

# AFFIRMATIVE ACTION’S BADGE OF INFERIORITY ON ASIAN AMERICANS

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## INTRODUCTION

In 1896, the Supreme Court upheld the constitutionality of racially segregated railcars in *Plessy v. Ferguson*,<sup>1</sup> dismissing the argument that “separation of the two races stamps the colored race with a badge of inferiority.”<sup>2</sup> In dissent, Justice Harlan wrote that the Constitution “is color-blind, and neither knows nor tolerates classes among citizens.”<sup>3</sup> Fifty-eight years later, in *Brown v. Board of Education of Topeka*,<sup>4</sup> the Supreme Court vindicated Justice Harlan’s view and overturned *Plessy* in a decision ending racial segregation in public schools, writing that “[s]eparate educational facilities are inherently unequal.”<sup>5</sup> The *Brown* Court rested its holding on the very argument that *Plessy* had rejected—that separation based on race stamps people of color with a badge of inferiority. Irrespective of the educational conditions of segregated schools, the very act of separating black students from white students “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>6</sup>

In this Article, I argue that racial preferences, sometimes referred to as race-based affirmative action, are incompatible with the logic of *Brown*. By employing racial quotas and holding Asians to a higher standard for admission solely because of their race, universities deny Asians an opportunity to earn admission “on equal terms” with students of other races.<sup>7</sup> By treating Asians differently from white, black, Hispanic, and Native American students, and making it more difficult for them to earn admission solely on account of their race, schools demean their accomplishments and stamp them with a badge of inferiority as to their status in the community. As a result, racial preferences are contrary to *Brown v. Board of Education of Topeka*.

In Part I, I provide a brief overview of the history of racial discrimination against Asians in the United States. In Part II, I discuss twenty-first century stereotypes against Asians, which Jane Hyun has described as part of a “bamboo ceiling” preventing Asians from achieving positions of leadership in the United

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1. 163 U.S. 537 (1896).

2. *Id.* at 551.

3. *Id.* at 559 (Harlan, J., dissenting).

4. 347 U.S. 483 (1954).

5. *Id.* at 495.

6. *Id.* at 494.

7. *Id.* at 493 (holding that education is “a right which must be made available to all on equal terms”).

States.<sup>8</sup> Part III discusses how universities employing racial preferences rely on these same stereotypes to diminish the accomplishments of Asians, stamping Asians with a badge of inferiority. Because racial preferences are demeaning toward Asians on account of their race, I conclude that racial preferences cannot be reconciled with *Brown* and its repudiation of *Plessy*.

#### I. A HISTORY OF DISCRIMINATION AGAINST ASIANS

One of the greatest hazards of any discussion about the Asian experience in America is the arbitrariness of that racial category. As the American-born son of Chinese immigrants, I had no conception of myself as “Asian” until I was asked to identify my race on standardized tests and college applications using America’s crude and antiquated system of racial classification. Many Americans, particularly those who are biracial, have had similar experiences.<sup>9</sup> The arbitrariness of the racial category of Asian is a central topic of Eric Liu’s book *The Accidental Asian*.<sup>10</sup> As I have often remarked, people in China do not consider themselves to be of the same race as people in India, but in the United States they are classified under a single race—Asian—which happens to encompass more than half the earth’s population. Indeed, the 2016 National Asian American Survey showed that many Americans are confused about which groups are encompassed by the word Asian.<sup>11</sup> Although Chinese, Japanese, and Koreans were overwhelmingly perceived as being Asian, Indians and Pakistanis were seen as not Asian by over 40%

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8. JANE HYUN, *BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS* (2005).

9. See, e.g., Joy Resmovits, *Jordan Peele Got Inspiration for ‘Get Out’ from Taking Standardized Tests in Elementary School*, L.A. TIMES (Mar. 23, 2017), <http://www.latimes.com/local/education/la-essential-education-updates-southern-jordan-peelee-got-inspiration-for-get-1490224978-htmstory.html> [https://perma.cc/65TA-4WBJ] (“Jordan Peele said he first felt a sense of otherness and racial isolation when filling out the paperwork that came with standardized tests”); Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14admissions.html?ref=topics> [https://perma.cc/6LF5-9ZPD] (“[T]he number of applicants who identify themselves as multiracial has mushroomed, adding another layer of anxiety, soul- (and family tree-) searching and even gamesmanship to the process.”).

10. ERIC LIU, *THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER* (1998).

11. Karthick Ramakrishnan & Jennifer Lee, *Opinion: In the Outrage Over Discrimination, How Do We Define ‘Asian American’?*, NBC NEWS (May 10, 2017), <https://www.nbcnews.com/think/news/opinion-outrage-over-discrimination-how-do-we-define-asian-american-ncna757586> [https://perma.cc/88Y4-6YQ7].

of whites and other Asians.<sup>12</sup> For clarification, I use the term Asian in this Article to refer to all Asian and Pacific Islander groups recognized in the Census or the Common Application.

