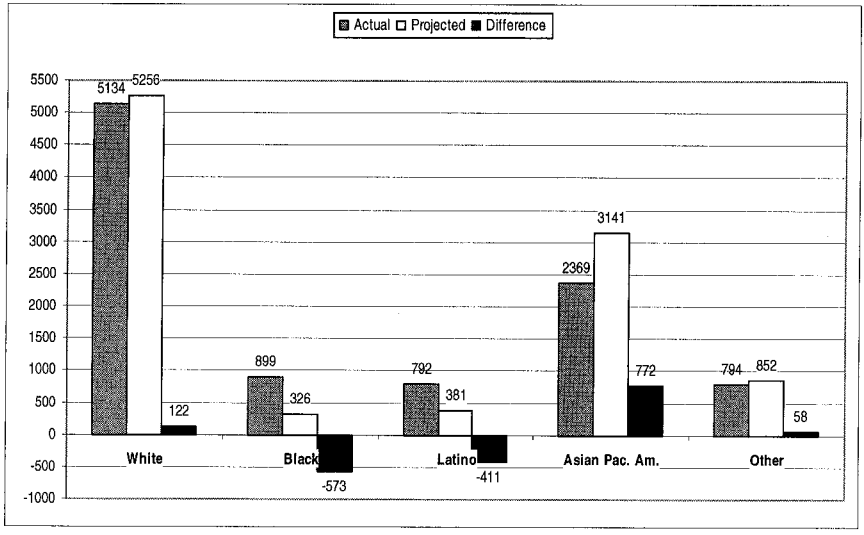
UC DAVIS SIX-YEAR GRADUATION RATES: FALL 1998 FRESHMEN CLASS					
Group (No.)	*SAT Avg.*	*Graduation Rate*	*Group (No.)*	*SAT Avg.*	*Graduation Rate*
Chinese (567)	1137	87.7%	Korean (100)	1177	66.0%
E. Indian/ Pakistani (79)	1165	78.5%	Other Asian (78)	1045	70.5%
Filipino (151)	1099	82.1%	Pacific Islander* (74)	1158	78.4%
Japanese (75)	1187	82.7%	Vietnamese (194)	1060	71.7%

Anecdotal evidence from UC Davis staff suggests that at least for the 1998 class, "Pacific Islander" may include some students who trace their national origins to Taiwan (and misunderstood that this category refers to those with ancestors native to Hawai'i, Guam, Samoa, etc.), a pattern consistent with the graduation and SAT figures. SAT scores are provided simply to give some sense of these students' varied academic profiles; SAT scores are a weak predictor of individual-level graduation rates at UC Davis.

37. *See* Press Release, Princeton Univ., *supra* note 12; Espenshade & Chung, *supra* note 1, at 298, 304.

38. This point is discussed in greater detail *infra* note 60.

CHART 1:
ADMISSION OFFERS WITH AND WITHOUT RACE AS A FACTOR AT 3 ELITE UNIVERSITIES (1997)[39]
Racial/Ethnic Composition of Admission Offers in Espenshade & Chung Table 2 (p. 299)



The problem is that Espenshade and Chung's study is internally contradictory: their research design confounds the role of negative action against APAs with the role of affirmative action for African Americans and Latinos, yet the research question they posed was about the "impact of affirmative action" and their conclusion that APAs "would gain the most" appears to attribute causation to *affirmative action per se* (or at the very least, Espenshade and Chung's blurry conclusion will mislead many reasonable readers into believing that a strong causal claim about affirmative action has been made).[40] Such a conclusion about affirmative action is untenable

39. Chart 1 provides information from Espenshade & Chung, *supra* note 1, at 299 tbl.2, comparing actual admission results with their Simulation 1, which equalized all racial/ethnic coefficients but left intact legacy and athletics-related admission factors. The total number of admits in reality (n = 9,988) is negligibly different from the number in Simulation 1 (n = 9,956). Simulation 3 also eliminated legacy/athlete admissions, but since Espenshade and Chung's claims relate directly to affirmative action and not to the disparate impact of other factors, Simulation 1 was more appropriate for evaluating their claims. Based on legacy application patterns, the "other" category appears to include some Whites who declined to state their ethnicity. Espenshade et al., *supra* note 1, at 1426.

