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A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty

Alfred C. Yen†

Law schools have long implemented affirmative action faculty hiring practices to remedy past discrimination, increase diversity, and provide role models for students of color. However, there is a growing sense among the relatively few Asian American law faculty that Asian Americans are not included in affirmative action hiring efforts. The author compares the hiring rates of Asian American, African American, Latino, and white law faculty candidates to test the hypothesis that Asian Americans are not included in affirmative action hiring programs. The author concludes that the pattern of law faculty hiring is consistent with affirmative action policies which exclude Asian Americans.

INTRODUCTION

A recurring theme in legal scholarship about Asian Americans is the ambiguous nature of Asian American racial identity. Asian Americans are clearly persons of color, but sometimes they are treated as white.¹ Asian Americans are considered free from racial discrimination and more eco-

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1. Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226, 271-74 (1995); see also DANA TAKAGI, *THE RETREAT FROM RACE* 11 (1992) ("Asians are perceived to be either like whites or not like whites; or alternatively, like blacks or not like blacks."); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994) [hereinafter Chew, *Asian Americans*]; Lisa C. 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, 1588-89 (1993) (describing the shifting racial identification of Korean Americans); Sumi Cho, *Model Minority Mythology and Affirmative Action: Supreme Stereotypes of Asian Americans* (Feb. 12, 1996) (unpublished manuscript, on file with the author).

nomically successful than whites when the opposite is true.² Asian Americans receive both admiration and vilification because of stereotypes about their diligence, family values, and thrift.³

As an Asian American law professor, I have often been curious about how the ambiguities of Asian American racial identity play out in the legal academy, especially when it comes to the hiring of new faculty. Law schools happily list Asian Americans among faculty of color,⁴ but do they really perceive Asian Americans as people of color?

For years, law schools have engaged in purposeful affirmative action hiring to increase the number of people of color on their faculties.⁵ The stated reasons for this include remedial action for underrepresentation,⁶ remedial action for discrimination against persons of color,⁷ diversity,⁸ and the provision of role models to students of color.⁹ Each of these reasons supports the affirmative action hiring of Asian American law professors.¹⁰ Asian Americans have been the victims of social discrimination by others, including universities.¹¹ Asian Americans bring new and important scholarly interests to the academy, especially their interest in Asian American issues.¹² Finally, Asian American law professors act as role models for a

2. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 18-25 (1994) 81 CALIF. L. REV. 1241, 1258-65 (1993), 1 ASIAN L.J. 3, Chew, *Asian Americans*, *supra* note 1, at 24-55.

3. RONALD TAKAKI, STRANGERS FROM A DISTANT SHORE: A HISTORY OF ASIAN AMERICANS 474-84 (1989); Wu, *supra* note 1, at 229-47.

4. See ASSOCIATION OF AMERICAN LAW SCHOOLS, AALS DIRECTORY OF LAW TEACHERS 1996-96 1265-71 (1995).

5. See Bylaws of the Association of American Law Schools § 6-4c. ("A member school shall seek to have a faculty, staff, and student body, which are diverse with respect to race, color and sex."); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 350-51 (1989).

6. Chew, *Asian Americans*, *supra* note 1, at 77.

7. Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 865-67 (1995); Chew, *Asian Americans*, *supra* note 1, at 77.

8. Brest & Oshige, *supra* note 7, at 862-64; Chew, *Asian Americans*, *supra* note 1, at 77.

9. Brest & Oshige, *supra* note 7, at 864, 870; Chew, *Asian Americans*, *supra* note 1, at 77.

10. It does not necessarily follow, however, that Asian Americans should be included in all affirmative action programs. For thorough discussions of the relevant issues, see generally Chew, *Asian Americans*, *supra* note 1; 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); Wu, *supra* note 1.

11. TAKAKI, *supra* note 3; John H. Bunzel & Jeffrey K. D. Au, *Diversity or Discrimination?: Asian Americans in College*, PUB. INTEREST, Spring 1987, at 49.

12. The following is a partial list of legal scholarship about Asian American issues by Asian American law professors. I apologize to those whose works I may have overlooked. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990 (Gordon H. Chang, ed., 1993); Keith Aoki, 4 *Foreign-ness and Asian American Identities: Yellowface, World War II Propaganda & Bifurcated Racial Stereotypes* UCLA ASIAN AM. PAC. ISLANDS L.J. (forthcoming 1997); Chang, *supra* note 2; Robert S. Chang, *Reverse Racism! Affirmative Action, the Family and the Dream That is America*, HASTINGS CONST. L. Q. (forthcoming 1996); Chew, *Asian Americans*, *supra* note 1; Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 7 (1996) [hereinafter Chew, *Legal Academy*]; Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, Iowa L. Rev. (forthcoming 1997); Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Silences and Storytelling*, 3 UCLA ASIAN

rapidly increasing Asian American student body.¹³ One would therefore think that law schools would include Asian Americans in their affirmative action hiring efforts. Yet, in 1990, the year immediately before the period under study, Asian Americans comprised 2.9% of the American population in 1990, but only 1.4% of all law faculty.¹⁴