As a result of the arbitrariness of the racial category of Asian, it is difficult to comprehensively discuss the history of discrimination against Asians in America. To the extent various Asian groups share a common experience in this country, it is in their similar experience of racial stereotypes and similar treatment in identity politics. As I discuss later in this Article, Asians are often stereotyped as immigrants or nerds who are book smart but lacking in social skills, creativity, and independent thought. And when it comes to public discourse about identity-based discrimination, the media and political elites tend to treat discrimination against Asians as an afterthought, focusing greater attention on discrimination against other groups, such as those who are black, Hispanic, female, lesbian, gay, bisexual, transgender, Muslim, or disabled. In the words of Michael Luo, a New York Times journalist who started the hashtag #ThisIs2016 to draw attention to discrimination against Asians: “It’s resonating because Asian Americans have this feeling that racism against them is not taken as seriously as other groups.”<sup>13</sup> The difficulties of writing about the Asian experience are further compounded by the challenges of intersectionality. Just as the stereotype of black aggression affects black men differently from black women, the stereotype of Asian effeminacy affects Asian men differently from Asian women. It is already difficult to discuss the different experiences of racism by different groups of Asians; it is even harder to discuss how those experiences differ for Asians based on other aspects of their identities. Nevertheless, having acknowledged these challenges, I will provide a brief overview of the history of discrimination against Asians in the United States.<sup>14</sup>

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12. *Id.*

13. Hope King, #ThisIs2016 Rallies Asian Americans Against Racist Encounters, CNN (Oct. 10, 2016), <http://money.cnn.com/2016/10/10/technology/thisis2016-michael-luo-nytimes/index.html> [https://perma.cc/Z29K-B77V].

14. For a more comprehensive history of discrimination against Asians in the United States, see ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (2d ed. 2006).

*A. Yellow Peril and Anti-Asian Legislation*

In the mid to late 1800s, concerns that Chinese immigrants were depressing wages led many white workers to view East Asians through the lens of “yellow peril.”<sup>15</sup> East Asians were often depicted as vast, faceless hordes of “Chinamen,” with slanted eyes, braided hair, and conical hats.<sup>16</sup> California’s legislature and Governor passed a number of anti-Chinese laws that sought to deny Chinese people equal rights and prevent them from migrating to California.<sup>17</sup>

One of those laws was ruled unconstitutional by the Supreme Court of the United States in *Yick Wo v. Hopkins*,<sup>18</sup> which invalidated an ordinance in San Francisco that made it illegal to operate a laundry in a wooden building without a permit from the Board of Supervisors.<sup>19</sup> There were about 320 laundries in San Francisco at the time, and about 310 of them were constructed of wood.<sup>20</sup> The Board was given unchecked discretion to grant or deny permits, and although the petitioner<sup>21</sup> and 200 other Chinese people were denied permits to continue their businesses, those who were not Chinese were all granted permits, with one exception.<sup>22</sup> The Court struck down the permitting scheme as unconstitutional, writing:

No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are

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15. *See id.* at 49.

16. *See generally* JOHN KUO WEI TCHEN & DYLAN YEATS, *YELLOW PERIL! AN ARCHIVE OF ANTI-ASIAN FEAR* (2014) (archiving anti-Asian images and writings dating back to European colonialism).

17. *See, e.g.*, *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) (striking down ban on fishing by Chinese people in California); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (striking down ban on corporations from hiring Chinese or Mongolian workers); *Lin Sing v. Washburn*, 20 Cal. 534 (1862) (striking down “an act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the State of California”).

18. 118 U.S. 356 (1886).

19. *Id.* at 374.

20. *Id.* at 358–59.

21. “Yick Wo” was not the laundryman’s real name; it was the name of his business. *See* CHARLES MCCLAIN, *CHINESE IMMIGRANTS AND AMERICAN LAW* 23 n.40 (1994) (“He, like many other Chinese businessmen during this period, used the name of his firm as his personal alias.”).

22. *Yick Wo*, 118 U.S. at 359.

permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.<sup>23</sup>

*Yick Wo* provides just one example of the multitude of anti-Asian laws that were passed in the late 1800s due to anti-Asian bigotry and xenophobia.

### B. Exclusion from Immigration and Naturalization

Under the Naturalization Act of 1870, naturalization was made available to “aliens of African nativity and to persons of African descent,” but not to Asians.<sup>24</sup> In *Ozawa v. United States*,<sup>25</sup> the Supreme Court held that a Japanese man was ineligible for naturalized citizenship because he was not white,<sup>26</sup> and in *United States v. Thind*,<sup>27</sup> the Court held that an Indian Sikh, who the Court described as a “high-caste Hindu, of full Indian blood,” was not white, and was therefore was ineligible for naturalized citizenship.<sup>28</sup>

Despite the exclusion of Asian immigrants from the benefits of naturalized citizenship, white workers further marginalized Asians by blocking immigration from Asian countries. Responding to this nativist political climate, Congress enacted the Chinese Exclusion Act in 1882,<sup>29</sup> which completely banned Chinese immigration to the United States until the Act’s repeal in 1943.<sup>30</sup> In the same dissent in *Plessy v. Ferguson* in which he described the Constitution as color-blind, Justice Harlan summarized the exclusion of Chinese people from immigration and naturalization:

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23. *Id.* at 374.

24. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.

25. 260 U.S. 178 (1922).

26. *See id.* at 198 (holding that “white person” is synonymous with “a person of the Caucasian race”).

27. 261 U.S. 204 (1923).

28. *See id.* at 206, 214–15 (holding that the words “free white person” are synonymous with the popular understanding of the word “Caucasian,” which did not include Thind, based on the “physical group characteristics of the Hindus”).

29. Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).

30. Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.<sup>31</sup>

Nativism and xenophobia in the United States continued to grow in the early 1900s, and organizations formed to advocate for the exclusion of Asians from the United States. In 1905, a group of white labor leaders formed the Japanese and Korean Exclusion League.<sup>32</sup> In 1907, the group renamed itself the Asiatic Exclusion League in order to include the exclusion of South Asian and Chinese immigrants in its mission.<sup>33</sup> Advocating for the ideal of a “white man’s country,” the Asiatic Exclusion League used violence and rioting to terrorize Asians.<sup>34</sup>

In 1917, Congress passed the Immigration Act of 1917,<sup>35</sup> sometimes referred to as the Asiatic Barred Zone Act. That act expressly banned immigration from South Asia, Southeast Asia, and the Middle East.<sup>36</sup> In addition, the Act excluded low-skilled European immigrants with a literacy test,<sup>37</sup> a provision championed by the Immigration Restriction League, which was founded in 1894 by three Harvard alumni, Charles Warren, Robert DeCourcy Ward, and Prescott Hall, with the goal of excluding Southern and Eastern Europeans.<sup>38</sup>

The Immigration Act of 1924,<sup>39</sup> which included the Asian Exclusion Act, completely banned immigration from all Asian countries by imposing a rule that no alien who was ineligible to become a citizen could be admitted to the United States as an immigrant.<sup>40</sup> Because Asian immigrants could not become

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31. 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

32. See KORNEL CHANG, *PACIFIC CONNECTIONS: THE MAKING OF THE U.S.-CANADIAN BORDERLANDS* 105–06 (2012).

33. *Id.* at 106.

34. *Id.* at 106–07.

35. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (amended by Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163).

36. 39 Stat. 876 (specifying longitudes and latitudes of immigration ban).

37. 39 Stat. 877.

38. See *Immigration Restriction League*, HARV. U., <http://ocp.hul.harvard.edu/immigration/restrictionleague.html> [<https://perma.cc/4XGS-9W7H>] (“[League Members, associated immigration with the socio-economic problems of their increasingly urban and industrialized society—crowded tenements, poverty, crime and delinquency, labor unrest, and violence.”).

39. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

40. See *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1921-1936/immigration-act> [<https://perma.cc/WK8R-U29V>] (detailing the historical background of The

citizens, they were completely banned from immigration to the United States. This policy remained in effect until the Immigration and Nationality Act of 1952, which lifted the ban on Asian immigration and Asian naturalization.<sup>41</sup>

### C. Japanese Internment

One of the most infamous chapters in Asian American history is the internment of Japanese Americans during World War II. Shortly after the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt ordered the federal government to forcibly relocate and incarcerate over 112,000 Japanese Americans.<sup>42</sup> The internment was challenged and appealed to the Supreme Court in 1944, resulting in one of the most infamous decisions in the history of constitutional law, *Korematsu v. United States*.<sup>43</sup>

By a 6 to 3 vote, the Supreme Court in *Korematsu* upheld the government's internment of Japanese Americans as a wartime necessity, even though it acknowledged that “[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.”<sup>44</sup> Writing in dissent, Justice Murphy argued that Japanese internment was racially discriminatory and violated the constitutional right to equal protection of the laws:

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.<sup>45</sup>

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Immigration Act of 1924, which completely excluded immigrants from Asia).

41. *See id.* (explaining that Congress did not revise The Immigration Act of 1924 until 1952); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

42. *See* *Korematsu v. United States*, 323 U.S. 214, 236 (1944) (referring to over 112,000 Japanese Americans).

43. *Id.*

44. *Id.* at 219–20.

45. *Id.* at 242 (Murphy, J., dissenting).



It was not until 2011 that the Department of Justice formally repudiated its position in *Korematsu*.<sup>46</sup> Nevertheless, the Court's decision in *Korematsu* remains on the books as precedent, and it serves as a reminder of this country's history of discrimination against Asians. The anti-Asian legislation of the 1800s and early 1900s, the exclusion of Asians from immigration and naturalization until 1952, and the internment of Japanese Americans during World War II are just a few examples of the unique history of discrimination that Asian Americans have faced in the United States.

## II. PERSISTENT STEREOTYPES ABOUT ASIANS

Since the 1950s, the advances of the civil-rights movement have transformed the landscape of U.S. law and culture to protect the rights of racial minorities. From *Brown v. Board of Education of Topeka*<sup>47</sup> to *Loving v. Virginia*,<sup>48</sup> the Supreme Court struck down Jim Crow laws as incompatible with the Constitution's guarantee of equality. Congress passed the Civil Rights Act of 1964,<sup>49</sup> which among other things, outlawed employment discrimination<sup>50</sup> and required places of public accommodation to serve people of all races.<sup>51</sup> These achievements ushered in a new era of attention and sensitivity to the discrimination that racial minorities face on a daily basis. Nevertheless, in the twenty-first century, Asian Americans continue to face persistent stereotypes that prevent them from achieving positions of leadership in the country.

One of the most enduring stereotypes about Asians in America is that we are book smart, but lacking in social skills, creativity, and independent thought. As the stereotype goes, we may be good at grueling work and studying for exams, but we tend to keep our head down and stay quiet instead of speaking up and expressing our views. At first glance, the stereotype of academic prowess may appear to be positive, but time and time again, in the halls of elite power, the perception of Asians as one-

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46. *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUSTICE (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/6CG2-WC7C].