40. Espenshade and Chung are not unaware of the distinction between affirmative action and negative action, Espenshade & Chung, *supra* note 1, at 301. However, they treat this distinction too casually. In their companion study, Espenshade, Chung, and Walling define affirmative action as "preferences extended to underrepresented minority groups—principally students of African or Hispanic, but not Asian, heritage." Espenshade et al., *supra* note 1, at 1423 n.1. Espenshade and Chung then contradict their own definition by fold-

unless the role of negative action is truly *de minimus*,[41] but Espenshade and Chung conservatively estimate that the penalty APAs confront because of negative action typically translates to about 50 points on the SAT.[42] Moreover, given that there were 5,134 Whites in the admit pool, compared to 1,691 African Americans and Latinos, it follows from this three-to-one ratio that Whites must be the primary beneficiaries of negative action against APAs. By implication, ending negative action would primarily involve a transfer of admission offers from Whites back to APAs; inevitably, the number of African American and Latino admission offers that would be at play with the end of negative action is substantially smaller.

In addition to sheer numbers, the distribution of likely admits in Espenshade and Chung's study also suggests that their conclusion —that absent affirmative action APAs would acquire four out of five seats taken away from Blacks and Latinos—is, to put it mildly, swimming upstream in relation to their data: 80.8% of actual admits and 84.5% of Simulation 1 admits had SAT scores in the 1300–1600 range (56.9% and 61.1% were 1400–1600 range), and the authors note that if they ranked the top 9,988 applicants by SAT scores (enough to equal admission offers), only 3.1% of that pool is African American or Latino whereas 86.4% is White or APA.[43] Espenshade et al.'s companion study of the same elite universities found, "The largest admission preferences are conferred on applicants who have SAT scores above 1400 . . . ."[44]

The upshot of the fact that White admitees outnumber Blacks/Latinos 3-to-1, and the aforementioned discussion about the composition of actual and likely pool of admitees is that Espenshade and Chung's study contains a "yellow peril causation fallacy" that misidentifies APAs as the group poised to be the biggest numerical winners if affirmative action ended at elite universities. In other words, when an APA applicant in their dataset is denied admission because of negative action despite a strong transcript and say a 1510 or 1430 or 1360 on the SAT, it

---

ing negative action into their conclusions about affirmative action. *Cf.* Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 250 (1995) ("In affirmative action cases, Asian Americans. . .are relegated to the status of footnotes.").

41. In statistical parlance, the problem with Espenshade and Chung's causal explanation about affirmative action is an example of "Simpson's paradox." Paul W. Holland, *The False Linking of Race and Causality: Lessons From Standardized Testing*, 4 RACE & SOC'Y 219, 220 (2001) (summarizing Simpson's paradox and giving the example of a claim of sex discrimination in UC Berkeley graduate admissions as being unsubstantiated due to a confounding variable). APA critical legal scholars agree that the causal role of negative action should not be confused with that of affirmative action. *See* articles quoted *infra* notes 22–23.

