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EXPANDING THE CIVIL RIGHTS DIALOGUE IN AN INCREASINGLY DIVERSE AMERICA: A REVIEW OF FRANK WU'S *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE*¹

*Harvey Gee*²

I. INTRODUCTION

Books on the Asian American³ experience have appeared on book store shelves at a steady pace over the past few years, containing literature that includes surveys of practically every Asian ethnicity and focusing on particular time periods. Long the province of academic historians and social scientists, the field consisted predominantly of narratives or policy analysis that

¹ FRANK H. WU, *YELLOW: RACE, IN AMERICA BEYOND BLACK AND WHITE* (2002).

² Law Clerk to the Honorable Roger T. Benitez, United States District Court for the Southern District of California. LL.M, George Washington University Law School; J.D., St. Mary's University School of Law; B.A., Sonoma State University. The views expressed herein are not necessarily attributed to any past, present, or future employers. The author has previously written on Asian Americans and the law. See, e.g., *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C.J. INT'L L. & COM. REG. 559 (2001); *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. L.A. INT'L & COMP. L. REV. 1 (2001). In the interests of disclosure, the author worked as a legal assistant with Frank Wu at the Morrison & Foerster law firm in San Francisco where Professor Wu served as a litigation associate prior to embarking on an academic career. Professor Wu has also assisted the author, while as a law student, in the development of several potential topics for law review articles. The author thanks Professor Neil Gotanda for his helpful comments during the final stages of the completion of this review.

³ The term "Asian American" encompasses people of Asian descent from over 30 countries, including countries in East Asia, Southeast Asia, the Indian Subcontinent and the Pacific Islands. WU, *supra* note 1, at 20.

evaluated immigration, assimilation, and multiculturalism. More recently, Asian American legal activist-scholars, by using the Critical Race Theory approach,⁴ have sought to expand the genre by placing the Asian American experience within the wider context of race relations and civil rights. They have attracted much needed attention to the experiences of Asians and Asian Americans in dismantling the traditional black/white paradigm of race relations and in negotiating the contemporary racial and cultural boundaries in this country.⁵ Each of these volumes reflect markedly distinct approaches to analyzing the history of Asian

⁴ The two leading anthologies on Critical Race Theory are CRITICAL RACE THEORY: THE KEY WRITING WHICH FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., The New Press 1995) and CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., Temple University Press 1995). Critical Race Theory addresses this problem by challenging the very core of the traditional racial paradigm characterizing American law, pushing the limits of race analysis beyond the historical black/white dichotomy of race relations. Critical Race Theory, in its purest form, is best understood as the antithesis to the traditional belief in "color-blindness." Critical Race Theorists posit that the "color-blind" ideal is an inadequate attempt by political conservatives and legal institutions, including the Supreme Court, to address social racism because color-blindness actually supports the existing racial hierarchy. Accordingly, a deeply rooted modern legal system that distinguishes between whites and non-whites must be maintained to vindicate the rights of minorities who have suffered from subordination in the past due to racial classifications. The persistence of racial classifications in the law lends legitimacy to the notion that separate races do exist and that all members of society cannot help but think of themselves and others in racial terms. Thus, the modern day legal system must address the systemic effects of these classifications.

⁵ See, e.g., ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (Rutgers University Press 1998); ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION-STATES (New York University Press 1999); LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (Duke University Press 1996); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (New York University Press 1999). The contributions by Asian American scholars to the Critical Race genre have been tremendous. See generally Gee, *Beyond Black and White*, *supra* note 2.

Americans and the cultural and political issues they face. Their diversity reminds us that readers must try to distinguish between works that contain something new and those that simply retrace previously explored paths.

Howard University Law Professor Frank Wu brings forth a truly innovative analysis in his eagerly awaited new book, *Yellow: Race, in America Beyond Black and White*. This volume is perhaps one of the most ambitious books ever written about Asian Americans and what he terms the “new paradigm” of civil rights, which is multiracial and includes everyone. Within its dense 399 pages, Wu invites readers to engage in a substantive dialogue about the interplay between race and culture in America. While Wu includes some of his previous writings, most of the material found in *Yellow* is original work. The issues that Wu presents are the same issues that many Asian Americans can identify with and relate to.

During a recent car drive from San Diego into Mexico, I reflected upon the ease with which I could cross the border between the two countries without any concern. If I were questioned at the border about my citizenship, I would merely respond with the obligatory, “U.S.C.” or “U.S. Citizen,” and be done with it. By virtue of having been born in 1968 at Kaiser Permanente Hospital in San Francisco, I have been a citizen of this country since birth. My parents had immigrated from Canton, China only a decade before. In some respects I am grateful, if not indebted, to Wong Kim Ark, another native San Franciscan who

in 1898 brought his constitutional challenge to the United States Supreme Court.⁶ His case formally dealt with the right of Chinese Americans to citizenship. The facts were straightforward: He was refused admission to the United States upon his return from an overseas visit on the ground that he was not a citizen and could not be admitted as an immigrant because of the Chinese Exclusion Acts.⁷

Without doubt, *Wong Kim Ark* has been the major legal precedent establishing birthright citizenship under the Fourteenth Amendment. At the time the case was heard, and under the terms of the naturalization statutes at the time, Asians were not generally eligible for naturalization.⁸ The Supreme Court in *Wong Kim Ark* defined national citizenship while preserving the distinction between national and state citizenship.⁹ The Court construed the first sentence of Section 1 in accordance with the congressional intentions, holding that a child born in the United States of Chinese parents who themselves were ineligible to be naturalized is, nevertheless, a citizen of the United States entitled to all the rights and privileges of citizenship.¹⁰ Building upon *Wong Kim Ark*, and

⁶ *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

⁷ The Chinese Exclusion Acts include the Chinese Immigration Act, ch. 126, 22 Stat. 58 (1882); the Chinese Immigration Act, ch. 220, 23 Stat. 115 (1884); the Exclusion of Chinese Laborers Act, ch. 1015, 25 Stat. 476 (1888); and the Cary Act, ch. 301, 28 Stat. 372 (1894).

⁸ Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002).

⁹ *Wong Kim Ark*, 169 U.S. at 675-76.

¹⁰ *Id.* at 688. Congress' intent in including the qualifying phrase "and subject to the jurisdiction thereof" was apparently to exclude from the reach of the language children born of alien enemies in hostile occupation, a recognized exception to the common-law rule of acquired citizenship by birth, as well as

other equally important social, political, and legal events that have taken place in Asian American history, *Yellow* places the necessary analytical framework to understanding who Asian Americans are.

On a theoretical level, Wu touches upon many of the issues that other Asian American scholars have only begun to examine. To summarize, Asian Americans have been perceived as being: (1) foreigners, even if they were born in this country and speak with a distinctly American accent; (2) unfairly economically competitive; and (3) “overrepresented” model minorities in higher education.¹¹ Perhaps at the core of all of these racial stereotypes is the popular perception by mainstream Americans that Asian Americans, regardless of how long they have been in this country, do not really belong. These misperceptions, along with others, are methodically addressed and refuted by Wu like a highly skilled surgeon with the sharpest scalpel that cuts through layers of skin with precision.

In his book, Wu combines his personal awareness with a scholar’s detachment and an activist’s engagement. This combination of personal and professional experiences helps us to examine critically all sides of the racial discourse. Wu draws on an impressive array of printed materials accompanied by extensive footnotes that alone contain the necessary groundwork for academics and graduate students to produce other individualized research papers. Wisely relying on personal accounts and concrete

children of members of Indian tribes subject to tribal laws. *Id.* at 689; *see also* *In re Look Tin Sing*, 21 F. 905 (C.C.Cal. 1884) (holding that an American-born son of Chinese parents was, under the Fourteenth Amendment, an American citizen).

¹¹ *See generally* WU, *supra* note 1.

examples of current events, Wu effectively uses quotations to add authority and a sense of immediacy to his text. His prose largely consists of engaging passages that avoid the unbearable excess that all too often taints books about race and civil rights.

Frank Wu is well qualified to write this book. He is the first Asian American to join the faculty at the Howard Law School. Anyone familiar with Asian American issues knows of him or has at least seen extensive citations to his scholarship. Professor Wu has been prolific in producing a large body of research and policy analysis of Asian American issues. He has authored many influential law review articles, and more than 200 articles have appeared in major periodicals such as the Washington Post, L.A. Times, Chicago Tribune, and Asian Week.¹²

Unmistakably, *Yellow* takes in the entire breadth of the Asian American experience, ranging from the milestone events such as the 1940s internment camps and the 1992 Los Angeles riots to the prosecution of nuclear scientist Wen Ho Lee.¹³ Wu's volume is timely and is a much needed meditation on the position of Asian Americans in United States society. Readers who are curious to know the racial motivation behind the 1982 killing of a

¹² See, e.g., Frank H. Wu, *Profiling Principle: The Prosecution of Wen Ho Lee and the Defense of Asian Americans*, 7 UCLA ASIAN PAC. AM. L.J. 52 (2001); Theodore Hsien Wang & Frank H. Wu, *Wen Ho Lee Was Singled Out by Race*, THE PLAIN DEALER, Sept. 1, 2001, at 11B.

¹³ After the attack on Pearl Harbor, Japanese-Americans were interned in camps, a practice upheld as constitutional by the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944). WU, *supra* note 1, at 98. In the 1990s, Wen Ho Lee, a naturalized American citizen, was the focus of a United States government investigation into possible espionage because it reasoned, "if the

Chinese American, Vincent Chin, in Detroit or the changing dynamics of Asians passing as “whites” will find concise and accurate treatments.¹⁴ They will also find detailed analyses about a wide breadth of related issues such as the model minority myth, the perpetual foreigner syndrome, the social acceptability of a Caucasian man dating an Asian or Asian American woman but not of an Asian or Asian American man dating a Caucasian woman, and the question of whether Asians eat dogs. This material might strike some readers as tedious and repetitive, but others, especially readers unfamiliar with these issues, will be grateful to have such things explained so clearly and eloquently by Wu.

As Wu notes in the introduction, “race matters because it shapes every aspect of my life — and everyone else’s.” He explains that the book should serve to gain empathy and understanding from his white friends and white relatives.¹⁵ He “examines what it means to live as an Asian American and its implications for the United States as it thrives as a multiracial nation.”¹⁶ Wu primarily draws from his professional experiences as a first generation Chinese American man who grew up in Michigan. He went to college in Baltimore, worked as an attorney

Chinese military had sought an inside source, they would have found an ethnic Chinese.” WU, *supra* note 1, at 177.

¹⁴ In 1982, two white autoworkers beat 17-year-old Vincent Chin to death with baseball bats out of misplaced anger that Japanese cars were driving Detroit auto manufacturers out of business. WU, *supra* note 1, at 70. Passing is when “[p]eople of color who have the requisite skin tone and facial feature . . . pretend that they are exclusively white so that they can enjoy the tangible advantages.” WU, *supra* note 1, at 290.

¹⁵ WU, *supra* note 1, at 7.

¹⁶ WU, *supra* note 1, at 16.

in a large corporate law firm in San Francisco, and uses his daily experiences as the first Asian American law professor at Howard University in order to illustrate that a broader perspective on race jurisprudence is possible.

Armed with an analytical framework utilizing history, social science data, and personal anecdotes, Wu advances his primary theme to illustrate how Asian Americans still face discrimination, even as they continue to gain social and economic mobility.¹⁷ Due to what Wu terms “rational discrimination,” the discrimination against Asian Americans which ranges from the “glass ceilings” in the work place to overt racist violence against Asian Americans, pervasive racial stereotypes of Asian Americans have been permitted to perpetuate without challenge.¹⁸

Typically, Asian American issues receive little attention, perpetuating the widespread belief that racism against Asian Americans is insignificant or non-existent. Wu believes that this popular misconception needs to change, that Asian Americans are situated differently from other racial minorities. I believe this is inadequate to deal with the demographic spectrum of many forms

¹⁷ WU, *supra* note 1, at 16.

¹⁸ WU, *supra* note 1, at 196 (acknowledging that “[r]ational discriminators cannot avoid criticism by claiming that they rely on the truth, because they conflated the truth about a group with the truth about the individual”). According to Wu:

It . . . does not much matter if the racial inference is positive or negative. Rational discriminators could infer that an Asian American is a good student, a likely spy, or both. For them, the issue is whether the connections are supported, not whether the conclusion is a compliment or an insult, a minor slur or a major cruelty.

Id. at 198.

of discrimination against Asian Americans, including anti-Asian violence and inter-minority conflicts. The shortcomings of the post-Civil Rights discrimination laws demonstrate the need for a more refined and inclusive analysis of race which guarantees Asian Americans equal protection of the laws.¹⁹

This book review summarizes the descriptive sections of *Yellow* and examines some of Wu's major points. It is organized into five sections. Part II explores the racialization of Asian Americans from perpetual foreigner and model minority to indispensable foreign spy and terrorist. Part III analyzes Wu's arguments in support of affirmative action and responds to his views on the subject of Asian Americans and affirmative action. In particular, this review will examine Wu's strong defense of affirmative action and suggest that socio-economic affirmative action is a better pragmatic alternative to race-based preferential treatment. This part also examines the role that Asian American civil rights organizations have played in advocating on behalf of Asian American interests. Part IV discusses race as a fluid social

¹⁹ See Michael Omi & Dana Y. Takgai, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 271 (Robert Post & Michael Rogin eds., 1998). The authors explain:

The hegemonic 'black/white' paradigm of race relations has fundamentally shaped how we think about, engage, and politically mobilize around racial issues. Historical narratives of racialized minorities in the United States are cast in the shadows of the black/white encounter. Contemporary conflicts between a number of different ethnic/racial groups are understood in relationship to this bipolar model. . . . This prevailing bipolar model of race significantly obscures the complex patterns of race over time.

construction, and it focuses on Wu's discussion of intermarriage and the unique racial experiences of mixed race individuals. Part V concludes with remarks about the significance of Wu's *Yellow* in the future landscape of the emerging Asian American jurisprudence.

II. THE RACIALIZATION OF ASIAN AMERICANS

The case of Wen Ho Lee shows how powerful . . . racial understandings remain in America. Until we are able to dislodge both structural reaffirmations of racial categories as well as disrupt the commonsense nature of culturally embedded racial profiles, we will make little progress in attacking American racial practices.²⁰

Wu opens his book with personal observations about growing up in the only "Oriental" family in a suburban neighborhood outside of Detroit. He then focuses on how Asians and Asian Americans are racialized in this country, ending with an analysis of the importance of coalitions among racial minority communities as a means of improving race relations.²¹ Wu

²⁰ See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1703 (2000).

²¹ WU, *supra* note 1, at 18. See also Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U.L. REV. 687, 689 (1996) (discussing the value of coalition building between different racial groups in an acknowledgement of the democratic process).

presents a strong argument that discrimination against Asian Americans is a real and serious issue that should be addressed. In one of the most compelling sections of *Yellow*, Wu tackles the issue of historical and contemporary stereotyping.²² He proceeds to analyze how Asian Americans have been classified as “perpetual foreigners.”²³ Anyone familiar with Asian American studies knows of its origins. History has shown that the American legal system has played a central role in the racialization of Asian Americans as “outsiders.” Numerous immigration laws based upon race and national origin during the nineteenth century were directed at Asian immigrants,²⁴ creating racial barriers to

²² WU, *supra* note 1, at 18.