A number of Asian American law professors doubt whether law schools are truly committed to the affirmative action hiring of Asian Americans. Anecdotally, they report that their schools apply affirmative action to African American and Latino candidates, but treat Asian Americans as if they were white. The schools then list Asian Americans as people of color when reporting hiring statistics.¹⁵ Of course, these reports may represent nothing more than a few isolated instances, and law schools would probably deny consciously or unconsciously excluding Asian Americans from affirmative action hiring. Nevertheless, the omission of Asian Americans from affirmative action in other university contexts makes the suspicions of Asian American law professors quite plausible.¹⁶

This Article provides information which helps answer the question of how law schools perceive and treat Asian Americans by studying the hiring of new law school faculty from 1990-91 to 1992-93, a period during which law schools openly practiced affirmative action hiring. In particular, the Article compares the success rates of whites, Asian Americans, African Americans and Latinos to test the hypothesis that American law schools have excluded Asian Americans from affirmative action hiring efforts. The

AM. PAC. ISLANDS L.J. (forthcoming 1996); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1986); Ikemoto, *supra* note 1; Kang, *supra* note 10; Cynthia K. Lee, *Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J.165(1995); Mari J. Matsuda, *Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Wu, *supra* note 1; Eric K. Yamamoto, *Korematsu Revisited: Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review*, 26 SANTA CLARA L. REV. 1 (1986); Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. POLICY 223 (1993); Cho, *supra* note 1.

13. See Brest & Oshige, *supra* note 7, at 869-71 (describing the value of role models).

14. Chew, *Asian Americans*, *supra* note 1, at 85.

15. One Asian American law professor described the phenomenon:

[W]e are not included in affirmative action efforts, except when the administration is counting up its minorities. We do not receive preferential treatment in hiring, promotion, benefits. In fact, I know of instances where we are discriminated against. At the same time, others believe that we do get preferential treatment. Other minorities resent us because they think we are not a "true minority." Whites resent us because they think we don't deserve or need preferential treatment. We lose both ways.

Chew, *Asian Americans*, *supra* note 1, at 75. See also Chew, *Legal Academy*, *supra* note 12, at 31 (quoting other law professors). Apparently some universities also use Asian foreign nationals (as opposed to Asian Americans) to pad their minority hiring statistics.

16. See Brest & Oshige, *supra* note 7 (Asian Americans excluded from affirmative action student admissions at Stanford Law School); Chew, *supra* note 1, at 75 n.339 (reporting that the University of Wisconsin "Madison Plan" and the Case Western Reserve University Minority Scholars Program excluded Asian Americans); Wu, *supra* note 1, at 270 n.199 (noting the exclusion of Asian Americans from affirmative action student admissions and raising the possibility that universities have set ceiling quotas on the admission of Asian Americans); Bunzel & Au, *supra* note 11, at 58-60.

logic behind this comparison is simple. If law schools practiced affirmative action, one would expect the favored groups to experience higher success rates than omitted groups.

Until recently, it would have been extremely difficult to conduct this type of study because no one kept information about unsuccessful applicants for law faculty positions. Accordingly, studies about law professor hiring have been forced to analyze only those who successfully found positions.¹⁷ While this sort of study certainly provides insight about law school hiring practices, it does not allow a direct measurement of how race is related to the likelihood of finding a law faculty position. However, the Association of American Law Schools now keeps information on large numbers of applicants for law professor positions. This information includes racial and ethnic identification, so it is now possible to test the relationship between race and success. As this Article shall show, the overall pattern of law school faculty hiring is consistent with an affirmative action policy which excludes Asian Americans.

I.

DESCRIPTION OF THE STUDY

Each year, the Association of American Law Schools (AALS) holds its Faculty Recruitment Conference (FRC). The vast majority of law schools send interviewers to the FRC to meet with candidates for appointment. As part of this process, the AALS invites prospective candidates to submit a one page form which contains basic information about the candidate, including schools attended, honors, law review experience, job history, subject matter interests, gender information, and ethnicity.¹⁸ Many of those conducting national job searches submit these forms because the FRC attracts so many potential employers. In fact, the FRC process accounts for nearly half of all new tenure track law professor hiring.¹⁹ The AALS collates these forms in a series of books known as the Faculty Appointments Register (FAR) and distributes the FAR to member law schools. The schools then use these forms to select the candidates they wish to interview.

For the academic years 1990-91 through 1992-93, the AALS kept basic information about each candidate who submitted an FRC form, including name, gender and race/ethnicity. When this information is com-

17. See, e.g., Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Deborah J. Merritt and Barbara F. Reskin, *The Double Minority: Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992).

18. With respect to race or ethnicity, the forms allow the following designations: American Indian or Alaskan Native, Asian or Pacific Islander, Black, Chicano, Puerto Rican, Other Hispanic-American, White, and Other. See AALS DIRECTORY OF LAW TEACHERS, *supra* note 4.

19. See Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. OF LEG. ED. 424, 431 (1994).

pared against the following year's Directory of Law Teachers (DLT),²⁰ it becomes possible to determine which FAR candidates obtained jobs on law faculties. A simple calculation then yields the overall success rate of FAR candidates. Similar calculations also yield the success rate of men, women and members of various ethnic or racial groups.