42. Espenshade & Chung, *supra* note 1, at 293–94; Espenshade et al., *supra* note 1, at 1433, 1444.

43. Espenshade & Chung, *supra* note 1, at 297 tbl.1, 301 n.5.

44. Espenshade et al., *supra* note 1, at 1431.

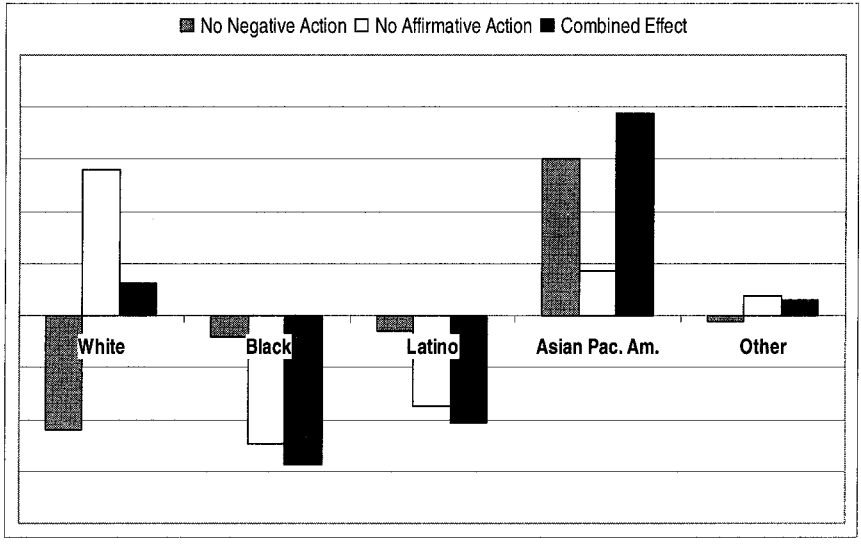
is exceedingly more likely that the student admitted instead was a White applicant with slightly lower academic credentials, not a Black or Latino applicant given an affirmative action plus factor. This pattern is obscured when the distinction between negative action and affirmative action is ignored, so in Chart 2 I attempt to bring the issue into sharper focus.

Chart 2 provides ballpark estimates of what the results would look like if Espenshade and Chung had separately estimated the effects of ending negative action and affirmative action (I say "ballpark" because the dataset is not yet publicly available). The "combined effect" bars in Chart 2 are the same as the "difference" bars in Chart 1. The lion's share of APAs' gains in admission offers stem from the abatement of negative action. Consequently, Whites, not APAs, would occupy the largest number of the seats created by ending affirmative action at the elite universities in question. Espenshade and Chung's contrary suggestion defies basic arithmetic.

Thus, even from the confined vantage point of self-interested APAs (and in the Conclusion I discuss considerations that go beyond educational self-interest), the logical focus of criticism and activism at elite private universities should be on ending negative action, since that would yield a much higher payoff in terms of increasing educational opportunities than would focusing criticism on affirmative action policies.

CHART 2[45]

Ballpark Estimates of the Impact of Ending Negative Action Versus Ending Affirmative Action by Race/Ethnicity in Espenshade & Chung Table 2 (p. 299)



II. LAW SCHOOL REALITY CHECK: HOW APAS FARED BEFORE AND AFTER AFFIRMATIVE ACTION BANS

To confirm their results, Espenshade and Chung review data from the "natural experiment" of affirmative action bans in California and Washington, including the law schools at UC Berkeley (Boalt Hall), UCLA, and UC Davis.[46] The UC law school data are consistent with Espenshade and Chung's findings with respect to Blacks and Latinos. Yet, rather than simply concluding that "our simulation results are in very good agreement with the California experience"[47] the data should have alerted Espenshade and Chung that their conclusion—that ending affirmative action results in marginal gains for Whites and substantial gains for APAs—turns reality on its head.

45. Exact values are intentionally not displayed so as to avoid giving a false sense of precision. In writing this Essay I did not have access to the NSCE dataset. The NSCE data is not currently available for public use, though my correspondence with Espenshade indicates that it may become publicly available at some later date after publication of the book that he and his colleagues are drafting. The main point of Chart 2—showing that Espenshade and Chung's estimate of APAs receiving 772 additional admission offers is more a function of ending negative action than ending affirmative action—is, I believe, incontrovertible.

46. Espenshade & Chung, *supra* note 1, at 302–03, 303 n.6.

47. *Id.* at 303.