47. 347 U.S. 483 (1954).

48. 388 U.S. 1 (1967).

49. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

50. *Id.* §§ 701–716, 78 Stat. 241, 253.

51. *Id.* §§ 201–207, 78 Stat. 241, 243–46.

dimensional bookworms prevents them from being taken seriously and treated on an equal basis with people of other races.

In the business world, Asians rarely occupy positions of leadership, even in industries where they are well represented among entry-level employees. According to the Equal Employment Opportunity Commission, Asians made up 47% of professional jobs at Silicon Valley tech companies in 2015, but they held only 25% of executive positions.<sup>52</sup> In private companies in the U.S., Asians made up 12% of professionals, and only 5% of executives.<sup>53</sup> Asians were similarly underrepresented in finance at the executive level of companies such as Morgan Stanley, JP Morgan Chase, Citigroup, and Goldman Sachs.<sup>54</sup>

Jane Hyun coined the term “bamboo ceiling” to refer to the barriers that Asians face when it comes to achieving positions of leadership in the United States.<sup>55</sup> In her book *Breaking the Bamboo Ceiling*, Hyun identifies four persistent stereotypes of Asians that are perpetuated by the U.S. media: (1) the techie or nerdy science whiz; (2) foreigners who can’t speak English; (3) the quiet and submissive Asian; and (4) the model minority who is a diligent, loyal employee who doesn’t raise any flags.<sup>56</sup> Buck Gee, a former Vice President of a Fortune 100 company, observed of Asians that the “stereotype of quiet, talented professional has led to the widespread assumption that they are ill-suited to be business leaders.”<sup>57</sup>

During my first couple of years in private practice at one of the top commercial litigation boutiques in the United States, my colleagues treated me with the utmost professionalism and dignity, but some of the businesspeople I interacted with did not. The COO of a healthcare services company once asked me: “Do you have a fortune cookie that can tell me how this mediation will end?” A CEO of a Fortune 500 company once asked me: “Do

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52. Laura Colby, *Asian Americans Climb the Corporate Ladder, but Only So High*, BLOOMBERG (Nov. 11, 2017), <https://www.bloomberg.com/news/articles/2017-11-21/asian-americans-climb-the-corporate-ladder-but-only-so-high> [https://perma.cc/Z3EA-2UJP].

53. *Id.*

54. *Id.*

55. See HYUN, *supra* note 8.

56. *Id.* at 46–47.

57. Buck Gee, Opinion, *A Bamboo Ceiling Keeps Asian-American Executives from Advancing*, N.Y. TIMES (Oct. 16, 2015), <https://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/a-bamboo-ceiling-keeps-asian-american-executives-from-advancing> [https://perma.cc/S7LD-FYC3].

you have your work papers?” A colleague of mine warned me about a representative of another Fortune 500 company who complained during a meeting that there were too many Asians at the University of Texas at Austin. And a lawyer at a brunch of the Houston Bar Association once asked me if he could call me the “Terracotta Warrior.”

These are but a few examples of my encounters with the bamboo ceiling in the workplace, and they do not include the innumerable instances of racism that I have encountered in other settings throughout my life. From kids on the playground who taunted the appearance of my eyes to the retired police officer who told me that it was great to see me eating American food from McDonald's, the racism that Asians encounter on a regular basis extends well beyond the business world. As Eric Liu eloquently described:

I was keenly aware of the unflattering mythologies that were attached to Asian Americans: that we are indelibly foreign, exotic, math and science geeks, numbers people rather than people people, followers and not leaders, physically frail but devious and sneaky, unknowable and potentially treacherous. These stereotypes of Asian otherness and inferiority were like immense blocks of ice sitting before me, challenging me to chip away at them.<sup>58</sup>

The media in the United States greatly amplify the power of these stereotypes. In a country where roughly 6% of the population is Asian<sup>59</sup> and 73% of Asian adults were born in another country,<sup>60</sup> Asians are able to command only the tiniest fraction of media airtime, and there is little room for Asians to be portrayed in the media as anything more than caricatures—the uncouth immigrant, the awkward nerd, or the boring technician. Even in the rare stories from Hollywood that include Asian lead characters, white actors<sup>61</sup> (or mixed-race actors who

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58. LIU, *supra* note 10, at 50.

59. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> [<https://perma.cc/C6X9-MA8F>] (estimating that as of July 1, 2016, Asians make up 5.7% of the U.S. population, and Native Hawaiian and other Pacific Islanders make up 0.2% of the U.S. population).

60. Gustavo López et al., *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RES. CTR. (Sept. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/> [<https://perma.cc/4E7L-V5PU>].