²³ WU, *supra*, note 1, at 18. Neil Gotanda has surveyed the various aspects of foreignness and finds certain distinct themes. These images are stereotypes and caricatures of Asians: “(1) political foreignness, (2) social and cultural foreignness, and (3) foreignness in labor and economics.” Neil T. Gotanda, *Citizenship Nullifications: The Impossibility of American Politics*, in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS* 92 (Gordon H. Chang ed., 2001). See also Wu, *Profiling Principle*, *supra* note 12, at 53, where the author notes:

The perpetual foreigner assumption — that Asians are sojourners, visitors, and/or guests who cannot overcome an inherent alien status — makes it easy to deprive Asian Americans of civil rights. Asian Americans are not integrated into a paradigm of civil rights because the poor treatment accorded Asian Americans is based not only on their race but on their alienage, and therefore is acceptable.

Id.

²⁴ ANCHETA, *supra* note 5, at 25; see also Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22-23 (1998) (discussing Congress' racial motives for Asian exclusion through immigration laws); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1121-22 (1998) (describing how aspects of immigration and nationality laws reinforced the anti-Asian sentiment reflected in the exclusion laws).

naturalization.²⁵ Professor Lisa Lowe has suggested that during the last century and a half, the American citizen has defined the Asian immigrant in all aspects: legally, economically, and culturally.²⁶ These definitions, Lowe insists, have been created by whites casting Asian immigrants as people who are from countries that are exotic, barbaric, and alien.²⁷ Significantly, within the process, Asian Americans are racialized as foreign born outsiders.²⁸ Consequently, the foreignness component creates a precarious duality: Asian Americans are perceived as foreign and thus entitled to lesser standards of protection than “true Americans.”²⁹ Similarly, Law Professor Jerry Kang surmises that:

Asian Americans are seen as foreigners. Regardless of how many generations an Asian American’s family has been in the United States, a person of Asian descent is often presumed to be an immigrant, visitor, foreigner. Not surprisingly, this

²⁵ ANCHETA, *supra* note 5, at 25.

²⁶ LOWE, *supra* note 5, at 4.

²⁷ LOWE, *supra* note 5, at 4.

²⁸ LOWE, *supra* note 5, at 4. Through discussions of the continued exploitation of Asians and other racialized immigrants throughout and beyond the period of “enfranchisement” after 1965, Lowe emphasizes that “a critical interrogation of both the concept of citizenship and the state’s role as the guarantor of citizens’ rights has been and is still necessary.” *Id.* at 15.

²⁹ LOWE, *supra* note 5, at 12-13; see also Enid Trucios-Haynes, *Latino/as in the Mix: Applying Gotanda’s Models of Racial Classification and Racial Stratification*, 4 ASIAN L.J. 39, 56 (1997) (arguing that the “element of foreignness as part of a racial identity is maintained regardless of citizenship status, when a group is viewed as inassimilable”); Neil Gotanda, *Race, Citizenship and the Search for Political Community Among “We the People,”* 76 OR. L. REV. 233, 252 (1997) (book review) (stating that non-black racial minorities, primarily Hispanic Americans, Asian Americans, and Arab Americans, often face a form of racism possessing a dimension of “foreignness” which translates into racially discriminatory treatment).

reaction is especially strong toward those who retain the language, culture, and customs of their ethnic heritage. Yet even Asian Americans who exhibit no obvious cultural or linguistic signs of recent immigration are presumed to be foreign, incongruous newcomers.³⁰

The perpetual foreigner stereotype provides the necessary context for understanding the recent egregious episodes of the racial stereotyping of Asian Americans.

A. Democratic Fundraising Controversy

The concept of foreignness has been used against Asian Americans in their participation in the democratic process. In a dramatic fashion, Wu proceeds to deconstruct the assimilationist myth by arguing that America's national identity is based on the construction of Asian Americans as foreigners. He cites the example of the 1996 Democratic National Committee campaign controversy and analyzes the hidden meaning of the campaign finance scandal that unfairly targeted the contributions of Asian American donors.³¹ Even though Asian Americans have been citizens and legal residents of this country for generations, Wu

³⁰ Jerry Kang, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1931-32 (1993).

³¹ WU, *supra* note 1, at 104. See also Neil T. Gotanda, *Citizenship Nullifications: The Impossibility of American Politics*, in ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS, *supra* note 23, at 79 (stating that at this time there were hysterical headlines proclaiming that "Chinese intelligence, operating through spies of Chinese ancestry, had stolen crucial nuclear weapons secrets").

contends that they are nevertheless assumed to be foreign born.³² He argues that this misperception has led to racial stereotyping.³³ The racialization of the campaign served to resurrect and reinforce the “foreignness” of Asian Americans,³⁴ while reviving the historical legacy of political disenfranchisement that has plagued Asian Americans since they reached American shores. The scandal at issue was the result of political parties seeking campaign donations by any means necessary, leading to corruption, illegal practices, and ultimately a democratic crisis.³⁵

According to Wu, the racial aspects of the John Huang campaign fundraising fiasco were obvious. He argues that in late 1996, Asian Americans reached a turning point in their political empowerment.³⁶ Wu states that Asian Americans were transformed from invisible to infamous with the Democratic National Committee campaign financing scandal.³⁷ He insists that whatever the merits of allegations about individual wrongdoing or Chinese government intentions, the “Asian Connection” affair

³² WU, *supra* note 1, at 104.

³³ WU, *supra* note 1, at 104.

³⁴ Virtually every news article that offered a chronological or detailed description of the controversy mentioned Huang’s racial background and immigration history. Given his fundraising among Asian Pacific Americans, a general reference to race might be regarded as merely descriptive. But early allegations of misconduct, even in articles that explicitly noted there was yet no evidence for the claims, also mentioned that the Riady family, like Huang, is ‘ethnic Chinese’ in Indonesia. Frank H. Wu & May L. Nicholson, *Have You No Decency? An Analysis of Racial Aspects of Media Coverage on the John Huang Matter*, ASIAN AM. POL’Y REV. VII 18 (1997).

³⁵ *Id.*

³⁶ WU, *supra* note 1, at 104.

³⁷ WU, *supra* note 1, at 104.

incorporated racial stereotyping.³⁸ Wu astutely notes that Asian Americans have been racialized in a negative light by the media coverage and negative images of Asian Americans through its mass outlets.³⁹ In particular, during the late 1990s, mainstream Americans were exposed to the crude two dimensional stereotype of Asian Americans as foreign political campaign donors or spies against the States. Notably, this practice employed by the media has also been adopted, to a significant extent, by law enforcement officials and policymakers.

B. Injustice for Some: The Failed Prosecutions of Wen Ho Lee and Captain James "Youseff" Yee

Racial profiling of Asian Americans as spies demonstrates that the practice of law enforcement and policy makers stereotyping and penalizing African Americans solely on the basis of their skin color is not exclusive to one racial group.⁴⁰ In arguing that nuclear scientist Wen Ho Lee was the victim of racial profiling, Wu notes that the Federal Bureau of Investigation selectively targeted scientists because of their race. This indiscriminate use of racial profiling can lead authorities to believe

³⁸ WU, *supra* note 1, at 104.

³⁹ WU, *supra* note 1, at 104.

⁴⁰ WU, *supra* note 1, at 104. The issue of racial profiling has affected many non-whites and has become a topic of great discussion. Cf. Kathryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61, 63 (2001) ("The issue of racial profiling has evoked a wide range of policy responses, including legislation, political commentary, community protests, and empirical study.").

that every “ethnic” American is a potential spy.⁴¹ Wu suggests that racial profiling of Asian Americans is created by blending the racial category and the racial cultural understanding of Asian Americans.⁴² Similarly, in his argument that nuclear scientist Wen Ho Lee was the victim of racial profiling, Neil Gotanda writes that, “The assignment to Wen Ho Lee of a presumption of disloyalty is a well-established marker of foreignness. . . . And foreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Americans.”⁴³

Wu then draws an intriguing parallel between the prosecution of Wen Ho Lee and the internment of more than 112,000 Japanese Americans during World War II. During that time, every person of Japanese descent, regardless of their citizenship, was considered “foreign.”⁴⁴ Thus, Japanese loyalty became imminently suspect. Notably, however, this “foreignness” component was attributed to Japanese Americans and not Italian

⁴¹ Wang, *supra* note 12, at 11B.

⁴² Wu, *supra* note 1, at 104. See also DAN STOBBER & IAN HOFFMAN, A CONVENIENT SPY: WEN HO LEE AND THE POLITICS OF NUCLEAR ESPIONAGE 347 (2001) (“[T]he Wen Ho Lee affair was an ugly chapter in U.S. history. It was a time when democratic ideals were forgotten in the name of national security, when ideology and ambition overpowered objectivity, and when partisan warfare trumped statesmanship.”); Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence* 7 ASIAN L.J. 69, 76 (2000) (“The state has historically classified Asian Americans as foreigners and has treated Asian Americans as threats to U.S. solidarity and security.”).

⁴³ Gotanda, *supra* note 20, at 1694.

⁴⁴ Gotanda, *supra* note 23, at 82-83.

Americans or other whites.⁴⁵ Legal scholar Neil Gotanda has suggested that:

[T]he separability of the juridical categories of “citizen” and “alien” is clear, as is the parallel social distinction between “American” and “foreign.” But when the individuals concerned are Other Non-Whites, the racial considerations render the “natural” coincidence of citizen and American much less certain. A Japanese-American citizen in 1942 was easily considered “foreign,” thus making possible the judgment that likelihood of disloyalty was high enough to justify wholesale internment.⁴⁶

To be sure, Wu is critical of those who believe that the internment was proper because, at the time, the Japanese threat to the nation was perceived to be great, therefore making the internment “militarily necessary.”⁴⁷ Perhaps to the dismay of holders of unpopular views, Wu supports his position that the internment was a grave injustice by explaining that recent scholars have shown that before the camps were established, high-ranking

⁴⁵ WU, *supra* note 1, at 40. See also Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (“One of the critical features of legal treatment of Other non-whites has been the inclusion of a notion of ‘foreignness’ in considering their racial identity and legal status.”). Cf. Juan F. Perea, “Am I an American or Not?” *Reflections on Citizenship, Americanization, and Race*, in IMMIGRATION & CITIZENSHIP IN THE 21ST CENTURY 62 (Noah M. J. Pickus ed., 1998) (arguing that during the internment, for example, “when constitutional principles are tested and the perceived need for national unity is great, [there is a] majoritarian tendency to act against minority citizens, regardless of Americanization and regardless of citizenship”).

⁴⁶ Gotanda, *supra* note 45, at 1191.

⁴⁷ WU, *supra* note 1, at 40.

decision makers within the United States government had already concluded that Japanese Americans did not present a serious security risk.⁴⁸ The United States Department of Justice concealed this conclusion. Remarkably, forty years later, a court overturned the convictions of the individuals who challenged the internment.⁴⁹

Since the publication of *Yellow*, other examples of racial profiling of Asian Americans have further strengthened Professor Wu's arguments. Specifically, the events of September 11, 2001, and the present war on terrorism have brought about the latest round of tough new laws directed at immigrants and suspected terrorists.⁵⁰ The investigations have primarily focused on Muslims or people of Arab heritage. A particularly egregious case was the collapsed prosecution of suspected spy Captain James "Youseff" Yee, the Muslim Chinese American Army Officer at Guantanamo Bay. Yee, a native born Chinese American, "raised a Christian in

⁴⁸ WU, *supra* note 1, at 40. See also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in CRITICAL RACE THEORY: THE KEY WRITING WHICH FORMED THE MOVEMENT 67 (Kimberle Crenshaw et al. eds., 1995) stating:

This internment, now recognized as a constitutional violation, was initiated without any reasonable cause to believe the Japanese-Americans posed a threat to national security, as recently revealed documents confirm. The government's own conclusion that Japanese-Americans were loyal citizens was withheld from the Supreme Court in an act of fraud so egregious that federal judges have seen fit to use the extraordinary writ of error corum nobis to set aside the convictions of internment resisters some forty years after the fact.

Id.

⁴⁹ See Matsuda, *supra* note 48, at 67.

⁵⁰ See T. Alexander Aleinikoff, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 72 (2002). See

New Jersey, was a star wrestler in high school, went to West Point and converted to Islam in 1991.”⁵¹ That year, Yee was deployed to Saudi Arabia after the end of the Gulf War. He married a Syrian woman. “When he returned to the United States, he was asked by the Pentagon to serve as a chaplain, and he reenlisted.”⁵² Apparently, Yee was charged with various trumped up claims and is now stuck with a group of miscellaneous charges lodged against him, seemingly in an effort to drum him out of the military in disgrace.

Initially, it was alleged that Yee breached security as “part of a fifth column with two Arab-language translators” at Guantanamo Bay in Cuba.⁵³ He was held for a month before he was formally charged with five offenses: sedition, aiding the enemy, spying, espionage, and failure to obey a general order.⁵⁴ Officials reported that they found “suspicious documents” and notebooks in Yee’s backpack containing information and diagrams about detainees.⁵⁵ “Prosecutors seemed so certain of Yee’s guilt that they hauled him to the military’s maximum-security brig in South Carolina and warned his lawyers to start preparing a death-penalty defense.”⁵⁶

generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

⁵¹ Andrew Lam, *Wen Ho Lee II?*, ALTERNET.ORG, Sept. 29, 2003, at <http://www.alternet.org/story.html?StoryID=16851>.

⁵² *Id.*

⁵³ L.A. Chung, *Embattled Captain Receiving Support of Bay Areas Groups in Fight With Army*, THE MERCURY NEWS, Dec. 5, 2003, at 2003 WL 69054660.

⁵⁴ Lam, *supra* note 51.

⁵⁵ Mark Miller, *A Very Curious Case*, NEWSWEEK, Dec. 22, 2003, at 41.

While there were racial undertones in both cases, there were also “notable differences between Lee and Yee. Lee is a Taiwanese immigrant who became a naturalized citizen. Yee is the American-born son of Chinese immigrants [who] was raised in a New Jersey suburb.” Yee, unlike Lee, is a Muslim convert.⁵⁷

In the prosecution of Yee, he was portrayed as both Chinese and a Muslim, with possible ties to terrorists. This rare combination attributed two layers of “foreignness” to Yee. As Professor Saito remarked: Just as Asian Americans have been “raced” as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been “raced” as “terrorists”: foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.⁵⁸

But, in the end, other than these key distinctions, the Yee case is identical to the Wen Ho Lee case in form and structure. Both men are Asian Americans who worked for the government in classified, highly sensitive settings, and they were both accused of

⁵⁷ Deborah Kong, *Asian Activists Wary of Prejudice in Army Inquiry*, THE PHILADELPHIA INQUIRER, Oct. 20, 2003, at A4, at 2003 WL 63798346.