Table 1 displays pre and post-affirmative action enrollment percentages for APAs at five highly selective law schools between 1993 and 2005: UCLA, UC Berkeley, UC Davis, University of Washington, and the University of Texas. I am unaware of any credible evidence indicating that these public law schools practiced negative action against APAs in 1993–96, prior to affirmative action bans. Note then the marked contrast between the real data and the "yellow peril" prediction made by Espenshade and Chung. APA enrollments actually declined at UCLA (from 19.4% to 18.1%) and at Washington (from 17.8% to 15.2%). APA enrollments increased somewhat at Boalt Hall (from 15.5% to 17.9%) and UC Davis (from 17.1% to 20.6%) and increased marginally at University of Texas (from 5.7% to 6.3%). Across the five schools, APAs were 12.9% of the student body with affirmative action and 14.3% without affirmative action.

TABLE 1:[48]
APA ENROLLMENT PERCENTAGES AT SELECTIVE PUBLIC LAW SCHOOLS WITH AND *WITHOUT* AFFIRMATIVE ACTION, 1993–2005

	UCLA	UCB (Boalt)	UC Davis	U. of Washington	U. of Texas
1993	18.5%	18.5%	19.4%	20.9%	4.6%
1994	20.9%	14.9%	15.7%	24.1%	5.7%
1995	22.8%	13.5%	19.1%	11.2%	6.2%
1996	15.6%	17.5%	14.5%	13.4%	5.8%
1997	*21.5%*	*17.5%*	*14.0%*	17.5%	*8.8%*
1998	*17.7%*	*17.8%*	*16.4%*	19.7%	*6.8%*
1999	*22.8%*	*13.0%*	*14.9%*	*13.9%*	*5.6%*
2000	*17.4%*	*18.9%*	*20.2%*	*14.7%*	*5.0%*
2001	*17.1%*	*16.1%*	*24.3%*	*16.3%*	*6.1%*
2002	*17.7%*	*19.9%*	*20.5%*	*20.1%*	*6.4%*
2003	*13.8%*	*20.6%*	*26.9%*	*11.5%*	*5.8%*
2004	*17.5%*	*19.3%*	*23.7%*	*14.3%*	*6.0%*
2005	*16.9%*	*17.8%*	*21.6%*	*15.6%*	6.5%
Average With & *Without* Affirmative Action	19.4%	15.5%	17.1%	17.8%	5.7%
	18.1%	*17.9%*	*20.6%*	*15.2%*	*6.3%*
Cumulative Average (all 5) With Affirmative Action: 12.9%			*Cumulative Average (all 5) Without Affirmative Action: 14.3%*		

48. *See* Univ. of Cal. Office of the President, University of California's Law Schools (Oct. 2005), *available at* http://www.ucop.edu/acadadv/datamgmt/lawmed/; Univ. of Washington School of Law, Applicant and Enrollment Statistics for Minority Students (unpublished memorandum provided by the Admissions Office); Univ. of Texas Office of Institutional Research, Table 12 of the 1995–96 and 2005–06 *Statistical Handbook*, *available at* http://www.utexas.edu/academic/oir (I excluded foreign students from the totals to maintain consistency with the other law schools in Table 1). For APAs, N = 840 with affirmative action and N = 1720 without affirmative action.

Given that this data spans over a dozen years, one might expect some increase in APA enrollments due to larger demographic trends in higher education rather than the role of affirmative action bans. At a national level, in 1993 APAs were 5.50% of applicants (and 5.47% of enrollments) at ABA-accredited law schools, whereas in 2005 APAs were 8.29% of applicants (and 8.21% of enrollments) at ABA schools.[49] Thus, the proportion of APAs in the applicant pool and first-year class at ABA law schools increased by 50% between 1993 and 2005 with the vast majority of American law schools practicing affirmative action to some extent during this entire period. In California (an interesting test case because it is the state with the highest proportion of APAs in the continental U.S.),[50] APAs' proportion of the applicant pool at UC law schools had already been gradually increasing prior to the ban on affirmative action, and it kept increasing at the same rate after the ban, so it is not surprising that there was some increase in UC enrollment percentages, as that would most likely have occurred with or without Proposition 209.[51] Likewise, with affirmative action in place, APA enrollments at Texas increased from 1% in 1986–89 to 5.5% in 1993–96, so APAs' additional gains under *Hopwood*[52] (to 6.3% in 1997–2004) pale by comparison. In summary, for APAs the cumulative effect of affirmative action bans at the UC, UW, and UT law schools appears to be more or less a wash.[53]