61. See, e.g., Eliza Berman, *A Comprehensive Guide to the Ghost in the Shell Controversy*, TIME (Mar. 29, 2017), <http://time.com/4714367/ghost-in-the-shell-controversy-scarlett-johansson/> [<https://perma.cc/H38P-UDRJ>] (explaining the protest by fans for casting Scarlett Johansson, a white actress, as the lead character in the English-language adaptation of a popular Japanese Manga series); David Sims, *What is Matt Damon Doing on*

can pass as white<sup>62</sup>) are often cast to play those roles. The practice of casting white actors to play Asians has been referred to as “yellowface”<sup>63</sup> or “brownface,” alluding to the blackface performers in the minstrel shows of the 1800s. Mickey Rooney’s portrayal of Mr. Yunioshi, with taped eyelids, buck teeth, and sibilant accent remains one of the most persistent stereotypes of East Asians in film.<sup>64</sup> Comedian Aziz Ansari described how dismayed he was to discover that the first Indian character he saw with a lead role in a movie—Ben Jahvri from *Short Circuit 2*—was actually played by a white actor who faked an Indian accent.<sup>65</sup> These examples, and others, illustrate how Asians have been systematically marginalized and excluded from American mass media.<sup>66</sup> “There is a bias against Asian Americans,” says Professor Nancy Wang Yuen.<sup>67</sup> “I feel like we are invisible in society. We are nondescript and in a way dehumanized by not existing in scenes or having speaking roles. We are just part of the backdrop.”<sup>68</sup>

The media’s reduction of Asians to one-dimensional stereotypes has made us particularly sensitive to racial insults against Asians in the media. Although offensive jokes about stereotypes are part and parcel of any comedian’s routine, it is

*Top of The Great Wall?*, ATLANTIC (Aug. 2, 2016), <https://www.theatlantic.com/entertainment/archive/2016/08/what-is-matt-damon-doing-on-top-of-the-great-wall/494090/> [<https://perma.cc/B9CU-G52V>] (claiming the film *Great Wall* starring Matt Damon relies “on the face of well-known white American actor to sell its story”).

62. For example, Keanu Reeves played Siddhartha Gautama. *Little Buddha* (1993), IMDB, <http://www.imdb.com/title/tt0107426/> [<https://perma.cc/HCR8-QCY3>].

63. See, e.g., Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface*, *World War II Propaganda*, and *Bifurcating Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 21 (1996) (describing the misappropriation of immigrant identities by white actors in “yellowface” in minstrel shows, dime museums, circuses, early vaudeville, and early cinema).

64. Jeff Yang, *The Mickey Rooney Role Nobody Wants to Talk Much About*, WALL ST. J.: SPEAKEASY BLOG (Apr. 8, 2014), <https://blogs.wsj.com/speakeasy/2014/04/08/the-mickey-rooney-role-nobody-wants-to-talk-about/> [<https://perma.cc/8R7K-EJUV>].

65. Aziz Ansari, *Why Is ‘Everyman’ a White Guy?*, N.Y. TIMES, Nov. 15, 2015, at AR10.

66. See, e.g., Keith Chow, Opinion, *Why Won’t Hollywood Cast Asian Actors?*, N.Y. TIMES, Apr. 23, 2016, at A19 (“[F]ilmmakers fall back on the same tired arguments. Often, they insist that movies with minorities in lead roles are gambles.”); Marc Bernadin, *Hollywood’s Glaring Problem: White Actors Playing Asian Characters*, L.A. TIMES (Apr. 18, 2016), <http://www.latimes.com/entertainment/movies/la-et-mn-racial-erasure-essay-20160418-story.html> [<https://perma.cc/9KZF-JUVT>] (“[W]hen in the process of adaptation, filmmakers remove the original racial identities of the characters in favor of . . . something else. Something Hollywood (wrongly, some might say) perceived to be box-office safe.”).

67. Meg James & David Ng, *In Hollywood, Asian American Actors See Few Lead Roles, and Pay Discrepancies When They Land One*, L.A. TIMES (July 8, 2017), <http://www.latimes.com/business/hollywood/la-fi-ct-hawaii-five-0-asian-actors-20170708-story.html> [<https://perma.cc/Y49V-L34W>].

68. *Id.*

difficult to laugh when those stereotypes are the *predominant* representation of Asians in the media. To make matters worse, many of the most notable examples of racism in the media have come from ostensibly liberal celebrities such as Rosie O'Donnell and Chris Rock, who in other contexts pride themselves on denouncing prejudice. Rosie O'Donnell, an advocate for LGBT rights, drew widespread criticism when she mocked the Chinese language as "ching chong, ching chong" on *The View*.<sup>69</sup> During the Oscars in 2016, Chris Rock brought three Asian children on stage to play his "accountants" as part of a racist joke *in the same performance in which he criticized the Oscars for its lack of black representation*.<sup>70</sup> The limits of identity politics begin where the sympathies and attention spans of so-called liberals end.

The harmful stereotypes perpetuated by the media reinforce the bamboo ceiling and make it harder for Asians to advance to positions of leadership. Indeed, the media's selective portrayal of Asians can at times make us feel like strangers in our own home, perpetual foreigners, incapable of living out the full range of human experiences. As W.E.B. Du Bois famously wrote in *The Souls of Black Folk*, racial minorities are seen by the majority through the "veil" of race, and we experience a "double-consciousness," "this sense of always looking at one's self through the eyes of others."<sup>71</sup>

### III. AFFIRMATIVE ACTION'S BADGE OF INFERIORITY

Despite the historical and present-day discrimination against Asians in the United States, universities that use racial preferences do not provide Asians with benefits in the admissions process similar to those given to other historically disadvantaged groups, such as blacks, Hispanics, and Native Americans. Instead, the statistics show that at many schools using racial preferences, Asians are *harmed* by their race, and have a harder time gaining admission than even white students.