This study focuses on candidates from the 1990-91 through 1992-93 FARs who identified themselves as belonging to the following racial/ethnic groups: African American, Asian American, Latino, and white.²¹ The study then compares the success rates of these groups against one another.²²

20. The AALS puts out the DLT each year. It lists each faculty member at an AALS accredited school, along with some basic biographical information. See, e.g., AALS DIRECTORY OF LAW TEACHERS, *supra* note 4.

21. The study omits 502 candidates who provided no ethnic or racial identification because it is not possible to study how race affected their chances of finding law faculty jobs. The study also omits 14 candidates who identified themselves as Native American because such a number is too small to be statistically meaningful. With respect to the 15 candidates who identified themselves as bi-racial, the following order of preference was used: African American, Latino/a, and then Asian American. The categorization of those who identify as biracial is clearly problematic. Nevertheless, the study used that categorization because I believe that law schools (and indeed most Americans) perceive African Americans as the most "authentic" persons of color, followed by Latino/as and Asian Americans. This is particularly true when it comes to affirmative action. Cf. Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1107 (author describing self as "one who has long favored and practiced affirmative action with respect to African-Americans, and on occasion for women, members of other minorities, or persons with special disabilities."); Chew, *Asian Americans*, *supra* note 1, at 67-68 (noting that Asian Americans often do not feel fully accepted by either whites or other people of color); Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1157-58 (confining discussion of affirmative action to that in favor of African Americans); Wu, *supra* note 1, at 248-51. If a person claims affiliation with more than one of these groups, American culture generally treats that person as a member of the most "authentic" group. Perhaps the best example of this is the prominent golfer Eldrick "Tiger" Woods. Woods' father is African American (his ancestry is a quarter American Indian, a quarter Chinese, and half black), and his mother is Asian American (her ancestry is half Thai, a quarter Chinese and a quarter white). Although Woods acknowledges affiliation with both groups, he identifies himself as Asian American on forms which request racial information. Nevertheless, the media almost always identifies him as African American. See Rick Reilly, *Goodness, Gracious, He's a Great Ball of Fire*, SPORTS ILLUSTRATED, Mar. 27, 1995, at 62, 66, 69 (describing Woods as "black American" one paragraph after quoting Woods as saying "I always fill in 'Asian'" on forms).

With respect to the effect that this categorization might have on this study, two observations can be made. First, the number of such categorizations is small. Second, to the extent that there is an effect on outcomes, any erroneous categorizations created by this scheme would tend to reduce the difference between the two groups represented by a biracial person. For example, if someone is categorized as African American when she was truly perceived by law schools as Asian American, the effect would be to inject some Asian American experience into the African American category. This would make African American experience more similar to Asian American experience, thereby lessening the likelihood that a statistically significant difference between the two groups would be found. Thus, the categorization of biracial candidates used here is a conservative approach to the problem.

22. Rick White, the AALS Research Associate/Data Analyst, has already performed these calculations to report on the relative success of male, female and minority FAR candidates. White, *supra* note 19. That report, however, did not break down information about minorities into racial subgroups. Instead, it simply lumped the experience of all non-white groups together as "minority."

II.
DESCRIPTION OF FAR CANDIDATE POOL

Two-thousand six-hundred seventy-five candidates comprise the population under study. Of these, 2288 (85.53%) were white, and 387 (14.47%) were persons of color — 67 (2.5%) Asian American, 233 (8.71%) African American, and 87 (3.25%) Latino.

TABLE 1

| Candidate Pool Profile 1990-1993 | | |
|-------------------------------------|---------------|----------------|
| <u>Ethnic Group</u> | <u>Number</u> | <u>Percent</u> |
| White | 2288 | 85.53% |
| Asian American | 67 | 2.50% |
| African American | 233 | 8.71% |
| Latino | 87 | 3.25% |
| Persons of Color Subtotal | <u>387</u> | <u>14.47%</u> |
| Total | 2675 | 100.00% |

Of these 2675 candidates, 819 appeared in the 1990-1991 FAR, 893 appeared in 1991-1992, and 963 appeared in 1992-1993. Of the 819 who appeared in 1990-1991, 703 (85.84%) were white, and 116 (14.16%) were persons of color — 12 (1.71%) Asian American, 67 (8.18%) African American, and 35 (4.27%) Latino. Of the 893 who appeared in 1991-1992, 759 (84.99%) were white, and 134 (15.00%) were persons of color — 21 (2.35%) Asian American, 87 (9.74%) African American, and 26 (2.91%) Latino. Of the 963 who appeared in 1992-1993, 826 (85.77%) were white, and 137 (14.22%) were persons of color — 32 (3.32%) Asian American, 79 (8.20%) African American, and 26 (2.70%) Latino.