⁵⁸ Natsu Taylor Saito, *Symbolism Under Siege: Japanese Americans Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001). Cf. Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 53-54 (2002) (“The internment of Japanese Americans during World War I is the obvious precedent for the treatment of Arab Americans and Muslim Americans in the aftermath of the September 11, 2001, terrorist attacks”).

and arrested for possession or mishandling of classified information, which immediately turned into accusations of espionage and treason.⁵⁹

From the start of the media's coverage of the case, the government offered very little information. Yee was eventually freed after spending three months in military prison when "the Army quietly dropped the espionage accusations and . . . allowed him to return to active duty" — but he was relieved of his Guantanamo duties and was reassigned to a desk job.⁶⁰ However, just a month after his release, in an arguably vindictive move, authorities brought new charges of adultery and downloading pornography on government-issued computers against him.⁶¹

⁵⁹ While much of the recent legal and popular literature, including *YELLOW*, has discussed the model minority myth and the perpetual foreigner stereotype in great detail, remarkably, none of the writings have offered the supposition that each of these generalizations may be exclusive of one another. While the details are not discussed here, I would suggest that these two stereotypes, though they compliment one another quite a bit, are actually mutually exclusive in the affirmative action discussions and in the news accounts of spy allegations against Asian Americans nuclear scientist Wen Ho Lee and Muslim Chaplain James Yee. By most definitions, both highly educated men realized the American dream through hard work and perseverance, but these achievements were ignored while Lee and Yee were portrayed as un-American and as foreign spies.

⁶⁰ Miller, *supra* note 55.

⁶¹ Miller, *supra* note 55.

C. Model Minority Myth

The model minority is a companion stereotype to the perpetual foreigner. In several compelling passages, Wu uses the “model minority myth” to describe the racial experience of Asian Americans, noting how Asian Americans are portrayed as models of success, which has lent itself to the creation of the myth.⁶² This myth depicts Asian Americans as one monolithic ethnic group that achieves economic success and social acceptance through education and hard work without governmental assistance or racial preferences.⁶³ Wu asserts that this has been the dominant image of Asians in the United States. “Ever since the immigration reforms in 1965 led to a great influx of Asian peoples, we have enjoyed an excellent reputation.”⁶⁴ Wu suggests, that “[Asian Americans] are said to be intelligent, gifted in math and science, polite, hard working, family oriented, law abiding, and successfully entrepreneurial.”⁶⁵ This will lead the reader to Wu’s explanation of the origins of the myth and its factual inaccuracies.⁶⁶ He asserts

⁶² WU, *supra* note 1, at 40. See also Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L. J. 1, 2 (2000) (“Asian Americans have received applause for their academic achievements, high family incomes, industriousness, low levels of criminal behavior, and stable family structures. Asian Americans may be perceived as blending neatly into corporate and community structures because of their cultural values of non-aggression and preservation of the status quo.”).

⁶³ WU, *supra* note 1, at 40.

⁶⁴ WU, *supra* note 1, at 40.

⁶⁵ WU, *supra* note 1, at 40.

⁶⁶ WU, *supra* note 1, at 41.

that it is nothing more than a stereotype which defies the reality of the Asian American experience in America.⁶⁷

Other scholars have presented similar findings. For example, scholars Lucie Chang and Philip Yang dispel the inaccurate and disingenuous stereotype by revealing real facts about Asian Americans.⁶⁸ First, the perception of the high average income levels of Asian Americans is supported by the past three censuses which show that for the country as a whole, Asian Americans have a significantly higher level of median household income than all other breach ethnic groups.⁶⁹ However, in dispelling the stereotype, Cheng and Yang explain that “[m]edian household income may be a misleading indicator, since Asian families have more workers per household than white families and

⁶⁷ WU, *supra* note 1, at 49. Wu states that “[t]he model minority myth also looks modern. It seeks to be the product of scientific research rather than reflexive superstition. It cancels out prejudices of only a generation ago. It is ostensibly founded on empirical findings of social science, primarily Census tabulations.” See also PEI-TE LIEN, *THE MAKING OF ASIAN AMERICA THROUGH POLITICAL PARTICIPATION 2* (2001) (criticizing the common stereotypes of Asian Americans and stressing that Asian Americans are pragmatic and sophisticated “people capable of adopting a wide array of political strategies and styles”).

⁶⁸ Lucie Chang & Philip Yang, *The Model Minority Deconstructed*, in *CONTEMPORARY ASIAN AMERICA: A MULTIDISCIPLINARY READER* 459 (Min Zhou & James V. Gatewood eds., 2000).

⁶⁹ *Id.* at 469-71. See also Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U.L. REV. 811 (1996) (arguing that while it may be true that Asian Americans’ family income is higher than the average American family income, it does not necessarily follow that the data is appropriately used to make generalizations in support of the model minority myth); Margaret Chon, *The Truth About Asian Americans*, in *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS* 239-40 (Russell Jacoby & Naomi Galuberman eds., 1995) (“Asian Americans have inadequate access to culturally and linguistically appropriate voter assistance, health care, and job training. Asian American households are less wealthy than white ones. Asian Americans occupy substandard housing projects and attend under funded public schools.”).

since Asians tend to be concentrated in a few large metropolitan areas, where incomes, as well as costs of living, are higher than the national average.”⁷⁰ In addition, “If the Asian lead in median family incomes is consistent with the model minority thesis, a lack of personal earnings confounds it. Most groups of Asian men do worse than whites. . . .”⁷¹

Professor Wu exposes the model minority myth for its inherent dangers, particularly the hurtful message it sends to other racial minorities who are blamed for not making it in light of Asian Americans’ success.⁷² The problem with the myth image is two-fold: it obfuscates the fact that Asian Americans are still in need of affirmative action, and it is often used by opponents of affirmative action to show that affirmative action is not needed to help minorities.⁷³ The model minority stereotype is often used to place Asian Americans in a falsely elevated position relative to African Americans and Latinos.⁷⁴ Wu argues that:

As well meaning as it may be, the model minority myth ought to be rejected for three reasons. First, the myth is a gross simplification that is not

⁷⁰ Chang, *supra* note 68, at 469. See COMMISSION ON CIVIL RIGHTS, THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION. U.S. 3 (1988).

⁷¹ See COMMISSION, *supra* note 70, at 3. “American-born Filipino and Indian families, however, have substantially higher poverty rates; compared to a white poverty rate of 6.6 percent, their poverty rates are 15.8 and 20.2 percent, respectively.” Chang further notes that, “Filipino and Indian families have the lowest poverty rates of any foreign-born group (including whites), whereas the poverty rates of foreign-born Chinese, Japanese, and Korean families exceed those of white families.” *Id.*

⁷² WU, *supra* note 1, at 18.

⁷³ WU, *supra* note 1, at 49.

⁷⁴ ANCHETA, *supra* note 5, at 158.

accurate enough to be seriously used for understanding 10 million people. Second, it conceals within it an invidious statement about African Americans along the lines of the inflammatory taunt: 'They made it; why can't you?' Third, the myth is abused both to deny that Asian Americans experience racial discrimination and to turn Asian Americans into a racial threat.⁷⁵

Wu's contentions are reinforced and strengthened by Professor Jerry Kang's research. Kang asserts that:

Complementing the unfair competitor image [of Asian Americans], the stereotype of Asian Americans as the model minority stokes other, separate scapegoating mechanisms. By waving supposed successes of Asian Americans in the faces of other minority groups, the majority obliquely implies that, but for their incompetence or indolence, they too would be succeeding in America. This tactic, at once obfuscating and provocative, amounts to interracial baiting that heightens resentment against Asian Americans.⁷⁶

Further, Wu describes how for every "positive" aspect of the model minority myth, there is a negative reverse.⁷⁷ For example, "hardworking" Asian Americans are also seen as "unfair economic competition," and what is praised as "strong Asian family values" is also used to paint a picture of Asian Americans as being "clannish."⁷⁸ Wu rejects the racial stereotyping of Asian

⁷⁵ WU, *supra* note 1, at 49.

⁷⁶ KANG, *supra* note 30, at 1936.

⁷⁷ WU, *supra* note 1, at 49-50.

⁷⁸ WU, *supra* note 1, at 49-50.

Americans by entirely dismissing the model minority myth.⁷⁹ He contends that the myth ignores both the history of discrimination and the contemporary problems facing Asian Americans.⁸⁰ With great resolve, Wu vigorously asserts that the myth renders the oppression and discrimination of Asian Americans invisible.⁸¹ Moreover, according to Wu, this disingenuous stereotype is created to perpetuate the dominance of white Americans, and it is most often used in the affirmative action debate.⁸²

III. YELLOW AS NEITHER BLACK NOR WHITE

A. Asian Americans and Affirmative Action

A significant point to be drawn from *Yellow* is Wu's argument that Asian Americans need to be considered as active players in order to advance race relations. According to Wu, "[e]ven books about race have relegated Asian Americans and immigrants to the margins and footnotes."⁸³ Elsewhere, Wu has written that:

As important is the fact that Asian Americans are being considered. . . . In the famous *Bakke* case, for example, there is a note stating that including 'Orientals' in affirmative action at medical school 'is especially curious' because of the 'substantial numbers . . . admitted through the regular

⁷⁹ WU, *supra* note 1, at 39.

⁸⁰ WU, *supra* note 1, at 18.

⁸¹ WU, *supra* note 1, at 18.

⁸² WU, *supra* note 1, at 18.

⁸³ WU, *supra* note 1, at 26.

admissions process.' The neglect of Asian Americans occurred despite the late Justice William O. Douglass observing that in passing in the earliest affirmative action case, 'there is no Western state that can claim that it has always treated Japanese and Chinese in a fair and even-handed manner.' Justice Douglas, though, thought discrimination against Asian Americans served as an argument against affirmative action: If Asian Americans were included, too many others might make claims as well.⁸⁴

However, in the most recent affirmative action controversies, Asian Americans have been moved from the margins and placed squarely within the contemporary affirmative action debate.⁸⁵

When most Americans hear the terms affirmative action and civil rights they tend to think of remedial programs implemented for African Americans and Latinos to address past discrimination.⁸⁶ However, as Wu has noted, Americans rarely think of Asian Americans as being in need of affirmative action to compensate for past discrimination.⁸⁷ I would suggest that all too often, Asian Americans are not seen as disadvantaged or

⁸⁴ Gena A. Lew, ed., *Common Ground: Perspectives on Affirmative Action and its Impact on Asian Pacific Americans* (LEAP Asian Pacific American Public Policy Institute, 1995).

⁸⁵ See JERRY KANG ET AL, BEYOND SELF-INTERESTS: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE IV (1996) (suggesting Asian Americans have become increasingly visible in the political scene, especially in the debate over affirmative action).

⁸⁶ The next several paragraphs are adapted from my earlier article. See Harvey Gee, *The Other Minority: Asian Americans and Affirmative Action*, ASIAN WEEK, Mar. 7, 1997, at 5.

⁸⁷ Wu, *supra* note 1, at 49.

underrepresented enough to warrant the assumed consideration offered to other minority groups.⁸⁸

Similarly, the limited success that Asian Americans have achieved is routinely used by opponents of affirmative action to argue that race-based remedial programs are unnecessary.⁸⁹ The absence of Asian Americans from affirmative action discussions is troubling and demonstrates the need for the voices of Asian Americans to be heard.⁹⁰ Unfortunately, this overly broad characterization glosses over the truth that affirmative action does and should involve Asian Americans. In reality, they are no different than other minorities who have suffered from racism and discrimination.⁹¹ Wu states that it is imperative to include Asian Americans in the national conversation about race.⁹²

Other commentators assert that Asian Americans are being manipulated into assuming the role of being the model minority — a model which is still a minority and is aspiring to the ideal of whiteness. Evelyn Hu-DeHart states that, “[Asian Americans] aren’t White but they act White; that’s where the model comes in. So they are close to White; they exhibit all the characteristics that define Whiteness; which, then, is the reason of their success.”⁹³ Wu adds that:

⁸⁸ WU, *supra* note 1, at 49.

⁸⁹ WU, *supra* note 1, at 49.

⁹⁰ WU, *supra* note 1, at 18.

⁹¹ WU, *supra* note 1, at 49.

⁹² WU, *supra* note 1, at 18.

⁹³ Evelyn Hu-DeHart, *Beyond Black and White*, available at <http://www.jhu.edu/~igscph/spr96ehd.htm> (last visited April 19, 2004); *see also* Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 208

On each of these divisive topics, Asian American examples can enhance our awareness of the color line between black and white, rather than devalue the anguish of African Americans Asian Americans can be agents of our own destinies, insisting that we are ourselves and refusing to be either black or white. Asian Americans meet the moral choices of honorary whiteness.⁹⁴

Law Professor Martha Minow argues that “[c]olorblindness simply leaves in place racialized thinking that benefits whites, and seems rational because it is so familiar. Ignorance or denial of longstanding racial discrimination contributes to the easy embrace of faulty neutralities.”⁹⁵ Undoubtedly, race will always be an issue, and as such, the “colorblind” principle advocated by opponents of affirmative action is fallacious.⁹⁶

Similarly, critical race theorist Ian Haney Lopez strongly questions the arguments by affirmative action opponents who subscribe to the ideal of race-blindness. Lopez professes that:

(1996) (book review) (“The late twentieth century marked a shift for Asian Americans away from being considered functionally black and toward being seen as functionally white. But this new racial status has only a limited ambit: Asian Americans become white predominantly for the purpose of attacking affirmative action programs.”).

⁹⁴ WU, *supra* note 1, at 18.

⁹⁵ MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW 153 (1997).

⁹⁶ Cf. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* in CRITICAL RACE THEORY: THE KEY WRITING WHICH FORMED THE MOVEMENT, *supra* note 4, at 266 (“Colorblind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded — unless it takes the form of individual intended, and irrational prejudice . . . formal-race

[R]ace-blindness would not challenge the continuation, extension, and innovation of new patterns of discrimination, so alone as these patterns did not explicitly make distinctions on racially impermissible bases. Race-blindness ironically targets not the harmful effects of racism, but the efforts to ameliorate such harms . . . race-blindness threatens the gains racial minority groups have recently made not only in the law, where color-blindness has already significantly weakened the force of remedial legislation, but in popular culture as well.⁹⁷

Moreover, any notions of having a race-blind society would be quickly dispelled if applied to Asian Americans in the affirmative action context.⁹⁸ In the affirmative action debate, the extreme race-conscious laws invoked against Asian Americans for their perceived “foreignness” in the past have been superseded by the race-conscious rhetorical arguments offered by opponents of affirmative action and claims of “overrepresentation” of Asian Americans on university campuses.⁹⁹

unconnectedness helps to maintain white privilege by limiting discussion or consideration of racial subordination.”).

⁹⁷ IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 178 (1996). He further contends that “[r]ace-blindness suits best those who are already accustomed to never thinking about themselves and their social position in racial terms.” *Id.* at 179.

⁹⁸ *Id.*

⁹⁹ *Id.* See also DINESH D’SOUZA, *Sins of Admission*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 232 (Nicolaus Mills ed., 1994) indicating:

Although universities strenuously deny the existence of quota ceilings for Asians, it is mathematically impossible to raise the percentage of students from underrepresented groups without simultaneously reducing the percentage of students from overrepresented groups. . . . For Asians, minority quotas that

With this in mind, I would argue that any exclusion of Asian Americans from affirmative action programs and discussions about race relations serves as preclusion from equal participation in American society.¹⁰⁰ The practice of not considering Asian Americans as beneficiaries of affirmative action denies the fact that they have suffered discrimination and maintains their status as “other minorities” situated between black and white.¹⁰¹

This concept is further expounded upon by Wu in a chapter entitled, “Neither Black Nor White: Asian Americans and Affirmative Action,” based on his widely cited law review article of the same name.¹⁰² Here, Wu makes it clear that he is a strong supporter of affirmative action, for he argues that affirmative action prepares our society for racism and helps us to develop our racial relationships in a protective manner.¹⁰³ His discussion is founded on the conceptual framework that situates Asian

were intended as instruments of inclusion have become instruments of exclusion.