---

49. Law School Admission Council, 1992–93 National Decision Profiles (Jan. 1994); Law School Admission Council, National Decision Profiles for Fall 2005 (Jan. 2006), unpublished memoranda available from the LSAC Data Management Department. Whites' share of the national applicant pool at ABA law schools dropped from 73.2% in 1993 to 65.3% in 2005. *Id.*

50. JESSICA S. BARNES & CLAUDETTE E. BENNETT, THE ASIAN POPULATION: 2000 5, tbl.2 (Feb. 2002), *available at* http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf.

51. The available combined data for Boalt, UCLA, and Davis only went back to 1993, but given this limitation, APAs' proportion of the UC Law School applicant pool increased from 18.8% in 1993 to 20.8% in 1996 (the last year with affirmative action), an increase of 11%. Between 1997 and 2000 (an equal time interval) APA application proportions increased 9%, and they also increased by 11% between 2001 and 2004. *See* Univ. of Cal. Office of the President, *supra* note 48.

52. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *superseded*, Grutter v. Bollinger, 539 U.S. 306 (2003).

53. Espenshade and Chung correctly note that higher education admissions is a dynamic rather than static system, with students responding to altered incentives. Espenshade and Chung, *supra* note 1, at 294–95 n.1. It is therefore noteworthy that at the five highly selective law schools in Table 1, the rate of APAs' enrollment increases lagged behind the rate at which APA applications and enrollments increased nationally at ABA schools. This suggests that APA law school candidates did not, on balance, redirect their interest toward law schools subject to affirmative action bans, for whatever reason (e.g., there were not significant opportunity-maximizing benefits to be had; such benefits were perceived to be offset by other factors such as the benefits of learning in a racially diverse class, attractiveness of financial aid packages, etc.). This contrasts somewhat with Long's finding that APA high school seniors increased applications to selective universities in California and Texas immediately after affirmative action bans took effect. Mark C. Long,

In addition, Wightman's logistic regression model of race-blind admissions at the top 30 U.S. law schools reports declines for APAs,[54] and Princeton demographer Marta Tienda's study of the Texas flagship public universities found mixed results for APAs after an affirmative action ban.[55]

CONCLUSION: OPPORTUNITIES LOST IN "OPPORTUNITY COST"

When a political talk show host on cable TV makes a "yellow peril" prediction that absent affirmative action, by 2007 APAs will be 80% of the class at the UCLA Law School, one hopes most scholars will easily dismiss that as nonsense.[56] However, when the recent chair of the Sociology Department at Princeton suggests in a well respected peer-reviewed social science journal that APAs "would occupy four out of every five seats" created by ending affirmative action for African Americans and Latinos, such a claim is taken very seriously by social scientists, policymakers, and the press. In this case, that is unfortunate.

College Applications and the Effect of Affirmative Action, 121 J. ECONOMETRICS 319 (2004). One admittedly speculative partial explanation for the difference between APA college and law school application patterns could be that APA high school students are more likely than older, more mature APA law school candidates to succumb to the "causation fallacy," the unrealistic belief that the end of affirmative action would greatly improve their admission chances at schools like Berkeley, UCLA, and the University of Texas at Austin. *See* Liu, *supra* note 33, at 1046–48.

54. Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 247 tbl. 9 (2003) (using actual applicant and admission data in the 2001 cycle, and finding that if admissions were based solely on LSATs and UGPAs, at Tier 1 law schools APA admission offers would go down from 834 to 731, and would decrease at Tier 2 law schools from 1,693 to 1,580, though offers to Whites would go up at Tiers 1 and 2).