TABLE 2

| Candidate Pool Profile 1990-1991 | | |
|-------------------------------------|---------------|----------------|
| <u>Group</u> | <u>Number</u> | <u>Percent</u> |
| White | 703 | 85.84% |
| Asian American | 14 | 1.71% |
| African American | 67 | 8.18% |
| Latino | 35 | 4.27% |
| Persons of Color Subtotal | <u>116</u> | <u>14.16%</u> |
| Total | 819 | 100.00% |

TABLE 3

| Candidate Pool Profile 1991-1992 | | |
|-------------------------------------|---------------|----------------|
| <u>Group</u> | <u>Number</u> | <u>Percent</u> |
| White | 759 | 84.99% |
| Asian-Pacific American | 21 | 2.35% |
| African American | 87 | 9.74% |
| Latino | 26 | 2.91% |
| Persons of Color Subtotal | <u>134</u> | <u>15.00%</u> |
| Total | 893 | 100.00% |

TABLE 4

| Candidate Pool Profile 1992-1993 | | |
|-------------------------------------|---------------|----------------|
| <u>Group</u> | <u>Number</u> | <u>Percent</u> |
| White | 826 | 85.77% |
| Asian-Pacific American | 32 | 3.32% |
| African American | 79 | 8.20% |
| Latino | 26 | 2.70% |
| Persons of Color Subtotal | <u>137</u> | <u>14.22%</u> |
| Total | 963 | 100.00% |

III.

SUCCESS RATES

Of the 2675 candidates under study, 365 (13.65%) found positions on law school faculties. 279 (12.19%) of the 2288 white candidates, and 86 (22.22%) of the 387 candidates of color found positions — 9 (13.43%) of the 67 Asian Americans, 51 (21.89%) of the 233 African Americans, and 26 (29.89%) of the 87 Latinos.

TABLE 5

| Success Rate of Applicants 1990-1993 | | | |
|---|-------------------|-------------------|---------------------|
| <u>Group</u> | <u>Applicants</u> | <u>Successful</u> | <u>Success Rate</u> |
| White | 2288 | 279 | 12.19% |
| Asian American | 67 | 9 | 13.43% |
| African American | 233 | 51 | 21.89% |
| Latino | 87 | 26 | 29.89% |
| Persons of Color Subtotal | <u>387</u> | <u>86</u> | <u>22.22%</u> |
| Total | 2675 | 365 | 13.65% |

Of the 819 candidates who appeared in the 1990-91 FAR, 124 (15.14%) found positions as entry level tenure track professors. Ninety-three (13.23%) of the 703 white candidates, and 31 (26.72%) of the 116 candidates of color found positions — 3 (21.43%) of the 14 Asian Americans, 16 (23.88%) of the 67 African Americans, and 12 (34.29%) of the 35 Latinos.

TABLE 6

| Success Rate of Applicants 1990-1991 | | | |
|---|-------------------|-------------------|---------------------|
| <u>Group</u> | <u>Applicants</u> | <u>Successful</u> | <u>Success Rate</u> |
| White | 703 | 93 | 13.23% |
| Asian American | 14 | 3 | 21.43% |
| African American | 67 | 16 | 23.88% |
| Latino | 35 | 12 | 34.29% |
| Persons of Color Subtotal | 116 | 31 | 26.72% |
| Total | 819 | 124 | 15.14% |

Of the 893 candidates who appeared in the 1991-1992 FAR, 126 (14.11%) found positions as entry-level tenure-track professors. Ninety-six (12.65%) of the 759 white candidates, and 30 (22.39%) of the 134 candidates of color found positions — 2 (9.52%) of the 21 Asian Americans, 22 (25.29%) of the 87 African Americans, and 6 (23.08%) of the 26 Latinos.

TABLE 7

| Success Rate of Applicants 1991-1992 | | | |
|---|-------------------|-------------------|---------------------|
| <u>Group</u> | <u>Applicants</u> | <u>Successful</u> | <u>Success Rate</u> |
| White | 759 | 96 | 12.65% |
| Asian American | 21 | 2 | 9.52% |
| African American | 87 | 22 | 25.29% |
| Latino | 26 | 6 | 23.08% |
| Persons of Color Subtotal | 134 | 30 | 22.39% |
| Total | 893 | 126 | 14.11% |

Of the 963 candidates who appeared in the 1992-1993 FAR, 115 (11.94%) found positions as entry-level tenure-track professors. Ninety (10.90%) of the 826 white candidates, and 25 (18.25%) of the 137 candidates of color found positions — 4 (12.50%) of the 32 Asian Americans, 13 (16.46%) of the 79 African Americans, and 8 (30.77%) of the 26 Latinos.

TABLE 8

| Success Rate of Applicants 1992-1993 | | | |
|---|-------------------|-------------------|---------------------|
| <u>Group</u> | <u>Applicants</u> | <u>Successful</u> | <u>Success Rate</u> |
| White | 826 | 90 | 10.90% |
| Asian American | 32 | 4 | 12.50% |
| African American | 79 | 13 | 16.46% |
| Latino | 26 | 8 | 30.77% |
| Persons of Color Subtotal | 137 | 25 | 18.25% |
| Total | 963 | 115 | 11.94% |

IV.

DATA ANALYSIS AND INTERPRETATION

The success rates of the various racial groups are consistent with an affirmative action policy which either excludes or rarely benefits Asian Americans. If law schools hired without regard to race or credentials strongly associated with race (such as an interest in race based scholarship), one would expect various racial subgroups to experience roughly equal success rates in the hiring market. However, the four racial subgroups in this study did not experience roughly equal success rates. Over the three years of the study, whites (12.19%) and Asian Americans (13.42%) did find jobs at roughly the same rates. By contrast, African Americans (21.89%) and Latinos (29.89%) found jobs at much higher rates.