See also Andrew Hacker, *Education: Ethnicity and Achievement*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 220. (“Given their good records and the large numbers applying, there is likelihood that those campuses could become overwhelmingly Asian.”).

¹⁰⁰ *Id.* See also Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* in CRITICAL RACE THEORY: THE KEY WRITING WHICH FORMED THE MOVEMENT, *supra* note 4, at 257.

¹⁰¹ *Id.*

¹⁰² Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995). Similarly, law professor Robert Chang has detailed the arguments in support of affirmative action, as well as those views held by affirmative action opponents. Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L. Q. 1115, 1117 (1996).

Americans in a unique place within the context of the affirmative action debate and is apparent and prevalent in any discussion of racial preferences in higher education.¹⁰⁴ While many Asian Americans are succeeding at university campuses across the country, many still could benefit from preferential treatment provided by affirmative action.¹⁰⁵

The issue of the overrepresentation of Asian Americans in the student body can be used as a proxy for bias by universities. By singling out Asian Americans, the stereotype of the “yellow menace” is perpetuated by academic institutions exercising preferences for whites and “preferred minorities.”¹⁰⁶ Notably, Asian Americans who are against affirmative action have

¹⁰⁴ WU, *supra* note 1, at 171.

¹⁰⁵ Chon, *supra* note 69, at 239-40. According to Chon:

Asian Americans must not allow themselves to be misused To do so would just exacerbate two problems that we already face in the United States. First, painting Asian Americans as very intelligent just lets America pretend we don't exist. Social service agencies ignore us because we don't need help. Governments ignore us because we've already made it. Schools won't recruit us because we do so well on the SATs. Yet Asian Americans have inadequate access to culturally and linguistically appropriate voter assistance, health care, and job training. Asian-American households are less wealthy than white ones. Asian Americans occupy substandard housing projects and attend under funded public schools. And at least thirty Asian Americans died in 1993 as a result of homicides in which racial animus was suspected or proven. Asian Americans of all intelligence levels face discrimination based on accent and appearance.

Id.

¹⁰⁶ See Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 667 (1989) (“Historic discriminatory practices are now directed at the newest Asian immigrant group to challenge the racial composition of highly selective institutions.”).

strenuously argued that schools such as the University of California at Berkeley have de-emphasized objective admissions criteria in the game of achieving diversity. The result is that more qualified whites and Asian Americans are losing admission slots to lesser qualified African Americans and Latinos.¹⁰⁷ In addition, many Asian Americans who oppose affirmative action believe that without affirmative action there would be more Asian Americans on university campuses.¹⁰⁸ In effect, such criticisms reveal how universities can design admissions policies which function to set aside the successful achievements of Asian Americans simply because there are “too many of them.”¹⁰⁹ This outcome seems to

¹⁰⁷ See Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L. J. 185, 209 (1996) (“At the University of California, Berkeley, for example, it is taken for granted that Asian Americans and whites form the group that is disadvantaged by affirmative action, and African Americans and Latinos form the group that benefits.”).

¹⁰⁸ See Peter Schrag, *Backing Off Bakke: The New Assault on Affirmative Action*, NATION, Apr. 22, 1996, at 11 (discussing exclusion of Asian Americans from admission for purposes of diversity). Asian American students themselves are ambivalent on the issue. Ellis Cose has reported that “[s]ome Asian Americans wonder whether they have become the Jews of the 1990s, whether they are being sacrificed, despite their academic accomplishments, for a political agenda that does not serve their best interests.” ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 128 (1997).

¹⁰⁹ See Karen Avenso, *Asian Americans Question Latin Quotas: Many Say the System Works Against Them*, BOSTON GLOBE, Oct. 14, 1996, at B1 (reporting on angry Asian American parents who feel their children are being discriminated against because of their ethnicity and scholastic achievement). See also Chang, *supra* note 102, at 1127 (arguing that the disingenuous use of the model minority myth is “divide and conquer” at its worst). According to Chang:

Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for white students. Through negative action against Asian Americans, whiteness becomes a diversity category meriting a ‘plus’ in many admissions processes, demonstrating

be at odds with the logic behind affirmative action. By maintaining affirmative action for African Americans and Latinos while seeking proportional representation of whites, Asian Americans' opportunities are limited.¹¹⁰ However, it is important to note that Wu responds to this assertion as a false premise.

Minnesota law professor Jim Chen is an American of Taiwanese descent who has written extensively against "racial fundamentalism" and affirmative action.¹¹¹ In his writings, Chen strives for the colorblind ideal.¹¹² He argues that race consciousness is self-defeating in that it promotes, but does not eliminate racism, and it assumes an essentialist minority experience. In his mind, the fact that his surname is Chen does not materially distinguish him from other Americans, nor is there such a thing as a unique minority thinking or viewpoint.¹¹³ Chen has previously elaborated on the view that race consciousness, including Asian American race consciousness, worsens, not improves, race relations.¹¹⁴ He perceives this race consciousness as an unwillingness to assimilate into the dominant (white) culture

how the merit and fairness rationales are a smoke screen for what is really being protected — white entitlement.

Id.

¹¹⁰ Chon, *supra* note 69, at 239.

¹¹¹ See, e.g., Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994).

¹¹² See, e.g., Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203 (2002); Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123 (1997).).

¹¹³ Chen, *supra* note 111, at 146.

¹¹⁴ Chen, *supra* note 111, at 149.

and an opposition to interracial marriages and multi-racial adoptions.¹¹⁵

Professor Chen challenges the use of race as a public entitlement in the affirmative action debate. He perceives diversity as the expectations about an individual's opinions, interests, and commitments. Essentially, he prefers colorblindness over race consciousness. According to Chen:

'Diversity' has become a euphemistic synonym for affirmative action, even in contexts where no plausible interest in cultural or intellectual diversity exists. Often 'diversity' simply means proportional representation. In the educational setting, official race-consciousness for diversity's sake has sparked an extraordinary season of intolerance, especially of 'counterrevolutionary' views expressed by nonwhites. Whatever diversity may be, it assuredly cannot be found in the shabby treatment accorded to dissimilar figures whose only crime is the temerity to question the wisdom of affirmative action. The quest for diversity has occasioned rampant content and viewpoint discrimination against nonwhites in the American academy, all in the name of advancing educational opportunities for the historically disadvantaged.¹¹⁶

Chen contends that diversity in practice, in seeking unique minority viewpoints, creates a hindrance, and sometimes a barrier, to equal treatment.¹¹⁷ Diversity's definitional problem poses a real

¹¹⁵ Chen, *supra* note 111, at 161-62.

¹¹⁶ Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1849-50 (1996).

¹¹⁷ *Id.* at 1906.

crisis for university administrators. “Many educators desperately seek licenses to adjust racial balance within their faculties and among their students.”¹¹⁸ “America’s obsession with race has blinded its universities to other measures of diversity. Other factors, rarely if ever considered in university admissions or faculty hiring, outweigh race in their impact on intellectual, aesthetic, and political viewpoints.”¹¹⁹

In this regard, Wu contends that with Asian Americans as actual participants in the dialogue, the affirmative action debate can be transformed into a productive discussion.¹²⁰ Significantly, unlike other tracts authored by the affirmative action advocates and its detractors, Wu offers solid reasons why affirmative action should be supported as a modest measure to help create equal opportunities for all Americans.¹²¹ As such, Wu presents his ideas about how affirmative action can work for society as a whole.¹²² In his stylized matrix, Wu shows how Asian Americans can add innovations to the case for affirmative action and strengthen it.¹²³ According to Wu:

Our perspective can only help the process of considering these contentious issues, because whether or not we admit it, each of us — white, black, brown, or yellow — shares in the outcome.

¹¹⁸ Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action’s Destiny*, 59 OHIO ST. L.J. 811, 827 (1998).

¹¹⁹ *Id.* at 904.

¹²⁰ WU, *supra* note 1, at 132-33.

¹²¹ WU, *supra* note 1, at 133.

¹²² WU, *supra* note 1, at 133.

¹²³ WU, *supra* note 1, at 132.

A forthright and productive conversation about affirmative action proceeds through the phrases: a statement of the racial problems, a determination of principles, and a dedication to pragmatism.¹²⁴

In this section, Wu emphatically argues that African Americans should remain the central focus of all affirmative action programs and that the compensatory rationale makes it difficult, if not impossible, to justify affirmative action as it is presently practiced for any racial group other than African Americans.¹²⁵ However, Wu insists that other nonwhites should not be excluded in any type of “contrived zero-sum game of any sort” offered by affirmative action opponents. Instead, while admitting that Asian Americans and other non-black groups could complicate the compensatory model, Wu asserts that they should be included in affirmative action programs since they could contribute to the diversity rationale behind affirmative action.¹²⁶ Wu is strongly supported by Jerry Kang. Professor Kang argues that “[f]or diversity’s sake, if a university wishes to increase the number of non-Asian minorities, it can do so without excluding Asian Americans. Nothing requires that there be a fixed percentage of ‘minority’ slots for which all racial minorities must battle in a

¹²⁴ WU, *supra* note 1, at 133.

¹²⁵ WU, *supra* note 1, at 132. Christopher Edley furnishes a thumbnail sketch of the discrimination that African Americans still endure today. He relies on social science evidence to support his findings. CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES, 42-52 (1996).

¹²⁶ WU, *supra* note 1, at 141.

zero-sum game.”¹²⁷ Here, in my view at least, both Kang and Wu seem to downplay the matter. Although they acknowledge that the compensatory model has been a real point of contention with opponents of affirmative action, I think that they could have discussed this issue in greater detail.

At bottom, Wu makes the intriguing argument that Asian Americans face a disparate impact from affirmative action programs regardless of how they are structured or implemented.¹²⁸ This is so because Asian Americans are disproportionately interested in pursuing education.¹²⁹ Wu insists that:

Logically, affirmative action could have a concentrated effect on Asian Americans only if it were designed as a blatantly illegal tit-for-tat quota whereby an Asian American was rejected for every African American who was accepted. . . . A system in which an Asian American was rejected for every African American who was accepted would be affirmative action as much of whites as for anyone else.¹³⁰

However, under current constitutional law, Wu argues that Asian Americans cannot be harmed in any special way unless whites are given preferential treatment.¹³¹ Sounding like a

¹²⁷ 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, 17 (1996).

¹²⁸ WU, *supra* note 1, at 141. See also WU, *supra* note 93, at 210 (“Analytically and empirically, Asian Americans are distinctive only if they are treated worse than whites, that is, when whites receive preferential treatment. Asian Americans are no different than whites as long as they are treated the same, regardless of whether affirmative action is in effect for other groups.”).

¹²⁹ WU, *supra* note 1, at 140.

¹³⁰ WU, *supra* note 1, at 141.

¹³¹ WU, *supra* note 1, at 132.

utilitarian in his defense of affirmative action, he responds that Asian Americans and whites should be treated equally and that the two groups should make collaborative efforts to shoulder the burden of such programs.¹³² By not doing so, Wu states that affirmative action is only a principle, disadvantaging the majority as a whole and not helping any particular racial group.¹³³ Along similar lines, Jerry Kang asserts that:

Whites and Asian Americans may resent the burden they bear, but again, resentment is not stigma. If even a racial minority can be constitutionally asked to shoulder the same burden as Whites, it is hard to argue that affirmative action conveys the objective social meaning that Whites — because they are White — deserve society's antipathy or indifference.¹³⁴

Ultimately, Wu's thesis creates a vision of racial justice that liberals would find appealing, and a perspective that conservatives and neoconservatives alike will find unpersuasive. Interestingly, some scholars have argued that affirmative action in its present form has strayed from its original purpose. Recently, sociologist John David Skrentny in his anthology, *Color Lines*:

¹³² WU, *supra* note 1, at 132.

¹³³ WU, *supra* note 1, at 140. See also JERRY KANG, ET AL, BEYOND SELF-INTERESTS: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE 25 (1996) (arguing that “[i]t may be legitimate not to include [Asian Americans] or other racial minorities . . . in affirmative action programs. In such cases, they should be treated indistinguishably from Whites.”); Victor Hwang, *In the Defense of Quotas: Proportional Representation and the Involuntary Minority*, 1 UCLA ASIAN PAC. AM. L.J. 1, 17 (1993) (asserting that “a closer analysis will reveal that the burden is in fact currently shared by all, since quota systems generally deprive all members of the majoritarian group (and actually all nonmajoritarian members as well) of the same hypothetical degree of freedom”).

¹³⁴ See Kang, *supra* note 127, at 45.

Affirmative Action, Immigration, and Civil Rights, points out that the Civil Rights Act arose at a time when opportunity for African Americans was *the* dominant issue.¹³⁵ “Politicians often spoke of ending discrimination in American society, of creating opportunity for all, and of helping ‘minorities,’ but they really meant Afro-Americans.”¹³⁶ He also argues that affirmative action has gradually expanded to include other non-black groups.¹³⁷ As a result of these changes, Skrentny argues that African Americans today have ceased to be “the” minority in the United States.¹³⁸ He contends that African Americans have in fact lost their place as the central focal point in discussions about race, racism, and prejudice.¹³⁹

Likewise, Professor Hugh Davis Graham argues that the unique moral force of affirmative action’s original public rationale, as a temporary remedy to compensate for the lingering effects of past discrimination, was eroded when preferences were extended to newly arrived immigrants from Latin America and Asia.¹⁴⁰ He states that, “[t]he ironic result for Americans at the century’s end has been a two-tiered system of policy-making where affirmative

¹³⁵ John David Skrentny, *Introduction* to COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS 4 (John David Skrentny, ed. 2001).

¹³⁶ *Id.* at 1.

¹³⁷ *Id.* at 8.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS, *supra* note 135, at 67. See also David Montejano, *Maintaining Diversity at the University of Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION, *supra* note 19, at 360. (“Affirmative action was never a question of individual qualifications or abilities; rather, it was a question of rectifying the institutional practices that continually reproduced virtually all-white work forces and all-white student bodies.”).

action remedies are narrowed for African Americans, who have been the chief beneficiaries, the protections for immigrants, where legal or illegal, are broadened.”¹⁴¹

B. The Missing Chapters: Responding to Wu's Prescription for Civil Rights

1. Why Should Asian Americans Support Affirmative Action?

Wu's defense of preferential admissions for racial minorities is based on two potentially faulty assumptions. Both focus on the social costs and benefits resulting from affirmative action. First, Wu argues that Asian Americans and whites should move beyond their own self-interests to bear the burden of affirmative action together.¹⁴² By supporting affirmative action even if we are not directly included in the specific program, Wu implies that Asian Americans will strengthen the argument for affirmative action as a matter of principle.¹⁴³ He argues that “[w]e do so because we support it for reasons that cannot be called

¹⁴¹ Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS, *supra* note 135, at 67.

¹⁴² WU, *supra* note 1, at 171.