55. MARTA TIENDA ET AL., CLOSING THE GAP?: ADMISSIONS & ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER AFFIRMATIVE ACTION 17–18, 40–42 tbls.4–6 (2003), *available at* http://opr.princeton.edu/papers/opr0301.pdf. Comparing the four years before and after the *Hopwood v. Texas* ruling banning affirmative action (1992–96 versus 1997–2000), Tienda et al. found APAs' admission prospects at Texas A&M worsened without affirmative action, and though gains for APAs were evident at the University of Texas at Austin, this was because the Texas Ten Percent plan and other changes appeared to lessen negative action against APAs vis-à-vis Whites. Tienda et al.'s post-affirmative action data merges one year without the Texas Ten Percent Plan (1997) with three years when the Plan was in effect (1998–2000)). The data shed a different light on the claims of Steinberg in the *New York Times* that APAs were the main beneficiaries of an affirmative action ban in Texas. Steinberg, *supra* note 24.

56. CNN *Crossfire* cohost Bob Beckel, trying to make an argument for affirmative action, asked a guest, "Would you like to see the UCLA Law School 80 percent Asian? Because at the rate it is going . . . by the year 2007 UCLA will be 80 percent Asian. Will that make you happy?" *See* Stephan Thernstrom, *Farewell to Preferences?*, 130 PUB. INT. 34, 42–43 (1998) (quoting Beckel). Table 1, *supra*, indicates APAs were 16.9% of the entering class at UCLA School of Law in 2005.

Unlike CIR, the National Association of Scholars and similar organizations actively working to dismantle affirmative action, Espenshade and Chung are not attempting to pit APAs against other groups as a shrewd political strategy.[57] At the end of the day, however, Espenshade and Chung effectively marginalize APAs by treating them as a buffer group, a kind of "middleman" in their affirmative action cost-benefit analysis between Blacks/Latinos and Whites.[58] At a political level, the net result of this marginalization, unintended though it may be, is that their study aids and abets affirmative action opponents and skews the public debate by improperly casting APAs as the enemies of diversity.[59]

Moreover, though it is unclear if Espenshade and Chung's evidence would be enough for an APA plaintiff to file a lawsuit[60] or spur a

---

57. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 58 (2002) ("[P]olitical scientist Claire Kim has argued that Asian Americans are positioned through 'racial triangulation' much as a Machiavellian would engage in political triangulation for maximum advantage."). Years ago, Michael Greve, a co-founder of CIR, candidly described this strategy. Michael S. Greve, *The Newest Move in Law Schools' Quota Game*, WALL ST. J., Oct. 5, 1992, at A12 (commenting on an early-1990s Office for Civil Rights investigation of Boalt Hall admissions as "an opportunity to call, on behalf of a racial minority (i.e., the Asian applicants) for an end to discrimination. It was an appeal that, when made on behalf of Whites, is politically hopeless and, perhaps, no longer entirely respectable.").

58. WU, *supra* note 57, at 58. Wu observes:

> "Asian Americans are as much a 'middleman minority' as we are a model minority. We are placed in the awkward position of buffer or intermediary, elevated as the preferred racial minority at the expense of denigrating African Americans. . . . Sumi Cho has explained that Asian Americans are turned into 'racial mascots' giving right-wing causes a novel messenger, camouflaging arguments that would look unconscionably self-interested if made by Whites about themselves."

Id. See also Dana Takagi, *The Three Percent Solution: Asian Americans and Affirmative Action*, 6 ASIAN AM. POL'Y REV. 1, 6, 12 (1996) (discussing APAs' middleman status).

59. *See* L. Ling-chi Wang, *Being Used and Being Marginalized in the Affirmative Action Debate: Re-envisioning Multiracial America from an Asian American Perspective*, 6 ASIAN AM. POL'Y REV. 49, 54–55 (1996) (criticizing some proponents of affirmative action for their Black-White bipolar paradigm that marginalizes APAs from the discourse and "aids and abets opponents of affirmative action.").