Of course, random chance may provide the explanation for these discrepancies, but this is not very likely. When chi-square tests²³ are performed to test for this possibility, the probability that random chance alone caused the overall pattern of success rates is 0.1%.²⁴ This translates to statistical significance at the 99.9% confidence level.

Similar results emerge when chi-square tests are performed on all possible two way discrepancies. The differences in the success rates of whites and Latinos, as well as whites and African Americans, are significant at a 99.9% confidence level. The difference in success rates of Asian Americans and Latinos is significant at a 95% confidence level.²⁵ The difference in success rates of Asian Americans and African Americans falls just short of statistical significance at the 90% level,²⁶ as does the difference in success rates of African Americans and Latinos.²⁷ By contrast, the difference in success rates between Asian Americans and whites is statistically insignificant. Indeed, the probability that random chance explains this difference is 76%. Table 9 presents the results of these chi-square calculations.²⁸

23. For explanations of independence testing in cross-classified data, see STEPHEN E. FIENBERG, *THE ANALYSIS OF CROSS-CLASSIFIED CATEGORICAL DATA* 10-13 (2d ed. 1980); RICHARD J. LARSEN & MORRIS J. MARX, *STATISTICS* 573, 599-609 (1990).

24. In other words, it is 99.9% likely that something other than random chance alone explains the overall pattern of success rates.

25. The actual probability that random chance alone explains this difference is 1.6%, so statistical significance approaches the 99% confidence level.

26. The probability that random chance alone explains this difference is 12.7%. The failure to achieve statistical significance at a traditional 95% or 99% confidence level is probably due to the relatively small number of persons of color in the pool.

27. The probability that random chance alone explains this difference is 13.7%.

28. It is important to note that the degree of statistical significance observed here requires the large number of comparisons made over the full three years of the study. When each year is viewed in isolation, the statistical significance of the two-way comparisons drops considerably, in part because relatively few comparisons involving persons of color are possible any given year. The chi-square test results for each year are as follows:

TABLE 9

| <u>Groups under comparison</u> | <u>Probability that random chance alone explains disparities in success rates</u> |
|-----------------------------------|---|
| Overall pattern | 0.1% |
| African American & white | 0.1% |
| Latino & white | 0.1% |
| Asian American & Latino | 1.6% |
| Asian American & African American | 12.7% |
| African American & Latino | 13.7% |
| Asian American & white | 76% |

Since random chance provides an unlikely explanation for the differing success rates of the various racial groups, it seems likely that something caused law schools to prefer hiring Latinos and African Americans over whites and Asian Americans. Although the identification of that "something" necessarily involves some degree of speculation, there are very plausible reasons to point the finger at affirmative action policies which exclude Asian Americans.

| 1990-1991 | |
|-----------------------------------|---|
| <u>Disparity between</u> | <u>Probability that random chance alone explains disparities in success rates</u> |
| Overall pattern | 0.1% |
| Asian American & white | 37.2% |
| Asian American & Latino/a | 37.8% |
| Asian American & African American | 84.4% |
| African American & white | 1.7% |
| African American & Latino/a | 26.4% |
| Latino/a & white | 0.1% |
| 1991-1992 | |
| <u>Disparity between</u> | <u>Probability that random chance alone explains disparities in success rates</u> |
| Overall pattern | 0.6% |
| Asian American & white | 67% |
| Asian American & Latino/a | 21.9% |
| Asian American & African American | 11.9% |
| African American & white | 0.1% |
| African American & Latino/a | 81.9% |
| Latino/a & white | 0.1% |
| 1992-1993 | |
| <u>Disparity between</u> | <u>Probability that random chance alone explains disparities in success rates</u> |
| Overall pattern | 1.1% |
| Asian American & white | 77.6% |
| Asian American & Latino/a | 8.8% |
| Asian American & African American | 69% |
| African American & white | 13.7% |
| African American & Latino/a | 11.3% |
| Latino/a & white | 0.2% |

First, law schools freely admit to practicing affirmative action, and affirmative action provides a good explanation for the higher success rates of Latinos and African American candidates. If law schools practice affirmative action to increase the representation of Latinos and African Americans on their faculties, that would make Latinos and African Americans more attractive than similarly credentialed whites. Additionally, if law schools believe that Latinos and African Americans develop interests in subjects like critical race theory more often than whites, then law schools who practice affirmative action for the sake of intellectual diversity should prefer Latinos and African Americans to whites.

Second, other articles and writings already illustrate how existing social stereotypes of Asian Americans make academic institutions less likely to include Asian Americans in affirmative action hiring. In particular, the model minority myth creates the perception that Asian Americans are all overqualified academic "superstars."²⁹ From this perspective, affirmative action need not include Asian Americans because it is assumed that sufficient numbers of Asian Americans will be hired anyway.³⁰ Additionally, the perceived academic success of Asian Americans makes people think that Asian Americans do not suffer from genuine discrimination.³¹ Finally, Asian Americans often are perceived as skilled in technical fields, but unskilled at less technical socially oriented fields. This might lead law schools to think that Asian Americans would be strong in areas like tax and corporations, but weak in fields related to affirmative action hiring like civil rights and critical race theory.³² Asian Americans should therefore be considered white for purposes of hiring because they are not really people of color.³³

Of course, it is still possible that a confounding factor has caused these results, and that Asian Americans experience the success rates they do despite being included in affirmative action. However, there is at least some reason to discount most obvious possibilities. For example, it could be that Asian Americans have weaker conventional academic credentials than other candidates.³⁴ Although it is not presently possible to directly test

29. Chew, *Asian Americans*, *supra* note 1, at 56-75; Wu, *supra* note 1, at 236-40. The stereotype clearly makes little sense in the context of law professor hiring because Asian Americans are underrepresented on law faculties. See *supra* note 15 and accompanying text.