¹⁴³ WU, *supra* note 1, at 171.

selfish.”¹⁴⁴ Second, arguing that an overrepresentation of Asian Americans would defeat any efforts to create a diverse student body assumes that affirmative action in higher education will produce a net benefit for society. According to Wu, affirmative action increases social interaction among people of different races, cultures, and backgrounds in an effort to break down misconceptions and prejudices.¹⁴⁵ In addition, with this variety of life experiences, classroom interaction will encourage and deepen social discourse.¹⁴⁶

However, I, even as a supporter of affirmative action, remain skeptical of Wu’s proposal, and I am not completely satisfied by Wu’s conclusion. Although Wu has forcefully argued that because affirmative action does not violate the constitutional rights of whites or Asian Americans and that whites and Asian Americans can only mildly disadvantage themselves provided they are equally disadvantaged for the important purposes of affirmative action, he fails to illustrate why Asian Americans should support affirmative action on this basis alone.¹⁴⁷ Why should we Asian Americans be the sacrificial lambs to be slain for the greater good of society? In other words, Wu does not adequately explain why Asian Americans should disadvantage themselves in an effort to get beyond their self-interests.

¹⁴⁴ WU, *supra* note 1, at 171.

¹⁴⁵ WU, *supra* note 1, at 171.

¹⁴⁶ WU, *supra* note 1, at 178. See also KANG, *supra* note 133 at 5.

¹⁴⁷ WU, *supra* note 1, at 140.

The complex and dynamic Lowell High School controversy in San Francisco illustrates why Asian Americans cannot always unilaterally support a race-based admissions program that apparently works against their interests. The high profile lawsuit *Ho v. San Francisco Unified School District*¹⁴⁸ challenged the validity of a 1983 judicial consent decree desegregating San Francisco's public schools.¹⁴⁹ The consent decree was a response to an NAACP class action charging educational discrimination by whites. The consent decree mandated racial and ethnic diversity in student bodies and imposed a forty percent cap for students at magnet schools from any racial or ethnic group.¹⁵⁰ While Chinese Americans were early beneficiaries, ten years later they became the plaintiffs to exceed the forty percent cap, claiming that the cap constituted unconstitutional race preferences in favor of those less qualified, many of whom were African Americans and Latinos.¹⁵¹

The *Ho* plaintiffs considered themselves the victims of so-called "reverse discrimination" as a result of the consent decree.¹⁵²

¹⁴⁸ 965 F. Supp. 1316 (N.D. Cal. 1997).

¹⁴⁹ *Id.* at 1318.

¹⁵⁰ *Id.*

¹⁵¹ See David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes From a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER L.J. 40, 51-52 (2000).

¹⁵² *Id.* at 62. Recently, Asian Americans have become stand-ins for whites as "innocent victims" of affirmative action. Thomas Ross has presented a valuable discussion of the notion of "innocence" with respect to "victims" of affirmative action. See Thomas Ross, *The Richmond Narratives*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 4, at 41. Ross states that:

Those who seek to limit or stop affirmative action say the white 'victims' of affirmative action are 'innocent.' The mere existence of an affirmative action program tells us that there are innocent white victims. In this vocabulary, the white

The class contended that Chinese American applicants were rejected not because of their qualifications, but because of their race.¹⁵³ The case was resolved with a settlement precluding the school district from using race or ethnicity as the primary or predominant consideration in determining student admissions.¹⁵⁴ In regards to the Lowell case,¹⁵⁵ I am not convinced that Wu's thesis about affirmative action and its relation to Asian Americans holds true or is as practical as he suggests. However, Henry Der, the former director of Chinese For Affirmative Action, may have a more plausible response.¹⁵⁶ According to Der, the *Ho* plaintiffs were unwilling to share the burden imposed by the consent decree.¹⁵⁷ Der professes that unlike other racial minorities who may be admitted under decree, Chinese American students, like whites, have other alternatives.¹⁵⁸ According to Der:

As it stands, 70 percent of all Lowell students are Asians — Chinese, Japanese, Filipinos, Koreans, Vietnamese, and other Asians. There is no more than a combined 30% of Whites, Blacks, Hispanics,

person is innocent so long as he has not committed an act of particular and proven racial discrimination in connection with the job or interest at stake.

Id.

¹⁵³ Levine, *supra* note 151, at 51-52. Jerry Kang would characterize this situation as "negative action" against Asian Americans because they are required to share a greater burden than whites. See Kang, *supra* note 127, at 15.

¹⁵⁴ See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1025, 1032 (N.D. Cal. 1999).

¹⁵⁵ 965 F. Supp. at 1316.

¹⁵⁶ See Henry Der, *The Asian Americans Factor; Victim or Shortsighted Beneficiary of Race-Conscious Remedies?*, in PERSPECTIVES ON AFFIRMATIVE ACTION. . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS 13, 15 (LEAP Asian Pacific American Public Policy Institute, ed., 1995).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

and American Indians at Lowell. . . . [T]he Consent Decree, [has] actually worked to the advantage of Asian students seeking access to Lowell, including ethnic Chinese from Southeast Asia who classify themselves as 'other non-whites' and are not counted in the 'Chinese' category. . . . Nonetheless, the supporters of Brian Ho remain unsatisfied and demand more Chinese students admitted into Lowell, as if students of other racial backgrounds cannot or do not deserve to benefit from a college preparatory education at Lowell.¹⁵⁹

The Lowell controversy will likely repeat itself. At my own alma mater, George Washington High School, a controversy is brewing over the issue of diversity. The high school is located in the Richmond District of San Francisco, which is predominantly Asian and white. The school district has made attempts to allow students of other racial minority backgrounds who reside in other parts of the city to enroll at the school in an effort to diversify the student body. Some parents of Chinese American students who reside in the neighborhood are beginning to cry foul, and they insist that their children should be able to enroll on the basis of geographic locality alone instead of being required to attend another school across town which may offer the same high quality of education available at Washington High School.¹⁶⁰

Nevertheless, given the long history of discrimination that Asian Americans have had to endure, and still experience, any

¹⁵⁹ *Id.*

¹⁶⁰ See also Nick Driver, *The City's Busing Bust*, S.F. EXAMINER, June 12, 2002.

arguments calling for Asian Americans to shoulder the burden for affirmative action like whites must be more persuasive than those offered by Wu and Der.

2. Let's Talk About Socioeconomic Affirmative Action

Although Wu achieves his primary goals of establishing and describing his theories and beliefs about race issues in neutral tones, his staunch support of affirmative action, in particular, his advocacy for all Asian Americans to support affirmative action, sometimes leads him astray. Wu cannot claim that he is taking an analytical stand. His arbitrary dismissal of class-based affirmative action is a case in point. There is an absence of any sense of the enormous positive effect that class-based affirmative action would have on Asian Americans.

Here, Wu's research stands to be broadened greatly. He relays that "[p]roponents of class-based affirmative action, in lieu of race-based affirmative action, already accept the propriety of collective action and the distributive justice as well as the goal of racial diversity, so its is unclear why they would prefer an indirect remedy to a direct one."¹⁶¹ In addition, Wu notes that "[o]pponents of race-based affirmative action who are ideological oppose the ends as well as the means they are as much against class-based affirmative action designed to promote racial diversity as much as

they are against other approaches to the same goal.”¹⁶² Wu does not view class-based affirmative action as a meaningful substitute for race-based affirmative action.¹⁶³ In describing the fact that blacks are disproportionately poor and whites make up the majority of the poor, he suggests that “[e]ven though race or class are related, they are different.”¹⁶⁴

I presume that Wu is aware that there have been a number of alternatives to race-based affirmative action programs, one of the more renowned being class-based alternatives. Though there have been criticisms made about the alleged inability of class-based schemes to address the dual problems of race and poverty,¹⁶⁵ I would argue that proposals for class-based affirmative action programs warrant careful consideration. With this in mind, I would constructively disagree with Wu by suggesting that a more moderate proposal is to retool these programs, utilizing a nuanced socioeconomic status scheme as a better approach. Such programs would also pass constitutional muster because they do not employ set-asides, preferences, or quotas.¹⁶⁶ I contend that if the practice

¹⁶² WU, *supra* note 1, at 170.

¹⁶³ WU, *supra* note 1, at 170.

¹⁶⁴ WU, *supra* note 1, at 170.

¹⁶⁵ Angelo Ancheta dismisses class-based schemes and claims that “[s]ubstituting class for race ignores the basic problem of racial discrimination in American society. Class-based affirmative action is an anti-poverty policy, not an anti-racism policy. Color-blind advocates envision a world where race and ethnicity can somehow be ignored. We do not live in such a world.” See ANCHETA, *supra* note 5, at 158.

¹⁶⁶ Richard Kahlenberg describes the methodology a university may utilize in providing preferences based on economic disadvantage. “A working definition of economic disadvantage should begin with what sociologists consider the ‘big three’ determinants of socioeconomic status: parents’ education, income, and occupation.” Kahlenberg, *supra* note 1, at 10. He argues that colleges and universities should eliminate legacy preferences,

of artificially manufacturing a diverse student body is dismissed, a class-based system would not actually guarantee a diverse student body, but it will be closer to the original intent of affirmative action.

Secondly, even though a class-based system would not address the dual problems of race and poverty, I suggest that perhaps affirmative action was never meant to do that. Sounding like Satan's paralegal, I would posit that maybe racism and discrimination must be alleviated naturally, without government intervention. Even if socioeconomic status is used as an admission criteria instead of race, Asian American enrollment would increase dramatically¹⁶⁷ and the overrepresentation of Asian American students would run counter to the goals of having a diverse student body.

Clearly, the implementation of class-based affirmative action programs and their effects on Asian American applicants serves as rich material for analysis. Remedies can vary depending on the program. By including Asians and Asian Americans in affirmative action, there remains a question of including some or all Asian groups. Contrary to popular beliefs, Asian Americans actually benefit from class-based affirmative action programs, for professors Michael Omi and Dana Takagi report that:

which are tantamount to affirmative action for the wealthy." See Richard D. Kahlenberg, *Class-based Affirmative Action in College Admissions*, IDEA BRIEF NO. 9, May 2000, at 4.

¹⁶⁷ See Hacker, *supra* note 99, at 223. ("Asians would end up with almost all of the 'race-blind' awards, since they obviously have better records from a strictly scholastic standpoint.").

[T]he use of class preferences will present a clear racial advantage for Asian American applicants to all UC campuses. If socioeconomic status is used as an admission criterion instead of race, UC officials predict that Asian American enrollment will increase by 15 to 25 percent while African American enrollment will drop 40 to 50 percent, Latino enrollment will fall 5 to 15 percent, and white entitlement will stay about the same.¹⁶⁸

While there has been very little research completed on the impact of affirmative action on particularly underrepresented Asian ethnic groups in higher education and their possible inclusion in affirmative action policies, I believe that this issue and other related ideas should be explored because such thinking reveals that: (1) Asian Americans are still in need of affirmative action; (2) affirmative action can be more inclusive than it traditionally has been; and (3) the desirable goals of affirmative action can be achieved. First, Indochinese groups,¹⁶⁹ in particular, would be the primary beneficiaries of such programs that require candidates to demonstrate a history of overcoming adversity and discrimination.¹⁷⁰ Most members of this ethnic group arrived in

¹⁶⁸ See Omi, *supra* note 19, at 271, 278.

¹⁶⁹ The term Indochinese will be used in this article to refer collectively to refugees from the countries of Vietnam, Laos, and Cambodia.

¹⁷⁰ See Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in THE CONTEMPORARY AFFIRMATIVE ACTION DEBATE 200 (George E. Curry, ed., 1996) ("The inclusion of [Asian ethnic groups that generally have lower incomes and are less assimilated] can bring more cultural income diversity to campuses that otherwise have a strong Asian-American presence.").

this country after the end of the Vietnam War.¹⁷¹ Upon arrival, there was an immediate negative reaction to these refugees.¹⁷²

Often times, “hardworking Indochinese adults were resented . . . because they competed with their American counterparts for increasingly scarce employment.”¹⁷³ The intense dislike of the refugees culminated in racially motivated behavior against persons of Asian descent as a result of general anti-Asian sentiment exacerbated by misperceptions about Asians and their characteristics. Not uncommon were incidents of racially motivated violence against these refugees.¹⁷⁴ The vestiges of these experiences linger to this day. Vietnamese, Cambodians, Laotians, and Hmong are amongst the poorest of Asian ethnic groups in this country.¹⁷⁵ There are a disproportionate number of Southeast

¹⁷¹ See Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT’L L. & COM. REG. 559, 602 (2001).

¹⁷² See Johnson, *supra* note 24, at 1511.

¹⁷³ See GILL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT* 167 (1986).

¹⁷⁴ ANCHETA, *supra* note 5, at 73-74.

¹⁷⁵ See A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, *CIVIL RIGHTS FACING ASIAN AMERICANS IN THE 1990S* 16 (1992) which indicates that:

Newer immigrant groups from Southeast Asia have sharply lower socioeconomic status than other Asian Americans. While 34 percent of all Asian Americans were college graduates in 1980, the proportion of college graduates among Southeast Asians ranged from 13 percent for the Vietnamese, to 3 percent for Hmong. Whereas Asian Americans as a group had a median family income almost 20 percent higher than that of general population. Southeast Asian family incomes ranged from 35 percent lower than the national average for the Vietnamese to 74 percent lower for the Hmong. Southeast Asian unemployment rates and poverty rates are also substantially higher than those of Asian

Americans as a group

Asians on public assistance.¹⁷⁶ In fact, they are the fastest growing segment of welfare recipients and have the highest welfare dependency rates of any ethnic or racial group.¹⁷⁷ Southeast Asian welfare households are distinct from African American and Latino households on welfare because they are generally larger in size and have higher fertility rates.¹⁷⁸ Further, the labor force participation rate among Southeast Asians in California between the ages of 18 and 54 is 57 percent, significantly below that of all United States additions. Moreover, Southeast Asians face the most economic hardship when compared to other Asian ethnic groups and are the most underrepresented and seriously disadvantaged in higher education. While Asian Americans tend to value educational accomplishments and have the highest median school years completed of all other racial groups, they also experience cultural conflicts, language challenges, and difficulties financing higher education.¹⁷⁹

Second, a socioeconomic-based program can also be defended, if need be, based on the strong argument that non-special admission applicants have weaker numerical and subjective qualifications and that the public educational system has failed to produce enough minority professionals. Such a program works to

¹⁷⁶ *Id.*

¹⁷⁷ See Paul Ong & Evelyn Blumenberg, *Welfare and Work Among Southeast Asians*, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES & POLICIES 113 (Paul Ong ed., 1994).

¹⁷⁸ *Id.* at 123.

¹⁷⁹ See Patricia K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 28-30 (1994).

enable qualified applicants from disadvantaged minority or non-minority communities to attend medical schools, law schools, and other institutions of higher learning in sufficient numbers to enhance the quality of education for all.