When confronted with evidence of discrimination in the admissions process, universities employing racial preferences

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69. Sara Bonisteel, *Asian Leaders Angered by Rosie O'Donnell's 'Ching Chong' Comments*, FOX NEWS (Dec. 11, 2006), <http://www.foxnews.com/story/2006/12/11/asian-leaders-angered-by-rosie-odonnell-ching-chong-comments.html> [https://perma.cc/WZ24-U3H3].

70. Katey Rich, *Chris Rock's Oscars Asian Jokes Finally Prompt Academy Response*, VANITY FAIR (Mar. 15, 2016), <https://www.vanityfair.com/hollywood/2016/03/chris-rock-asian-jokes-response> [https://perma.cc/54NZ-ZVB6].

71. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK 2* (Dover Publications 1994) (1903).

attempt to justify their unequal treatment of Asians by drawing directly on bamboo-ceiling stereotypes of Asians. By perpetuating these stereotypes of Asians, universities demean their accomplishments and stamp them with a badge of inferiority. By treating Asian students differently from white, black, Hispanic, and Native American students, solely on account of their race, Asians are made to feel like second-class citizens and perpetual foreigners in the only country they have ever known as their home. This stereotyping is incompatible with the logic and reasoning of *Brown*.

*A. Evidence of Racial Disparities in Admissions Standards*

Though defenders of racial preferences sometimes deny that Asians are disadvantaged, there is a well-established body of evidence demonstrating that Asian students are held to a higher standard for admission than students of other races. A study by Princeton University Professor Thomas Espenshade and his coauthor Alexandria Radford sought to quantify the effects of racial preferences in admissions at a number of elite universities on a 1600 SAT scale. Their study showed that white students have a 140-point advantage over Asian students, Hispanic students have a 270-point advantage, and black students have a 450-point advantage.<sup>72</sup> These numbers represent the effects of race alone, and do not include other factors such as socioeconomic status, legacy status, or being a recruited athlete.<sup>73</sup>

These disparities were similarly present at the University of Texas in the *Fisher* litigation. In the 2013 *Fisher* decision, Justice Clarence Thomas noted that there were significant disparities in the grades and test scores of students admitted from outside the Top 10% plan at the University of Texas.<sup>74</sup> Asian students had a mean GPA of 3.07 and a mean SAT of 1991 on the 2400 scale in effect at the time, white students had a mean GPA of 3.04 and a mean SAT of 1914, Hispanic students had a mean GPA of 2.83 and a mean SAT of 1794, and black students had a mean GPA of

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72. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 (tbl.3.5 (2009)).

73. *Id.*

74. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 331 (2013) (Thomas, J., dissenting).

2.57 and a mean SAT of 1524.<sup>75</sup> The district court that upheld the University of Texas's admissions policy dismissed the concern that Asians were the victims of discrimination by writing that "Asian-Americans . . . are largely *overrepresented* compared to their percentage of Texas' population."<sup>76</sup> But as the statistics show, regardless of whether Asians are overrepresented or underrepresented relative to their population in the state of Texas, Asian students were being held to a higher standard for admission than white, black, and Hispanic students.

Sara Harberson, who worked at the University of Pennsylvania, described how Asian students must meet a higher standard for admission than students of other races by being forced to compete against other Asians for a limited number of spots in the incoming class:

[T]here's an expectation that Asian Americans will be the highest test scorers at the top of their class; anything less can become an easy reason for a denial. And yet even when Asian American students meet this high threshold, they may be destined for the wait list or outright denial because they don't stand out among the other high-achieving students in their cohort.<sup>77</sup>

Nelson Ureña, a former admissions officer at Cornell University, hosted an "Ask Me Anything" on Reddit in which he discussed his experiences as an admissions officer.<sup>78</sup> In response to a question from an Asian student about whether indicating his race on his application would affect his chance of admission, Ureña admitted that Cornell forces Asians to compete against other Asians:

The honest fact is that, it is often the case that Asian and Asian American students often have relatively high test scores and so your application would fall (depending on how the individual school reading your application creates their applicant pools) in a pool with peers who have relatively high test scores. In your context your score of 28 is relatively low compared with

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75. *Id.*

76. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated*, 570 U.S. 297.

77. Sara Harberson, Opinion, *The Truth About 'Holistic' College Admissions*, L.A. TIMES (June 9, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> [<https://perma.cc/7QYC-GY8M>].

78. Abby Jackson, *Ex-Ivy League Admissions Officer Reveals Why It's Sometimes Tougher for Asians to Get In*, BUSINESS INSIDER (Sept. 18, 2016), <http://www.businessinsider.com/race-might-affect-college-admissions-especially-for-asian-applicants-2016-9> [<https://perma.cc/3L5H-M39R>].