30. Cf. *Regents of the University of California v. Bakke*, 438 U.S. 265, 309 n.45 (1978) (Powell, J., plurality opinion) ("The inclusion of [Asians as a favored group] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process."); Chew, *Asian Americans*, *supra* note 1, at 78.

31. See Chew, *Asian Americans*, *supra* note 1, at 8-24 (noting how people erroneously believe that Asian Americans do not suffer from discrimination); Posner, *supra* note 21, at 1157 (asking rhetorically if Asian Americans are an oppressed group to argue against affirmative action).

32. Chew, *Legal Academy*, *supra* note 12, at 34 n.101.

33. Wu, *supra* note 1, at 271-73; see also Chew, *Asian Americans*, *supra* note 2, at 78.

34. By conventional academic credentials, I mean criteria such as class rank, academic honors, law review membership, clerkships, advanced degrees, and published work which law schools traditionally have used to select new professors.

this proposition,³⁵ this does not seem likely because Asian Americans who are already law professors have traditional credentials which are as strong or stronger than those of other law professors.³⁶ Similarly, Asian Americans might have academic interests which are too narrow to make them attractive candidates. However, existing Asian American law professors teach and write in a wide variety of fields, including those related to affirmative action and those in high demand among law faculties.³⁷

CONCLUSION

This Article provides basic information which helps us understand the nature of Asian American racial identity. The statistics presented here are consistent with the belief that law schools do not regularly include Asian Americans in affirmative action hiring efforts. This suggests that law schools perceive Asian Americans as white or nearly white - at least for purposes of hiring new faculty. Further reflection about the statistics also shows that the subject of Asian American racial identity is one which merits further study.

Presently, there is too little statistical information about how Asian Americans fare under affirmative action. It is, of course, tempting to use statistics like those presented here to make sweeping statements about how all affirmative action affects Asian Americans, but such generalization is not warranted. The hiring of law professors represents a very narrow slice of our country's experience with affirmative action which may or may not be representative of the whole. Studies of other experiences with affirmative action are therefore necessary. Also, three years have passed since the candidates studied here applied to become law professors, and law school hiring tendencies may have changed during the interim. Politicians and courts have both raised serious attacks on the existence and scope of affirm-

35. The AALS has started to keep information about the credentials of FAR candidates along with racial information. However, as of this writing insufficient data had been collected to do a meaningful study.

36. Chew, *Legal Academy*, *supra* note 12, at 11, 17, 20, 23. It has also been noted that, as of 1990, Asian Americans comprised 5.3% of all Americans holding graduate and professional degrees despite comprising only 2.9% of the population. Chew, *Asian Americans*, *supra* note 1, at 46 n.211, 52 n.231. The statistics lend some support to the assertion that Asian Americans are highly credentialed.

37. There is some suggestion that Asian Americans concentrate their teaching in business law, international law, and constitutional law. Chew, *Legal Academy*, *supra* note 12, section III. D. 2. C. However, it is not clear whether this is the result of voluntary choice or the operation of stereotypes about Asian American technical skill. Furthermore, it is not at all clear how such interests would significantly lower success rates for Asian American candidates. Business law is considered a particularly difficult area in which to find candidates, so candidates who want to teach in those areas might be particularly desirable. International law is a steadily growing field. This would suggest that candidates in those areas might also be in high demand. Finally, constitutional law is a core subject which many other candidates want to teach, so it is not certain that Asian American interests in this field would make them significantly less desirable than other candidates.

ative action.³⁸ Academic institutions are not immune from these trends, and some have gone so far as to formally abolish affirmative action policies.³⁹ Additionally, affirmative action has increased the numbers of Latino and African American law professors, so law schools may now feel that they have done enough affirmative action hiring and can abandon the practice. Thus, it is possible that some law schools no longer practice affirmative action hiring, or that affirmative action hiring no longer exerts a statistically significant effect on the success rates of candidates for law faculty positions. It is also possible that affirmative action practices have changed to include Asian Americans.⁴⁰ Additional empirical research is needed before we have a complete understanding about how affirmative action presently affects Asian Americans, even in the limited world of law faculty hiring.

It is also important to study the fascinating connection between Asian American racial identity, Asian American political identity and the future of affirmative action. The inconsistent identification of Asian Americans as people of color gives Asian Americans a curious position in racial politics. For better or worse, affirmative action is generally seen as a zero-sum

38. For example, 1996 Republican presidential candidates have regularly used opposition to affirmative action in their campaigns. Evan Thomas & Bob Cohn, *Rethinking the Dream*, NEWSWEEK, June 26, 1995, at 18. One candidate, Pete Wilson, made that opposition a central theme. See B. Drummond Ayres Jr., *California Governor Vows to Cut Affirmative Action*, N.Y. TIMES, June 1, 1995, at B10; see also Howard Fineman, *The Rollback Begins*, NEWSWEEK, July 31, 1995, at 30 (outlining end of affirmative action at the University of California). The political appeal of attacks against affirmative action has wide appeal. The eventual Republican candidate for president, Bob Dole, promised legislation to end all federal racial preferences. *Id.* Even President Clinton, a Democrat, has found it necessary to qualify his support for affirmative action for fear of alienating voters. See John F. Harris, *For Clinton, A Challenge of Balance*, WASH. POST, June 14, 1995, at A1, A6.