Third, in the end, such criteria will screen out Asian American or African American applicants whose families include multiple generations of college graduates and who already enjoy an upper-middle class status and are arguably less in need of such policies. There is some consensus among academics that programs that are at least partly based on economics are proper to achieve such desirable goals. As such, universities may wish to move to programs that emphasize socioeconomic factors and language proficiency which would be more fair and equitable, and certainly less controversial.¹⁸⁰

3. What Do Asian American Civil Rights Activists Think About All of This?

As discussed earlier, I believe that Wu should have addressed Asian American political activism, especially the positions that the leading activist groups have considered. Though

¹⁸⁰ See Kahlenberg, *supra* note 166, at 6, where the author notes: Class-based affirmative action offers advantages on two additional fronts: legal and political. First, unlike race-based affirmative action, class-based preferences are legally unassailable. Even the most conservative Supreme Court Justices, Antonin Scalia and Clarence Thomas, have endorsed the idea as constitutional and as good policy. Second, class-based affirmative action is also far more popular among the public than racial affirmative action.

Wu should be commended for his meaningful discussion of historical and modern activism on the part of Asian Americans, a broader analysis is possible. More specifically, I believe that any book published today that could stand as the definitive reader on the Asian American experience in America, especially Wu's *Yellow*, should discuss the opinions and recent organizational efforts brought forth by the Asian American community. Such an examination would serve to strengthen Wu's efforts to dismantle the racial stereotyping of Asian Americans as being apolitical and even apathetic to the political process or non-aggressive when it comes to race matters.

In a recent study of the attitudes and voting patterns of Asian Americans, political scientists Bruce Cain and Wendy Tam suggest that Asian Americans have become the swing vote.¹⁸¹ Unlike African Americans and Latinos, Asian Americans have no predetermined loyalty to any one of the major parties, and their political attitudes remain largely unknown.¹⁸² Professors Cain and Tam provide some insight into the attitudes held by Asian Americans by exploring their preferences on two direct democracy initiatives in California: Propositions 187 ("Save Our State") and

¹⁸¹ Wendy K. Tam & Bruce E. Cain, *Asian Americans as the Median Voters: An Exploration of Attitudes and Voting Patterns on Ballot Initiatives*, in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS*, *supra* note 23, at 134-55.

¹⁸² Tam, *supra* note 181, at 134-35.

209 (“California Civil Rights Initiative”).¹⁸³ Interestingly, Wu states in a pair of writings not included in *Yellow* that these two subjects are rarely discussed together because they have been “based on the false assumption that liberal immigration and affirmative action cannot be reconciled.”¹⁸⁴

Most Asian Americans voted against the anti-immigrant Proposition 187 which provided that “undocumented immigrants, primarily Latinos and Asians, are denied access to public school education, non-emergency health care from state and local government providers, and government social services.”¹⁸⁵ But,

¹⁸³ Tam, *supra* note 181, at 140 (characterizing the measures as “two of the most controversial and hotly debated initiatives in recent memory”).

¹⁸⁴ Frank H. Wu, *Shaping the Rules for Belonging: Immigration and Affirmative Action Can Work Together*, LEGAL TIMES, Sept. 9, 1996, at 25. See also Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35, 52 (1996) where he notes:

The arguments for exclusion of immigrants from affirmative action programs are self-defeating. The argument that focuses on excluding immigrants because of affirmative action presents the circular and paternalistic logic that discrimination against racial minorities within a society justifies their exclusion from it. The perverse result is that efforts to remedy discrimination need never include immigrants. Immigrants are deemed to have consented to assuming a subordinate status. Some politicians have gone so far as to suggest that immigrants be barred for their lifetimes from receiving any governmental entitlements, not only those with a race-based component.

There was also a correlation between the way Asian Americans voted on Proposition 187 and Proposition 209. See Tam, *supra* note 181, at 144 (“Like white opinions, Asian American opinion on Proposition 187 are affected by their attitudes toward diversity and the need for affirmative action. . . . Asian American preferences on Proposition 187 are based on their experiences and attitudes toward other racial groups.”).

¹⁸⁵ See Harvey Gee, *Immigration and the New Nativism: A Review Essay*, 52 OK. L. REV. 685, 687 (1999) (book review). See also LOPEZ, *supra* note 97, at 145 where he explains:

“even though most Asian Americans voted against Proposition 187, they were less opposed than Latinos or blacks.”¹⁸⁶ The campaign for Proposition 187 bore unmistakable overtones of

The relative lack of intentional racial animus behind Proposition 187 and similar anti-immigrant legislation does not reduce the effect such laws have in maintaining and deepening racial hierarchies . . . anti-immigrant laws construct races coercively and ideologically. These laws force people apart, using state violence to assign meanings of belonging or exclusion, racial worth or worthlessness, to people possessing certain features, ancestries, and nationalities. . . . Anti-immigrant laws, drawing on deep social beliefs in racial hierarchy, give effect to and entrench those same social beliefs.

See also Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 178 (Juan F. Perea ed., 1997) (“The Proposition 187 campaign demonstrated that economic considerations were not the sole motivation for the initiative.”); Peter Salins, ASSIMILATION, AMERICAN STYLE 206 (1997) (describing Proposition 187 as the most aggressive public policy generated by California’s nativist climate); Peter H. Schuck, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (Westview Press 1998) (suggesting that Proposition 187 was an expression of public frustration with a government and society out of control).

¹⁸⁶ See also Tam, *supra* note 181, at 137 noting:

Asian Americans display attitudes that are not as widely contrarian as those of blacks and Latinos but also are not as divided as those of whites. Some of the variables that divide whites do not divide Asian Americans. Most notably, party is not significant in predicting Asian American attitudes as Proposition 187.

See also JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA’S ASSIMILATION ETHIC 136 (1998) explaining:

Despite the best efforts of activists who claim to speak for the silent masses, Hispanic and Asian American political behavior cannot be easily categorized. . . . It is true that both Hispanics and Asians occasionally display political tendencies, but each group also contains remarkable diversity. The reality of Hispanic and Asian American political behavior shatters the false notion . . . that all the members of a racial or ethnic group are carbon copies of each other. . . .

xenophobia and exclusionism, featured television commercials showing a flood of foreign-looking people with a narrator's voice intoning, "they keep coming." Governor Pete Wilson even lobbied President Bill Clinton to have legal aliens declared ineligible for federal welfare benefits.¹⁸⁷ In fact, critical race theorist Richard Delgado argues that "society enacts restrictive immigration laws and policies to keep foreigners — usually ones of darker coloration out."¹⁸⁸ Delgado asserts that anti-immigrant measures have the specific aim of making immigration or naturalization difficult and that recent policies favoring the elimination of social services for immigrants illustrate forms of legal treatment designed to disadvantage the foreign born.¹⁸⁹

The Asian American sentiments on immigration can be linked to views on affirmative action. Most Asian American civil rights organizations representing a diversity of interests and agendas have been generally in accord in strongly supporting

¹⁸⁷ See Richard Delgado & Jean Stefanie, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1555 (2000). Richard Delgado and Jean Stefanie have recently documented the ambivalent treatment of citizens of color, beginning in its early days and continuing into the present. California's momentum has inspired broad action around the country at the state level. *Id.*

¹⁸⁸ Richard Delgado, *Citizenship*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 185, at 318.

¹⁸⁹ Richard Delgado, *Citizenship*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 185, at 318.

affirmative action.¹⁹⁰ One prime example was the effort to oppose the 1996 California Rights Initiative.

In the November 1996 election, California passed, by a slim majority, the California Civil Rights Initiative.¹⁹¹ The Initiative is the first statewide ban of all racial, ethnic, and gender-based preferences in state employment, education, and construction in the history of affirmative action.¹⁹² As a result of its passage, all state-sponsored affirmative action programs have been eliminated.¹⁹³ To the surprise of many who had believed that the majority of Asian Americans oppose affirmative action, male

¹⁹⁰ Harvey Gee, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 640 n.120. "Affirmative action supporters included the Organization of Chinese Americans, the Japanese-Americans Citizens League, the Asian Pacific Americans Labor Alliance, . . . , the National Asian Pacific American Legal Consortium, and the National Asian Pacific American Bar Association." *Id.*

¹⁹¹ Bill Jones, Secretary of State, Proposition 209 in California Ballot Pamphlet, General Election, Nov. 5, 1996.

¹⁹² See Tam, *supra* note 181, at 141 (suggesting that "[m]any felt that the true impact of the proposition, the abolition of affirmative action, was carefully veiled and that the civil rights wording was improper."); Frank H. Wu, *New Paradigms of Civil Rights: A Review Essay*, 66 GEO. WASH. L. REV. 698, 718 (1998) ("Proposition 209, styled as the 'California Civil Rights Initiative,' meant to eliminate affirmative action, is interpreted by many racial minorities as sanctioning regular racial discrimination. To avoid a declaration of its unconstitutionality, ironically, its proponents claimed in court that it was not focused on race.").

¹⁹³ See Bill Ong Hing, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 169 (1997) ("A backlash against affirmative action . . . as epitomized by the Bakke case in the 1970s and by the move to dismantle preferential programs today that began in the 1980s, is also unmistakable. The combination of progress and retrenchment has fostered an environment ripe for ideological separatism."); Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 143 (1999) (arguing that "statewide affirmative action bans relocate political power to the special disadvantage of racial minorities").

Asian Americans overwhelmingly voted against the measure.¹⁹⁴ To Asian Americans, CCRI represented an end to equal opportunities.¹⁹⁵ According to Tam and Cain:

[A] majority of Asian Americans still believe that Latinos, blacks, women, and Asian Americans need the affirmative action programs that Proposition 209 would eliminate. A vast majority of Asian Americans prefer a merit system over one that rewards sheer diversity. For them, affirmative action is a means of remedying unfairness in the merit system, and not a rejection of that system *per se*.¹⁹⁶

The more aware Asian Americans became of CCRI, the more likely they were to believe that its passage would have a strong negative impact on Asian Americans.¹⁹⁷ Asian American attitudes toward affirmative action mirror those of the other major

¹⁹⁴ Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 n.12 (N.D.Cal. 1996), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997). In voting on California's Proposition 209, male Asian Americans, like other racial minority groups, voted 'no' to Proposition 209 by a 61 to 39 percent margin to those who had voted "yes." *Id.* See also Harvey Gee, *Race Track*, S.F. DAILY J. NOV. 16, 1999, at 4.

¹⁹⁵ *Id.*

¹⁹⁶ Tam, *supra* note 181, at 140.

¹⁹⁷ *Id.* The next two paragraphs are adapted from my earlier article. See Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative*, 2 J. OF PUB. INTEREST LAW 44-45 (2001). Lydia Chavez provides a detailed examination of the CCRI campaign. See Lydia Chavez, *THE COLOR-BIND: CALIFORNIA BATTLE TO END AFFIRMATIVE ACTION* (1998). See also Cass R. Sunstein, *Casuietry*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 324 (Robert Post & Michael Rogin eds., 1998) (reporting that the Proposition 209 campaign was "a bizarre parody of constitutional aspirations, involving advertising campaigns, gross hyperbole, and manipulations of various sorts").

racial/ethnic groups.¹⁹⁸ “Like Latinos and blacks, a majority of Asian American[s] . . . tend to believe that minorities have fewer opportunities to succeed in America.”¹⁹⁹

By combating the Initiative through education and campaigning, Asian Americans led a strong state charge against CCRI.²⁰⁰ In Los Angeles, the Asian Pacific American Legal Center of Southern California and Asian Pacific Americans for Affirmative Action coordinated the Asian coalition to oppose CCRI, while the broader based Metropolitan Alliance linked Asian organizations with other activists.²⁰¹ In the San Francisco Bay Area, Asian American organizations launched a two-pronged attack on CCRI in the form of (1) active grass-roots organizing, speaking at public forums, phone banking, precinct walking, voter registration, and exit polling; and (2) waging an aggressive media campaign by distributing literature, massive advertising and courting the ethnic press.²⁰²

Importantly, even after the passage of Proposition 209, the Asian American community remained mobilized against it. The newly formed coalition of Asian American civil rights groups (Coalition) demonstrated its strong support of affirmative action.²⁰³

¹⁹⁸ Tam, *supra* note 181, at 139.

¹⁹⁹ Tam, *supra* note 181, at 139.

²⁰⁰ Gee, *supra* note 197, at 44.

²⁰¹ Gee, *supra* note 197, at 44.

²⁰² Gee *supra* note 197, at 44-45.

²⁰³ PEI-TE LIEN, THE MAKING OF ASIAN AMERICA THROUGH POLITICAL PARTICIPATION 167-68 (2001) (“Asians as the middleman, like other minority groups, have often been a pawn in U.S. power politics. Their opportunities to form broadbased and lasting coalitions with other racial groups have been

The leaders of the Asian Pacific Americans for Affirmative Action objected to the almost cliché stereotype that Asian Americans are a model minority group and do not require the protections of affirmative action.²⁰⁴ In particular, they deplored the manner in which supporters of CCRI presented themselves as spokespersons for the Asian American community.²⁰⁵

To be sure, Asian American support for affirmative action has been deafening. Hiramoto's sentiments are echoed by Lillian Galeon, Director of Filipinos for Affirmative Action, in her response to opponents of affirmative action in the workplace:

Ending affirmative action will not save jobs leaving the country, or eliminated altogether. . . . Ending affirmative action is aimed at giving an advantage back to those who benefit from inequality and racism. . . . We can't let that happen. We must defend affirmative action, so that when the dust settles on these economic changes, we will not be at the bottom.²⁰⁶

Asian Americans have even supported affirmative action when they are not the direct beneficiaries. Recent efforts include advocacy by Asian Americans in defending affirmative action in higher education and in minority contracting. For example, Asian

determined by a structural condition that encourages racial mistrust, competition, conflict, and limited accommodation for nonwhites.").

²⁰⁴ Gee, *supra* note 197.

²⁰⁵ Gee, *supra* note 197, at 46.

²⁰⁶ David Bacon, *Affirmative Action: California Labor Prepares to Defend Affirmative Action*, available at <http://dbacon.igc.org/PJust/01LabDef.html> (Oct. 15, 1995).

American advocacy was prominent in the University of Michigan affirmative action cases in the Supreme Court's last term.

The *Grutter* and *Gratz* decisions represented a defining moment for both the Supreme Court and Asian Americans on civil rights issues.²⁰⁷ The important goal of diversity was again recognized by the United States Supreme Court in *Grutter v. Bollinger*,²⁰⁸ when it finally decided whether diversity is a compelling state interest. It was also given the opportunity to define specific guidelines for constitutionally permissible race-conscious admissions systems. In that case, the Supreme Court considered a challenge to the University of Michigan Law School's admissions policy, which affirmed the law school's commitment to racial and ethnic diversity, with "special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans."²⁰⁹ The Law School presented evidence that the goal of the policy was not to remedy past discrimination, but to admit students who may bring a different perspective to the classroom as compared to students who are not members of underrepresented minority groups.

²⁰⁷ These cases are expected to have broad effects on the future of race-conscious affirmative action in the United States. See Angelo N. Ancheta, *Revisiting Bakke and Diversity-Based Admissions: Constitutional Law, Social Science Research, and the University of Michigan Affirmative Action Cases*, C.R. PROJECT HARV. U. (2003).

²⁰⁸ 539 U.S. 306 (2003).

²⁰⁹ *Id.* at 324.