Asian applicants to some of the more selective schools. I will let you read between the lines here and come to your own conclusions about whether or not you wish to report your race. I would also mention that if there are ways in which you stand out from others within the context of your demographic grouping then it would be smart to highlight those ways in which you stand out.<sup>79</sup>

Princeton professor Uwe Reinhardt remarked that “I tend to feel in my gut that there is an anti-Asian policy.”<sup>80</sup> “There are many non-Asians with lower SAT scores admitted to the Ivy League. A lot of Asians have been rejected with far higher SATs than non-Asians who have been accepted.”<sup>81</sup> In the law school context, David French quantified the extent to which Asians are held to a higher standard for admission than students of other races:

[F]ew people understand how dramatic the boost is for favored minority groups. If students were black or the “right” kind of Latino, they would often receive admissions offers with test scores 20 or 30 percentile points lower than those of white or Asian students. When I expressed concern about an admissions offer to a black student with test scores in the 70th percentile—after we’d passed over white and Asian students in the 98th percentile and far higher grades—I was told that we *had* to offer admission or we’d surely lose him to our Ivy League rivals.<sup>82</sup>

As Harberson, Ureña, Reinhardt, and French’s experiences make clear, whether Asians are “overrepresented” in the pool of admitted students relative to their population in the United States has nothing to do with whether Asians receive an equal opportunity for admission. In fact, the very description of Asians as “overrepresented” and other minority groups as “underrepresented” suggests that Asians are being viewed as representatives of their race, rather than simply as individual human beings with unique talents and experiences. The ugly truth is that universities are forcing Asians to compete against other Asians for a limited number of spots in the incoming class.

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79. *Id.*

80. DANIEL GOLDEN, *THE PRICE OF ADMISSION* 205 (2006).

81. *Id.*

82. David French, *What Ivy League Affirmative Action Really Looks Like – from the Inside*, NAT’L REV. (May 18, 2015), <http://www.nationalreview.com/article/418530/what-ivy-league-affirmative-action-really-looks-inside-david-french> [<https://perma.cc/BF6E-EVPS>].



Although schools that use racial preferences often invoke the rhetoric of holistic, individualized admissions, the statistics show that in reality, they employ a quota on the number of Asians that are allowed entry into the incoming class. Table A of the Complaint in *Students for Fair Admissions v. President & Fellows of Harvard College*<sup>83</sup> shows that despite a significant increase in the Asian population as a share of the U.S. population for many years, the number of Asians at Ivy League universities has remained virtually unchanged:

**Asian American Enrollment at Ivy League Universities<sup>84</sup>**

	2007	2008	2009	2010	2011	2012	2013
<b>Brown</b>	15%	16%	15%	15%	14%	12%	14%
<b>Columbia</b>	17%	17%	16%	16%	16%	16%	18%
<b>Cornell</b>	16%	17%	17%	16%	16%	16%	16%
<b>Dartmouth</b>	14%	14%	15%	15%	14%	14%	14%
<b>Harvard</b>	15%	17%	17%	16%	17%	18%	18%
<b>Penn</b>	17%	17%	18%	18%	18%	18%	18%
<b>Princeton</b>	14%	15%	16%	17%	18%	19%	17%
<b>Yale</b>	14%	14%	15%	15%	15%	16%	16%

These numbers make it clear that universities using racial preferences are not being honest when they claim to employ an individualized admissions process. Instead, they engage in aggressive racial balancing—a numerical-results-by-any-means-necessary approach to achieving a particular racial composition—and set a much higher standard of achievement for Asians to be admitted than students of other races. When an admissions committee receives an application from an Asian student, the committee members do not simply ask whether the student's achievements and potential are outstanding. Rather, they ask whether the student's achievements and potential are outstanding *compared to the other Asians* who have applied to the school. Asians are made to compete against Asians, even though the result of the process is that Asians have a much harder time gaining admission to these schools than students with similar credentials of other races.

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83. Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F. R. D. 39 (D. Mass. 2015) (No.14-cv-14176).

84. *Id.* at ¶ 222.

*B. Harmful Stereotypes Perpetuated by Racial Preferences*

Faced with the overwhelming evidence that Asians are held to a higher standard for admission than students of other races, schools using racial preferences nevertheless claim that the results of their admissions processes are fair to Asians because a student's ability to contribute to a campus depends on more than just test scores and grades. This argument is based on the nasty and demeaning stereotype of Asians being woefully deficient in non-academic factors, such as social skills and leadership potential. There is an "implication that Asian Americans (1) do not participate in extracurricular activities to the same extent as other groups; (2) lack interpersonal skills; or (3) inherently cannot produce diversity—beliefs that are not only inaccurate but often rooted in racism."<sup>85</sup> Thus, universities are sending the racist and bigoted message that on non-academic factors, Asians as a race simply don't measure up. That bamboo-ceiling stereotype is false, harmful, and demeaning to Asians, many of whom are immigrants or the children of immigrants.

Schools using racial preferences also argue that achieving a certain racial composition in the student body has educational benefits for all students. But if racial balancing actually served an educational purpose, the implication would be that somehow, the presence of too many Asians harms the educational environment of a university's campus. Why would it be the case that having a 40–50% white campus is good for the learning environment, but having a 40–50% Asian campus is harmful? Who in the Ivy League decided to lock in the Asian share of the campus population at roughly 17%? Why did they choose that number as the desirable number of Asians to enroll?

The Ivy League's motivation in adopting an Asian quota is the same motivation that led it to discriminate against Jews in the early 1900s. Harvard President Abbott Lawrence Lowell feared a "Jewish invasion" of Harvard, and warned that enrolling too many Jewish students would "ruin the college."<sup>86</sup> "The summer

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85. Chan Hee Chu, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 ASIAN AM. L.J. 99, 115 (2016); see also GOLDEN, *supra* note 80, at 201 ("Asians are typecast in college admissions offices as quasi-robots programmed by their parents to ace math and science tests.").