In the courts, the trend is also against affirmative action. See *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (finding a violation of equal protection in a state law school admissions program that favored minority applicants).

39. See Fineman, *supra* note 38.

40. Shortly before this article went to press, the AALS released some preliminary statistics about success rates for the academic years 1993-94 and 1994-95. In 1993-94, the relative success rates of the four racial groups were:

| | |
|------------------|-------|
| white | 10.3% |
| Asian American | 10.8% |
| African American | 14.9% |
| Latino | 13.3% |

In 1994-95, the relative success rates of the four racial groups were

| | |
|------------------|-------|
| white | 10.3% |
| Asian American | 21.2% |
| African American | 32.9% |
| Latino | 20.7% |

RICHARD A. WHITE, DRAFT REPORT: VARIATIONS IN THE SUCCESS RATES OF MINORITY AND NONMINORITY CANDIDATES IN THE AALS FACULTY APPOINTMENTS REGISTER (1995) (copy on file with author). The data for 1993-94 suggests that affirmative action had a much smaller effect on hiring in that year than in previous years. However, the data for 1994-95 suggests a strong affirmative action effect which included Asian Americans. At this time, it is too early to tell what kinds of trends may be reflected in this information, especially in light of the possibility of that the relatively small number of Asian American candidates in any given individual year might render observed differences in success rates statistically insignificant. More research is undoubtedly necessary.

game. When jobs, government contracts or university admissions go to people of color because of racial politics, the common assumption is that those things would otherwise have gone to whites. This means that arguments about racial policy generally dissolve into trading the interests of whites for the interests of others.⁴¹ However, when Asian Americans become the focus of attention, things change. Asian Americans are obviously people of color, but the ease with which they are given white attributes makes it possible argue about the interests of whites without ever mentioning whites.

Consider how some opponents of affirmative action use Asian Americans to support their claims. They cite the academic, economic and professional success of some Asian Americans as proof that racial discrimination cannot possibly be a barrier to people of color in America.⁴² Affirmative action is not necessary to help people of color because Asian Americans do well without significant affirmative action benefits.⁴³ They then argue that affirmative action which excludes Asian Americans unfairly benefits other people of color over qualified Asian Americans.⁴⁴ Affirmative action should therefore be eliminated to create more opportunities for Asian Americans.

On its face, this argument is strictly about whether affirmative action is fair to Asian Americans. It never explicitly mentions whites. However, close attention reveals that the argument uses the malleable racial identity of Asian Americans to argue that affirmative action gives other people of color (i.e. African Americans and Latinos) unfair advantages over whites.

41. See Brest & Oshige, *supra* note 7, at 866 n.40 ("There is no avoiding the fact that admissions and employment are zero-sum games"); Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 776 n.115 (1995) (characterizing race-based scholarships as being at the expense of whites). But see Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 WAKE FOREST L. REV. 819, 826 (1995) (criticizing belief that affirmative action is always a zero-sum game); John E. Morrison, *Colorblindness, Individuality, and Merit*, 79 IOWA L. REV. 313, 354-55 (1994) (analyzing zero-sum assumptions about affirmative action).

42. Chew, *Asian Americans*, *supra* note 1, at 55-56.

43. Posner, *supra* note 21, at 1157 (using economic success of Asian Americans to criticize affirmative action); Wu, *supra* note 1, at 246 (discussing prevalent beliefs that Asian Americans are uniformly "well-off or have the ability to overcome discrimination.").

44. Consider the following argument by William Bradford Reynolds, deputy attorney general in the Reagan administration:

Charges that certain universities—Berkeley, U.C.L.A., Harvard, Stanford, Princeton, Brown, and others—are maintaining quotas to limit the number of Asian-American admissions have been made with alarming frequency in recent years. . . . Of particular interest to the topic at hand is the fact that racial preferences generally do not operate in favor of Asian Americans. Indeed, quite the opposite is true — they are the most likely explanation of the alleged discrimination against Asian Americans. . . . This has been the Department of Justice's objection all along to racial preferences, and the fact that the victims now are not white but members of other minority groups merely dramatizes the moral bankruptcy of the whole enterprise.

Wu, *supra* note 1, at 268-269. See also TAKAGI, *supra* note 1, at 2 ("Conservative scholars . . . complain that admissions policies set double standards, meritocratic ones for whites and Asians and preferential policies for other 'less qualified' minorities.").