Justice Sandra Day O'Connor, writing for the 5-4 majority, said the Court, in upholding the University of Michigan Law School's race-conscious admission policy, was endorsing Justice Lewis Powell Jr.'s view in *Bakke* twenty-five years ago that "student body diversity is a compelling state interest that can justify the use of race in university admissions."²¹⁰ However, Justice O'Connor required that affirmative action programs be narrowly tailored and of limited duration.²¹¹

In what will undoubtedly be a famous passage, Justice Sandra Day O'Connor, writing for the majority, explained, "we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."²¹² The Court noted the substantial benefits that flow from a diverse student body.²¹³ "These benefits are 'important and laudable' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds.'"²¹⁴ The Court further explained, "these benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures,

²¹⁰ *Id.* at 330.

²¹¹ *Id.* at 340.

²¹² *Id.* at 330.

²¹³ *Grutter*, 539 U.S. at 333.

²¹⁴ *Id.*

ideas, and viewpoints.”²¹⁵ The Court agreed that educational institutions must likewise remain diverse.²¹⁶

During that same term, the Court also considered a challenge to the University of Michigan’s admissions guidelines for undergraduates in *Gratz v. Bolinger*.²¹⁷ Under those guidelines, implemented in 1998, each applicant was assigned points on a 150-point “selection index” based upon various criteria including race, high school GPA, standardized test scores, high school attended, academic quality, in-state residency, and other factors.²¹⁸

Chief Justice William Rehnquist, writing the majority opinion, struck down Michigan’s undergraduate admission program as “not narrowly tailored,” in part because it gives an automatic twenty points to minorities toward the hundred points needed for admission.²¹⁹ The Court in *Gratz* required that race only be used as part of an “individualized review” of applicants.²²⁰

²¹⁵ *Id.*

²¹⁶ *Id.* See also PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 165 (2003) (“The diversity that Powell seemed to have in mind was not the pure ethnoracial diversity that affirmative action programs now prize.”); see also Gabriel Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 888, 890 (1996) (“A central defect of Justice Powell’s decision is its failure to identify a reason for diversity which is sufficiently clear and specific that it can be used to design a program for diversity admissions.”).

²¹⁷ 539 U.S. 244 (2003).

²¹⁸ *Id.* at 271-72.

²¹⁹ *Id.* at 284-85.

²²⁰ *Id.* at 281. Since the decision, the University of Michigan has unveiled a new affirmative action policy for undergraduates, dropping the point system that was deemed unconstitutional by the Court. See Sarah Freeman, *University of Mich. Drafts New Policy on Affirmative Action*, SAN DIEGO UNION TRIBUNE, August 29, 2003, at A16 (“The new undergraduate policy was modeled in part on the less rigid law school policy, which tried to ensure that minorities make up 10 percent to 12 percent of each class. Undergraduate applicants will now be

Both of the Michigan cases were framed as a limited debate over whether the educational benefits of a racially diverse student body are sufficiently compelling to justify affirmative action and whether the programs were narrowly tailored to this goal.²²¹

Importantly, Asian Americans had taken opposing stands on university affirmative action in both cases. On the one hand, the Asian American Legal Foundation, based in Northern California, agreed with the white plaintiffs and urged the Court to end race-based admissions policies.²²² However, nearly thirty Asian American political and legal organizations filed amicus briefs in support of the University of Michigan's race-based admissions program.²²³ NAPALC is a national organization which focuses on a broad array of policy issues dealing with civil rights. It argued that the University of Michigan program was extremely flexible and consistent under the *Regents of the University of California v. Bakke*.²²⁴

In short, some Asian American activists argued that even though Asians were not included in affirmative action programs, affirmative action should nonetheless be continued on the basis

asked to give more information about their socio-economic status and give a short answer explaining their thoughts about diversity.”).

²²¹ See *Grutter*, 539 U.S. at 280; *Gratz*, 539 U.S. at 306.

²²² Brief of Amicus Curiae Asian American Legal Foundation at 3, *Grutter*, available at 2003 WL 15263; see also David G. Savage, *Affirmative Action Case splits Asian Americans*, LOS ANGELES TIMES, March 30, 2003, available at <http://aad.english.ucsb.edu/docs/untitled-1.html>.

²²³ See, e.g., Brief of Amici Curiae National Asian Pacific Legal Consortium et. al., *Grutter*, available at 2003 WL 400140.

²²⁴ *Id.* at 9.

that diversity is a compelling interest.²²⁵ This was echoed in Frank Wu's testimony in the case. "Professor Wu pointed out that while much of the litigation over affirmative action has referred to Asian Americans at length, his testimony was the first time an Asian American voice has been heard in the actual litigation."²²⁶

On the other hand, Professor Jim Chen, along with other law professors who oppose affirmative action, filed an amici brief in *Grutter*.²²⁷ They opposed as unconstitutional the race-based admissions policies employed by the University of Michigan

²²⁵ *Id.* Asian Americans played a significant role in the *Bakke* litigation. See Brief of Amici Curiae Asian American Bar Association of the Greater Bay Area, *Bakke*, available at 1977 WL 189498. "The Asian American Bar Association of the Greater Bay Area ['AABA'] is a voluntary bar association founded in 1976 and composed largely, though not exclusively, of Asian American attorneys who practice in the San Francisco Bay Area." *Id.* at 1-2. The AABA advanced the argument that affirmative action should be supported because Asian American communities are underserved due to the dearth of Asian American professionals, especially in the legal profession. *Id.* at 15. Of paramount concern to AABA was whether the growing Asian American community, especially in California, would receive adequate legal representation. The AABA argued that the ability to communicate with immigrant populations is an essential prerequisite to the delivery of effective legal services. *Id.* at 15. Perhaps the most compelling argument made by AABA in support of affirmative action was the tremendous under representation of Asian Americans in the legal profession. In 1970, the ratio of Asian American attorneys to the Asian American population in the United States was only one-half the comparable ratio for white persons. *Id.* at 15-16. In the 1970 Census, there was a total of approximately 2.09 million Asian Americans, of whom approximately 1,000 were attorneys. *Id.* at 16. Asian Americans comprised almost exactly one percent of the nation's total population, but only three-tenths of one percent of the nation's total lawyers. *Id.* The statistics demonstrate the lingering effects of past racial discrimination against Asian Americans and the need for programs to increase the number of Asian American attorneys to serve the Asian American community. *Id.*

²²⁶ BAMN: Coalition to Defend Affirmative Action & Integration and Fight for Equality By Any Means Necessary, Trial Report, No. 4, available at <http://www.bamn.com/doc/2001/010214-trial-report-4asp> (last visited July 18, 2003).

²²⁷ Brief of Amici Curiae Law Professors Larry Alexander, et al., *Grutter*, available at 2003 WL 164181.

School of Law.²²⁸ In their view, “diversity” is employed by universities as a shorthand term for discrimination on the basis of race, is indistinguishable from the use of quotas, and is not a remedial interest. They assert that, “racial diversity in the classroom does not constitute academic diversity; to the contrary, it is based on racial stereotyping and fosters stigmatization and hostility.”²²⁹ Further, they contend that:

Even stereotypically assuming it resulted in a greater diversity of views and information, such a result is not a compelling interest that would outweigh constitutional rights in this or other contexts. . . . Diversity is a race-balancing interest that would, by its own terms, require race discrimination for eternity.²³⁰

It bears repeating that even though the challenged affirmative action program in the *Grutter* case did not include Asian Americans, the National Asian Pacific American Bar Association, National Asian Pacific American Legal Consortium, Asian Law Caucus, Asian Americans Legal Defense and Education Fund, and Asian Pacific American Legal Center supported the program. In their amicus curie brief, these groups stated:

[We are] also wise to dispel certain underlying assumptions about Asian Pacific Americans that Plaintiff Grutter appears to have injected into this litigation. For example, Plaintiff’s complaint

²²⁸ *Id.* at 2.

²²⁹ *Id.*

²³⁰ *Id.* at 2.

lumped together under the rubric 'disfavored racial groups' White Americans, who constituted the historical majority of this country, with certain minorities such as Asian Pacific Americans, as if the two groups face the same circumstances in this country. . . . By doing so, Plaintiff has missed Asian Pacific Americans to justify her politically difficult position of asserting claim for the racial group. . . . Plaintiff has brought Asian Pacific Americans into this dispute as a 'wedge group' . . . she has helped us Asian Pacific Americans as the model minority as means of telling other minorities, 'They made it, Why can't you.'²³¹

This practice of grouping whites and Asian Americans together in challenges to affirmative action programs that do not include Asian Americans is becoming more commonplace. I have written about this issue elsewhere concerning the earlier case of *Hopwood v. State of Texas*,²³² a case that is a close cousin to *Grutter*. In *Hopwood*, Asian Americans were used as constructive "whites" by the Fifth Circuit and affirmative action opponents.²³³ By treating Asian Americans as whites, the courts are conveying

²³¹ Brief of Amici Curiae National Asian Pacific Americans Legal Consortium, et al. at 5, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 01-1447).

²³² 78 F.3d 932 (5th Cir. 1996), *cert denied*, 518 U.S. 1033 (1996). See also Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION, *supra* note 197 ("Since the *Hopwood* decision, minority applications and admissions at the University of Texas Law School have fallen precipitously.").

²³³ See RICHARD D. KAHLENBERG & HARVEY GEE, A CLASS-BASED REMEDY: A BOOK REVIEW OF THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 278-79 (2000). Cf. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, in CRITICAL RACE THEORY: THE KEY WRITING WHICH FORMED THE MOVEMENT, *supra* note 4, at 444. (arguing that race is constructed in social contexts and that race has a "multiplicity of meanings" depending on each circumstance).

the implicit message that affirmative action is no longer necessary and race should never be considered in the college admissions process or in the awarding of government contracts. On this point, Asian American activist Karen Narasaki astutely observes, “[t]hese days Asian-Americans are being cast as victims of affirmative action. Many White Americans have held us up as ‘model minorities,’ giving us status as honorary Whites.”²³⁴ It may only be a slight simplification to say that if Asian Americans are able to be admitted into universities and law schools without the assistance of affirmative action and based on merit alone, these programs are no longer needed, and everyone can and should compete with each other equally. However, Professor Robert Chang explains that:

[A]lthough certain Asian American groups have enjoyed a fair amount of success in admission to elite educational institutions, all Asian American groups face continuing discrimination in the workplace. Affirmative action is still necessary for certain Asian American groups even in the context of elite school admissions, and it is still necessary if Asian Americans are to overcome the employment discrimination, often taking the form of glass ceilings, that operates to prevent our advancement.²³⁵

Finally, Asian Americans have shown their resistance to being used as a wedge group in the affirmative action debate. For example, Stewart Kwoh, executive director of Asian Pacific

²³⁴ Karen Narasaki, *I Too, Am an Affirmative-Action Baby, Model Minority: A Guide to Asian American Empowerment*, available at <http://modelminority.com/society/aababy.htm> (last visited December 21, 2003).

²³⁵ See Chang, *supra* note 102, at 1128.

American Legal Consortium explains his support: “We felt it was important to make a statement in support of affirmative action because Asian Pacific Americans are too often used as a pawn in the affirmative action debate.”²³⁶ Kwoh’s concerns are shared by Margaret Fung. She suggests that “even though Asian Pacific Americans are not included in the Law School’s admissions policy, they have a stake in the full inclusion of underrepresented minorities to level the playing field and achieve diversity.”²³⁷

The NAPALC also filed an amicus curiae brief in *Adarand Constructors, Inc. v. Mineta*.²³⁸ That case was essentially a second go around for *Adarand Constructors, Inc. v. Pena*,²³⁹ a case involving the awarding of construction contracts through a federal set-aside program. The Court, for the first time, invalidated a purely federal affirmative action program through the application of the strict scrutiny standard of review and announced a new standard of strict scrutiny of all congressionally authored affirmative action programs.²⁴⁰ The Court held that congressionally authorized race-conscious affirmative action

²³⁶ National Asian Pacific American Legal Consortium Press Release, *Asian Pacific Americans Legal Organizations Support the Continuation of Diversity Programs*, May 23, 2001, available at http://www.napalc.org/programs/vpr/Grutter_5-23-01.html (on file with author).

²³⁷ *Id.*

²³⁸ 534 U.S. 103 (2001).

²³⁹ 515 U.S. 200 (1995).

²⁴⁰ *Id.* at 200. See also Tony Freemantle, *Affirmative Action Pushed to Fore in '97*, HOUSTON CHRONICLE, Dec. 28, 1997 (“From a legal standpoint, the future debate about affirmative action will be over two issues left unresolved. . . . The ruling said that government programs granting racial preferences were not constitutional unless they were narrowly tailored to satisfy a compelling governmental interest, such as to remedy the effects of past discrimination.”).

programs should be subjected to strict scrutiny and remanded the case to the lower court for application of this standard of review.²⁴¹ The case made its way back to the Supreme Court. However, the merits of the case were never heard because the Court dismissed it on procedural grounds.²⁴²

In their brief, leading Asian American civil rights organizations describe the widespread discrimination against Asian Americans and argue that discrimination is pervasive in numerous areas related to contracting that prevents Asian American owned businesses from competing on an equal basis for public contracts.²⁴³ Stewart Kwoh says: "While the Supreme Court dismissed the case on procedural grounds, we are pleased that the court's decision leaves affirmative action as law of the land."²⁴⁴

²⁴¹ *Adarand*, 515 U.S. at 200.

²⁴² *Mineta*, 534 U.S. at 110.

²⁴³ See Brief of Amici Curiae National Asian Pacific Americans Legal Consortium, et al. at 8, *Adarand v. Mineta* 534 U.S. 103 (2001) (No. 01-1447) explaining:

Congress' findings, which are well supported by numerous other sources, demonstrate the existence of direct discrimination against Asian-Pacific-American-owned businesses in the awarding of federal government contracts [O]ther, more insidious means of racial discrimination also prevent Asian-Pacific Americans from . . . establishing contracting businesses. . . . [B]y excluding Asian-Pacific Americans from the 'old boy' networks critical to contracting decisions, racial discrimination prevents even those Asian-Pacific Americans who are able to start businesses from competing on a fair basis for many government contracts. Racial discrimination further blocks fair competition because it often results in . . . higher price quotations from suppliers, bid-rigging, and blocked access to bonding and financing from commercial lenders.

²⁴⁴ See Ji Hyun Lim, *Supreme Court Dismissed Adarand Appeal*, ASIANWEEK, Dec. 2001, available at http://www.asianweek.com/2001_12_07/news_supreme.html (on file with author).

These examples defy any assumption that mainstream America may have about any perceived lack of aggressive civil rights activities on the part of the Asian American community.²⁴⁵

However, this overwhelming support for affirmative action by leading Asian American activists should not gloss over their slight ambivalence, and even opposition, towards affirmative action by other groups. This has been seen in situations when it becomes unclear whether they are beneficiaries, or if it appears that their interests are actually harmed.²⁴⁶ More specifically, this was illustrated during the Lowell High School controversy.²⁴⁷ According to Law Professor Eric Yamamoto, the Asian American Legal Foundation, Chinese American Democratic Club, and other organizations representing Asian Americans characterized the suit as a fight against quotas, injustice against Chinese Americans, and civil rights.²⁴⁸ The professor also noted that conservative politicians embraced their positions and argued the harm of the consent decree to Asian Americans as another reason why they should oppose all affirmative action programs.²⁴⁹ Norman Matloff refutes with what he terms hypocrisy on the part of Asian

²⁴⁵ See CHARLES J. MCCLAIN, IN SEARCH OF INEQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 3 (1994). Asian Americans have a long history of activism. These efforts can be traced back to the Chinese protesting discriminatory treatment dating back to the infancy of immigration. *Id.*

²⁴⁶ See ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 31 (1999).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 31.