60. Tsuang, *supra* note 25 (analyzing data and legal arguments for scenarios in which APAs were treated unfavorably in comparison to Whites in elite college admissions). An empirical caveat is that there could be factors beyond those controlled for by Espenshade and Chung that would account for some of the negative action, such as a plus factor for students from rural backgrounds. *See, e.g.*, Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TCHRS. C. REC., 2224, 2231 (2004) (in California, 154 of 373 White-majority high schools are in rural locations, compared to zero of 19 APA-majority schools). Such facially neutral explanations would make it more difficult for an APA plaintiff to sustain an intentional discrimination claim under the Equal Protection Clause and Title VI. *Gratz*, 539 U.S. at 275. Additionally, as Goodwin Liu notes, what matters is not the treatment of the average applicant "but rather the treatment of the individual applicant who has chosen to become a plaintiff." Liu, *supra* note 33, at 1079.

Department of Education investigation,[61] Espenshade and Chung's study, flawed though it may be in its presentation, should still prompt officials at elite universities to critically reexamine their admissions practices. Regardless of how committed these institutions are to affirmative action, they should repudiate negative action against APAs.

Finally, to come full circle regarding the *Grutter* and *Gratz* cases and the so-called "Michigan Civil Rights Initiative," I should clarify why it can be inferred from the empirical discussion in Parts I and II of this Essay that Espenshade and Chung's findings are particularly inapplicable to APAs in Michigan.[62] The pending anti-affirmative action ballot initiative in Michigan would have the greatest impact in higher education admissions at highly selective programs like the University of Michigan Law School (programs comparable in selectivity to the elite private universities in Espenshade and Chung's study).[63] Yet, in *Grutter,* even the statistical analysis by CIR's expert witness failed to uncover evidence of negative action toward APAs in relation to White applicants.[64] This non-finding is

---

61. An Office for Civil Rights investigation is mentioned because it is no longer possible to bring a Title VI disparate impact (as opposed to intentional discrimination) claim either directly or (at least where many elite colleges are located) to enforce Title VI disparate impact regulations via Section 1983. Alexander v. Sandoval, 532 U.S. 275, 281 (2001). Cases precluding enforcement of Title VI disparate impact regulations include Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003); South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection, 274 F.3d 771 (3rd Cir. 2001); Harris v. James, 127 F.3d 993 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980 (4th Cir. 1987). Some circuits have not reached this issue. Beechwood Restorative Care Ctr. v. Leeds, 317 F. Supp. 2d 248, 280 n.23 (W.D.N.Y. 2004) (commenting on the 2nd Circuit). At least for now, some courts in the Sixth and Tenth Circuits have allowed enforcement of Title VI disparate impact regulations post-*Sandoval. See* Robinson v. Kansas, 295 F.3d 1183, 1187 (10th Cir. 2002)("Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations."); Johnson v. City of Detroit, 319 F. Supp. 2d 756, 761 n.4 (E.D. Mich. 2004); Lucero v. Detroit Public Schools, 160 F. Supp. 2d 767, 772–73 (E.D. Mich. 2001).

62. Espenshade and Chung do not explicitly claim that their results necessarily extend to selective institutions like the University of Michigan. However, given the way the authors frame their results around the Michigan affirmative action cases, it is realistic to expect that others may draw that inference.

63. *See, e.g.*, Richard O. Lempert et al., *Response: Answers to Methodological Queries*, 25 LAW & SOC. INQUIRY 585, 594–95 (2000) (modeling the impact of ending affirmative action at the University of Michigan Law School).

64. *See, e.g.*, Expert Report of Kinley Larntz, Ph.D *in Grutter v. Bollinger,* reprinted at 5 MICH. J. RACE & L. 463, 466–67, 477–82 tbls. 7–18 (1999). Note that I am not endorsing Larntz's methodology or conclusions, which the Supreme Court ultimately rejected in connection with the question of narrow tailoring, and I have been critical of the methodologically similar claims by Richard Sander regarding the role of affirmative action at the University of Michigan Law School. *See* Chambers et al., *supra* note 13, at 1886; Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 33, 45 n.89 (Feb. 2006), Univ. of Michigan Law School Olin Center Working Paper No. 60, *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1061&context=umichlwps.

significant when viewed in context. CIR would have been highly motivated to present evidence of unfairness toward APAs (either in court or to the media), given that it would have yielded a large political payoff in terms of racially triangulating APAs as the principal victims of affirmative action.[65]