The argument exploits the non-white version of Asian American identity to “prove” that people of color can succeed without affirmative action. At the same time, the argument “whitens” Asian Americans with model minority stereotypes and contends that it is wrong to prefer other people of color to Asian Americans with white attributes. This implies that affirmative action is also unfair to whites.⁴⁵

In short, the ambiguity of Asian American identity gives Asian Americans an unusual opportunity to affect the future vitality of affirmative action. If Asian Americans embrace or cultivate model minority stereotypes, they support arguments against affirmative action. If Asian Americans reject those stereotypes, they help affirmative action’s supporters. Not surprisingly, it is difficult to predict how Asian Americans will respond.

As an initial matter, Asian Americans disagree about whether affirmative action is in their best interests. Supporters can argue that affirmative action helps Asian Americans because it reminds people that racist stereotypes can negatively affect persons of color. If affirmative action ends, employers and others will quickly fall back into old patterns of behavior that completely exclude Asian Americans and all people of color. Thus, affirmative action helps Asian Americans even if they do not benefit as much as other people of color. By contrast, opponents can argue that affirmative action harms Asian Americans because it operates in a racist manner. Affirmative action programs are supposed to overcome racial discrimination, yet Asian Americans get left out because of racist stereotypes.

Additionally, Asian Americans disagree over the value of the model minority myth itself, as well as its broad social implications. Some Asian Americans will embrace the model minority stereotype because they find it flattering. Others will do so because they find it easier to survive when assimilated.⁴⁶ Still others will act out of a political conviction that persons of color should assimilate into a uniform “American” culture. For them, Asian Americans who efface their identities as people of color and oppose affirmative action are courageous, forward thinking people who will play an important role in healing America’s racial divides.⁴⁷

By contrast, other Asian Americans will reject the model minority myth because it draws disproportionate attention to a very small, admittedly successful segment of the Asian American population, thereby obscuring

45. See Chang, *supra* note 2, at 18-25; Chew, *Asian Americans*, *supra* note 1, at 71-72 (describing how model minority stereotypes can be used to create the impression that if other people of color do not succeed it is “their own fault”); Wu, *supra* note 1, at 271-73 (analyzing use of Asian American identity to argue against affirmative action).

46. See Chew, *Asian Americans*, *supra* note 1, at 69 (describing assimilation as common way for Asian Americans to “cope with . . . marginality”); Ikemoto, *supra* note 1, at 1588-89 (describing how, in the wake of the Los Angeles riots, Korean Americans tried to position themselves as whites within the racial hierarchy by placing themselves within the American Dream).

47. Cf. Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994). *But see Colloquy: The Politics of Backlash and the Scholarship of Reconstruction*, 81 IOWA L. REV. (forthcoming 1996) (a selection of essays discussing Professor Chen’s work).

significant numbers of Asian Americans who suffer from discrimination, poverty and poor health.⁴⁸ They will also be concerned that Asian Americans (and other people of color) can never truly assimilate into a white culture that has a long history of discriminating against them.⁴⁹ To be sure, the model minority myth holds Asian Americans out as people to be admired, even imitated, and this suggests that Asian Americans will face no discrimination as they cross the color line.⁵⁰ Despite all this, the fear is that too many whites will never see Asian Americans as true peers, and that the very qualities that fuel the model minority myth will eventually make Asian Americans appear threatening, just as they have in the past.⁵¹ When this happens, Asian Americans will again become the victims of discrimination, victims who have helped dismantle programs like affirmative action that could have helped them overcome discriminatory barriers.⁵²

There is still much to learn about the racial identity of Asian Americans. Future debates about Asian American identity, affirmative action and race in America will undoubtedly require further information about the experience of Asian Americans. Hopefully, the statistics provided in this Article will provide one of many points from which Asian Americans and others can continue exploration of the relevant issues.

48. Brest & Oshige, *supra* note 7, at 892-93; Chang, *supra* note 2, at 21; Chew, *Asian Americans*, *supra* note 1, at 28-31, 56.

49. Chang, *supra* note 2, at 78-79 n.403 (discussing problems with "melting pot" images of America); Chew, *Asian Americans*, *supra* note 1, at 67 (citing negative attitudes towards social relations with Asian Americans among white respondents to a recent study).

50. For example, in reporting on Asian Americans in a "60 Minutes" segment, Mike Wallace said, "Why are Asian Americans doing so exceptionally well? They must be doing something right. Let's bottle it." TAKAKI, *supra* note 3, at 474 (citing *60 Minutes: The Model Minority* (CBS television broadcast, Feb. 1, 1987)).

51. For example, the model minority myth compliments Asian Americans for being academic superstars. *Id.* Those same characteristics then become the basis for fearing Asian Americans in academic environments. Thus, "U.C.L.A." becomes an acronym for "University of Caucasians Living Among Asians." *Id.* at 479. Students also decline to take classes with high Asian American enrollments because the "curve will be too high." Jay Mathews, *Asian-American Students Creating New Mainstream*, WASH. POST, Nov. 14, 1985, at A6. This fear in turn may explain the apparent ceiling on Asian American enrollments in elite universities. Chew, *Asian Americans*, *supra* note 1, at 61-62; Bunzel & Au, *supra* note 11, at 47.

52. See Chang, *supra* note 2, at 24 ("[T]o the extent that Asian Americans accept the model minority myth, we are complicitous in the oppression of other racial minorities and poor whites."); Mari Matsuda, *We Will not be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79 (1993) (describing how Asian Americans could unwittingly help white racism unjustly defeat interests of people of color).