²⁴⁹ *Id.*

American organizations who brought the lawsuit against Lowell. Matloff points out that:

[the] Chinese American Democratic Club's] right to the moral high ground is shaky at best. The club seems to happily accept San Francisco's minority business enterprise law, which replaces merit with race in the awarding of city contracts; Chinese-owned businesses benefit greatly from this. The club can't have it both ways.²⁵⁰

This vigorous activism demonstrated by Asian Americans on both sides of the issue reinforces the vigor of the Asian American voice. If the activism surrounding the prosecutions of Wen Ho Lee and James Yee are any indication, activism from divergent perspectives on behalf of Asian Americans will likely continue to expand.²⁵¹

²⁵⁰ Norman Matloff, *Lowell High Plaintiffs Want It Both Ways*, S.F. CHRONICLE, Dec. 8, 1994, A29. In addition to barriers in governmental contracting, Asian Americans also experience discrimination in the workplace, coming often in the form of "glass ceilings." *Id.*

²⁵¹ WEN HO LEE & HELEN ZIA, MY COUNTRY VERSUS ME 330-31 (2001) stating:

[Wen Ho Lee's] attorneys . . . are working hard on the privacy lawsuit against the federal government for its continual leaks to the media of information about [him]. In addition, other people continue to fight issues stemming from [his] case, even though [he has] no connection to their efforts. . . . [S]everal groups, led by the American Civil Liberties Union of North[ern] California, the Asian Law Caucus, and Chinese for Affirmative Action . . . are seeking the discovery documents about racial profiling against Asian Americans that Judge Parker had ordered the prosecutors to produce. Others are independently seeking a presidential pardon for [Lee's] one felony count.

Supporters of James Yee applaud his release and criticize the prosecution. See Matthai Chakko Kuruvilla, *Activists See Soldier's Case as Excess in Terrorism War*, SAN JOSE MERCURY NEWS, Dec. 5, 2003, available at 2003 WL 69054634

IV. MODERN RACE AS A COMPLEX AND CONSTANTLY EVOLVING SOCIAL CONSTRUCTION: INTERMARRIAGE AND MIXED RACE AMERICANS

A. *Seeing Whiteness as the Ideal Color*

Wu's second strand of analysis centers on the notion that a racial hierarchy has developed in this country where whites are situated at the top, African Americans are at the bottom, and Asian Americans, along with other nonwhites, rest somewhere in between.²⁵² This theory becomes clearer in a later chapter focusing on intermarriage and the mixed race movement, where Wu suggests that interracial marriage still occurs in distinct configurations, and not all individuals have the same ability to engage in it.²⁵³ Wu says that "races come together asymmetrically."²⁵⁴ This fact has resulted in remarkable

(a coalition of Chinese American, American Muslim, and civil rights activists were brought together to condemn the changes against James Yee).

²⁵² LOPEZ, *supra* note 97, at 181.

²⁵³ WU, *supra* note 1, at 272. See also PEI-TE LIEN, *THE MAKING OF ASIAN AMERICA THROUGH POLITICAL PARTICIPATION* 177 (2001):

The dramatic rise of inter-Asian marriages in the share of all intermarriages involving Asians from 1980 to 1990 is revealed in an analysis of census data in California, where the rate for Asian men grew from 21 percent to 64 percent and that for Asian women it grew from 11 percent to 46 percent over the decade. . . . In that state, about a quarter of the married U.S.-born Asian men and women in 1990 had a spouse that was from a different Asian ethnicity. The equivalent rate for foreign-born Asian men and women was 17 percent and 14 percent, respectively.

²⁵⁴ Wu, *supra* note 1, at 212.

consequences. Relying on the most current social science data, Wu makes two related points: (1) Asian Americans, especially Asian women, are increasingly marrying outside their race, usually with whites; and (2) there presently exists, though wrongly, an ideal for all Americans to strive to become literally and figuratively “white.” He proceeds to develop his arguments in turn.

First, Wu asserts that interracial marriage may reinforce, rather than break down, the color line that separates whites from blacks because interracial marriage has risen primarily due to alliances among whites, Asian Americans, and Latinos, not African Americans.²⁵⁵ According to Wu, white-black interracial marriages lag behind as the least frequent, and whites are much more likely to marry Asian Americans at a rate that is triple the African Americans rate.²⁵⁶ Wu suggests that “Asian Americans generally marry up. . . . For most Asian Americans, a white spouse ranks higher than a black spouse.”²⁵⁷

These facts help support Wu’s belief that race has become a fungible matter of choice for some individuals. Wu suggests that despite how Asian Americans may perceive themselves, white Americans also rank above other Asian Americans. According to

²⁵⁵ WU, *supra* note 1, at 272. John Miller has also researched this issue, and has made similar findings. Miller reports that: “In 1990, 30 percent of all marriages including an Asian-American also included a non-Asian, usually a white. These marriages produced more than 314,000 children. Nearly one out of five Asian-American births was to a mixed-race couple.” See JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA’S ASSIMILATION ETHIC* 144 (1998).

²⁵⁶ WU, *supra* note 1, at 272.

Wu, although Asian Americans are marrying across Asian ethnicities more often than before, they are more likely to interracially marry with white Americans than with Asian Americans of a different ethnicity.²⁵⁸ Hence, Wu says that few fail to grasp that it is the “white look,” not the “Asian look,” that is in demand.²⁵⁹

Second, the author reiterates that this artificial social construction has been developed based on the false premise of whiteness as being the ideal, even preferred, standard. Significantly, Professor Barbara Flagg has developed a theory of white race-consciousness that seems to support Wu’s contentions. Flagg considers and rejects the development of a positive white racial identity, and describes what she terms the “transparency phenomenon,” whereby whites think and believe that white is not a racial term. According to Flagg, the tendency for whites to not think about whiteness functions to externalize their notion of race as about people of color.²⁶⁰

²⁵⁷ WU, *supra* note 1, at 273.

²⁵⁸ WU, *supra* note 1, at 273.

²⁵⁹ WU, *supra* note 1, at 273. *See also* LOPEZ, *supra* note 97, at 182 (“Like so much else in U.S. society, standards of attractiveness are not neutral in terms of race, but instead have been racialized in a hierarchical fashion which places Whites and White attributes at the top. In this context, positive minority identities differ remarkably in their political implications from a positive White identity. Positive minority identities call into question the core notions of racial identity.”).

²⁶⁰ *See* BARBARA J. FLAGG, *WAS BLIND: BUT NOW I SEE: RACE CONSCIOUSNESS & THE LAW* (1998). *Cf.* Neil T. Gotanda, *Citizenship Nullifications: The Impossibility of American Politics*, in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS*, *supra* note 23, at 80 (“The terms racialized and racialization capture the idea that race is often a dynamic process. The now frequently expressed notion that ‘race is socially

Wu argues that American society cannot avoid being color-conscious and that society aspires to whiteness, which brings tangible benefits.²⁶¹ In demonstrating this proposition, he uses two well-known celebrities as examples.²⁶² Wu examines golf sensation Tiger Woods and Hollywood actor Keanu Reeves, who are individuals of Asian extraction that are passing as black and white.²⁶³ Both Woods and Reeves have unique experiences in negotiating the color line. While both celebrities are of mixed race, mainstream society perceives one to be black, and the other white. The differences between the empirical classifications are stark. After Wu establishes that Woods is considered “black” in the minds of mainstream Americans, he explains the reasoning for this finding: the one-drop rule to which Woods referred was a legal rule.²⁶⁴ Wu proceeds to dismiss the one-drop rule. According to Wu, Woods is considered African American based on “the theory that a single drop of black blood would contaminate white virtue, any person whose ancestry could be traced back to a black person

constructed’ similarly emphasizes the historical and social contexts in which various ideas of race have developed.”).

²⁶¹ WU, *supra* note 1, at 273.

²⁶² WU, *supra* note 1, at 273.

²⁶³ WU, *supra* note 1. See also LOPEZ, *supra* note 97, at 192 (“Racial choices occur both on mundane and on epic levels . . . the most graphic illusion of choice in the legal construction of racial identities comes in the context of ‘passing.’ The ability of some individuals to change race at will powerfully indicates the chosen nature of race.”).

²⁶⁴ WU, *supra* note 1, at 295.

was deemed to be black no matter how distant the relationship.”²⁶⁵ The one-drop rule, which has no basis in biology, has been abolished legally, but not culturally. Somebody who is like Woods is, for practical purposes, “black.”²⁶⁶ No matter how much Woods may try to assimilate to white culture, he is still characterized as being black.

Wu points out that movie actor Keanu Reeves provides a contrasting example. Reeves, whose biological father is Hawaiian, can easily pass as being “white” because he looks and acts white, and because of his white appearance, he can pass as white and reap the benefits of being white.²⁶⁷ Wu suggests that Reeves is an example of a closeted Asian American, or what he terms a “Caucasian Asian.”²⁶⁸ Wu states that: “To most moviegoers, he is an average white guy. There is no reason for him to publicize that he is anything else. Only a fanatical devotee of tabloid news would even know his paternity. Neither his facial features nor his family name are obviously Asian.”²⁶⁹ According to Wu, Reeve’s father can be readily identified as Asian from the few published photographs.²⁷⁰ Wu characterizes Reeves as “peering out from the shadows as an enigmatic figure.”²⁷¹ He argues that there would be no reason other than excessive ethnic pride for Reeves to hold

²⁶⁵ WU, *supra* note 1, at 295.

²⁶⁶ WU, *supra* note 1, at 295.

²⁶⁷ WU, *supra* note 1, at 295.

²⁶⁸ WU, *supra* note 1, at 295.

²⁶⁹ WU, *supra* note 1, at 295.

²⁷⁰ WU, *supra* note 1, at 295.

²⁷¹ WU, *supra* note 1, at 295.

himself out as Asian.²⁷² If nothing else, Wu's succinctly written analysis provides the basic foundation for any crude cultural/benefit analysis that demonstrates the advantages of being functionally black and being constructively white.

Simultaneously, Wu recognizes the ease with which he has adopted whiteness. Wu writes that to the extent that he has chosen to be white and has consciously selected his whiteness, he confirms that whiteness is beneficial.²⁷³ Other scholars have also presented work that reinforces the idea that individuals are treated in different ways simply due to their skin color. In his recent book discussing the experience of being a mixed race individual in this country, law professor Kevin Johnson observes that having the physical appearance of a stereotypical Mexican can lead to distinctly "special treatment."²⁷⁴ Johnson also discusses the fact that Latinos face a different set of assimilation obstacles depending on their skin color. He states that "black-skinned Latinos face an entirely different set of assimilation obstacles." They cannot pass as white and are often seen not as Latino, but as African Americans, with the harsh stigma American society attaches to being "black."²⁷⁵

²⁷² WU, *supra* note 1, at 295.

²⁷³ WU, *supra* note 1, at 296.

²⁷⁴ KEVIN, R. JOHNSON, HOW DID YOU GET TO BE MEXICAN?: A WHITE/BROWN MAN'S SEARCH FOR IDENTITY 161 (1999). Johnson recalls his experiences in high school. He notes that he had aspired to be "white" by putting down other non-whites, and at times allowed others' assumptions that he was white to go uncorrected. As a high school student seeking to be "one of the crowd," he accepted his friends' practice of routinely disparaging Mexican Americans and Africans. *Id.* at 161.

Wu closes his book with a hypothesis that many Americans are afflicted with a partial color or race blindness. He states that Americans cannot see clearly and their would-be color blindness conceals the subjectivity of their own vantage points.²⁷⁶ Through this filter, Asian Americans see that being in the company of white Americans is accepted as assimilating into the mainstream, a sign of upward mobility.²⁷⁷ Wu suggests that someone who is neither black nor white observes that given a choice, it would be wise to try to become white, through assimilating as much as possible, because that status brings tangible benefits.²⁷⁸

B. Continuing the Conversation About Race and Expanding the Racial Dialogue Through Wu's New Paradigms of Civil Rights

In the most interesting sections of the book, Wu offers innovative and pragmatic resolutions. First, he contends that Americans can find hope in the mixed race movement, which represents our future. He insists that Asian Americans can play a unique role in achieving racial justice. By including Asian Americans in discussions about race, Wu illustrates how civil rights for all racial groups are a universal cause. In particular, he emphasizes the possibilities of creating and maintaining coalitions and suggests that coalitions can be formed and reformed to serve as the source of democratic strength. As this country heads into

²⁷⁶ WU, *supra* note 1, at 318.

²⁷⁷ WU, *supra* note 1, at 318.

the new century, the issue of race relations is more important than ever. The recent demographic changes in the United States within the last two decades have given rise to new paradigms for race relations which include everyone — whites, African Americans, Latinos, Asian Americans, immigrants, and other non-white minorities. These paradigms offer bold, multifaceted opportunities to expand and build already existing or new coalitions among communities of color.

Second, Wu stresses the importance of meeting societal obligations and considering the key principles upon which this society is based. He then describes the various pragmatic solutions to deal with racial discrimination, arguing that current legislation insufficiently addresses the current racial reality in America.²⁷⁹ Wu concludes that the country needs new models for civil rights, “which must offer both universal principles and specific applications, with the recognition that even universal goals may be best pursued through specific strategies.”²⁸⁰ According to Wu:

We ought to stop debating, and start doing. In addition, instead of focusing obsessively on affirmative action programs, we should concentrate on the realities of racial disparities. Taking up “reverse discrimination” and not regular discrimination shifts our attention toward the remedies prematurely, inducing us to find faults

²⁷⁸ Wu, *supra* note 1, at 318.

²⁷⁹ Wu, *supra* note 1, at 132.

²⁸⁰ Wu, *supra* note 1, at 132.

with potential solutions while ignoring the original problems of racial bias.²⁸¹

The first step is to move beyond the traditional black/white understanding of race, and as Wu has shown, this is especially imperative in the affirmative action debate.

V. CONCLUSION

Yellow: Race in America Beyond Black and White is released at a time to meet the important challenge of trying to improve race relations in this country. *Yellow* is a highly readable book which is undoubtedly a must-read for all who are interested and concerned about race relations in this country. Undoubtedly, in the wake of the September 11th terrorist attacks in New York and Washington, Wu's volume provides a contemporary relevance to today's discussions of the issues about the racial profiling of Arab Americans and related concerns about the suspension of civil liberties during a time of war. Unlike other recent legal writings by Asian American scholars,²⁸² Wu's book avoids a heavily and strictly legal analysis by offering personal anecdotes and pragmatic alternatives for general approaches to race relations. The volume

²⁸¹ WU, *supra* note 1, at 132.

²⁸² See, e.g., ANCHETA, *supra* note 5; CHANG, *supra* note 5; LOWE, *supra* note 5; YOMAN, *supra* note 5.

is a very comprehensive summary of the Asian American experience and the major contemporary legal, political, and social issues that have affected Asian Americans. Despite its slight shortcomings, Wu's book is a triumph. It is one of the most cogent and well-presented books about the Asian American experience, and the complex dynamics of race, culture, and politics. Wu has certainly written a great book and sets a high standard for future work in this genre.