Accordingly, if Michigan voters were to end affirmative action in public institutions of higher learning, the resulting gains for APAs in highly selective programs like the University of Michigan Law School would be far, far more meager than Espenshade and Chung's finding that APAs would receive four out of five spots taken away from African Americans and Latinos. And this is ultimately a rather narrow approach to assessing the costs and benefits of affirmative action for APAs.[66] Aside from the fact that some underrepresented APA groups (e.g., Filipinos, Southeast Asians, Pacific Islanders) can directly benefit from affirmative action in higher education,[67] overall APAs share in the compelling educational benefits associated with a racially diverse student body (including at the University of Michigan).[68] In addition, affirmative action, and the larger

---

65. *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 122–23 (1999) (describing how the "racial triangulation" of APAs involves valorizing Asian Americans relative to African Americans and that

> when the two groups are juxtaposed not only in abstract comparisons but in real-life conflicts, the ideological payoff is even greater....This payoff is so rich that conservatives have actually manufactured conflicts between Blacks and Asian Americans in order to achieve it ... [Conservative affirmative action opponents in the 1980s] shifted public debate from the real issue at hand—whether or not several leading universities imposed racial quotas on Asian American students to preserve the Whiteness of their student bodies—to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans.

See also sources quoted *infra* notes 51–52.

66. Dennis Hayashi & Christopher Edley, Jr., *The Presidential Review of Affirmative Action: A View from the Inside*, 6 ASIAN AM. POL'Y REV. 33, 40 (1996), stating:

> We believe that measuring the value of affirmative action solely by examining who benefits from a defined zero-sum game is short-sighted. Affirmative action's value is tied not just to an individual job or educational slot, but to the overall health and stability of a corporation, business, campus, or society and to an acknowledgment that discrimination remains an ongoing problem.

67. An example is the selective University of Washington Law School, where prior to Initiative 200 banning affirmative action, the Law School gave a plus factor to Filipino applicants. Looking at the same period as in Table 1, the University of Washington Law School enrolled an average of 5.7 Filipinos per year in 1993–98, compared to 2.1 in 1999–2005.

68. *See, e.g.*, *Grutter*, 539 U.S. at 327–33; Patricia Gurin et al., *Diversity in Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 352, 354 tbl.3 (2002)(racial/ethnic diversity in the classroom had a positive effect on active thinking and intellectual engagement for APAs at the University of Michigan); Dean K. Whitla et

movement toward inclusion of which affirmative action is a part, help to ensure fairness toward APAs in a variety of employment settings, such as opening up "good ol' boy" hiring networks in police/fire departments and contracting, and ensuring that stereotyping (unconscious or otherwise) does not place "glass ceilings" on APAs seeking leadership positions in government and corporate America.[69]

al., *Educational Benefits of Diversity in Medical School: A Survey of Students*, 78 ACAD. MED. 460, 463 fig.1 (2003) (survey of medical students at Harvard and UC San Francisco, including approximately 165 APAs, with 68% of APAs responding that having students of different races and ethnicities was a "clearly positive" element of their educational experience).

69. *See, e.g.*, Deborah Woo, GLASS CEILINGS AND ASIAN AMERICANS: THE NEW FACE OF WORKPLACE BARRIERS (2000); Deborah J. Woo, *Glass Ceilings: A Wake-Up Call for Asian Americans?*, *in* THE NEW FACE OF ASIAN PACIFIC AMERICA: NUMBERS, DIVERSITY AND CHANGE IN THE 21ST CENTURY 224 (Eric Lai & Dennis Arguelles eds., 2003); Paul M. Igasaki, *Discrimination in the Workplace: Asian Americans and the Debate Over Affirmative Action*, 6 ASIAN AM. POL'Y REV. 15 (1996); Theodore Hsein Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, 95 ANN. SURVEY AM. L. 463 (1995); APALSA Symposium, *Rethinking Racial Divides: Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 233–34 (1998) (comments of professor Sumi Cho).