86. Yascha Mounk, Opinion, *Is Harvard Unfair to Asian-Americans?*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/opinion/is-harvard-unfair-to-asian-americans.html> [<https://perma.cc/DXU5-NSDC>].

hotel that is ruined by admitting Jews is not ruined because the Jews are bad in character but simply because other people stay away, and the Jews themselves cease to come.”<sup>87</sup> Though Lowell was unsuccessful in pushing for a 15% cap on the number of Jews at Harvard, Harvard has for the past several decades succeeded in imposing a quota on the number of Asians that it admits. Just as the anti-Semitic President of Harvard worried in the early 1900s that having too many Jews would diminish the character of the campus,<sup>88</sup> the modern anti-Asian admissions committee at Harvard worries that having too many Asians would diminish the character of the campus. In their eyes, Asians are one-dimensional bookworms who know how to do little more than cram for exams; we are lacking in creativity, social skills, character, independent thought, and leadership. These are the same bigoted stereotypes about Asians that are perpetuated by the media and which form the bamboo ceiling on Asian achievement.

Asians' fears about being stereotyped are founded on more than mere speculation. In a moment of extraordinary frankness, Ron Bugarin, who served as an admissions officer at Brown and Columbia, stated that unless universities used racial discrimination, “our elite campuses would look like UCLA and Berkeley . . . . That wouldn't be good for Asians or for anyone else.”<sup>89</sup> Hence, as Bugarin acknowledged: “The bar is different for every group. Anyone who works in the industry knows that.”<sup>90</sup> According to Marilee Jones, the former Dean of Admissions at MIT, “it's possible that Henry Park looked like a thousand other Korean kids with the exact same profile of grades and activities and temperament . . . yet another textureless math grind.”<sup>91</sup> Princeton University Professor Uwe Reinhardt recounted a conversation with Princeton's administration, during which a representative told him: “[I]t's useful to have different cultures represented here. You wouldn't want half the campus to be Chinese.”<sup>92</sup>

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87. Bayley Mason, *President Lowell Creates the House Plan*, HARV. U., <https://lowell.harvard.edu/house-plan-creation> [<https://perma.cc/P3E2-ST9P>].

88. *Id.*

89. Ethan Bronner, *Asian-Americans in the Argument*, N.Y. TIMES (Nov. 4, 2011), <http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html> [<https://perma.cc/CE4B-3W25>].

90. *Id.*

91. GOLDEN, *supra* note 80, at 201.

92. *Id.* at 205.

Princeton University also made headlines in 2017 when the Department of Education revealed a trove of admissions files after Students for Fair Admissions filed a FOIA lawsuit seeking the documents.<sup>93</sup> Reporting on the contents of those files, Molly Hensley-Clancy of *BuzzFeed* wrote:

Princeton’s admissions officers repeatedly wrote of Asian-American applicants as being difficult to differentiate, referring to them dismissively as having “very familiar profiles,” calling them “standard premeds,” or “difficult to pluck out.” . . .

Of a Hispanic applicant, an admissions officer wrote, “Tough to see putting her ahead of others. No cultural flavor in app.” Of a black student, another said, “Very few African-Americans with verbal scores like this.”<sup>94</sup>

The clear import of these statements is that admissions officers from Princeton are making Asian students compete against Asian students, Hispanic students compete against Hispanic students, and black students compete against black students. There are specific references to a stereotypical conception of the “familiar” Asian profile as a “standard premed.” Rather than celebrating the unique achievements and interests of Asian applicants who happen to have a gift and passion for medicine, universities diminish those qualities by viewing them in light of the stereotypical Asian student.

Such a racist and bigoted process creates a perverse incentive for Asian students to hide or at least diminish the obviousness of their race. An entire industry of private consultants has emerged to coach Asian students on how to “appear less Asian” in their college applications.<sup>95</sup> The Princeton Review offered the following advice on how Asians can hide their racial identity in their application:

If you are an Asian American—or even if you simply have an Asian or Asian-sounding surname—you need to be careful

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93. Molly Hensley-Clancy, *Asians with “Very Familiar Profiles”: How Princeton’s Admissions Officers Talk About Race*, BUZZFEED (May 19, 2017), [https://www.buzzfeed.com/mollyhensleyclancy/asians-very-familiar-profiles-princeton?utm\\_term=.uwL8aWkr0#.uwL8aWkr0](https://www.buzzfeed.com/mollyhensleyclancy/asians-very-familiar-profiles-princeton?utm_term=.uwL8aWkr0#.uwL8aWkr0) [https://perma.cc/9A3G-K54R].

94. *Id.*

95. See Bella English, *To Get Into Elite Colleges, Some Advised to ‘Appear Less Asian’*, BOS. GLOBE (June 1, 2015), <https://www.bostonglobe.com/lifestyle/2015/06/01/college-counselors-advise-some-asian-students-appear-less-asian/Ew7g4JiQMiqYNQIiwqEIuO/story.html> [https://perma.cc/873T-YPBV] (explaining how Asian high school students seeking admission into elite colleges are told to switch musical instruments, hobbies, and desired majors as a way to deemphasize their “Asianness”).

about what you do and don't say in your application. You need to avoid being an Asian Joe Bloggs.

Asian Joe Bloggs is an Asian American applicant with a very high math SAT score, a low or mediocre verbal SAT score, high math- or science-related SAT II scores, high math and science grades, few credits in the humanities, few extracurricular activities, an intended major in math or the sciences, and an ambition to be a doctor, an engineer, or a research scientist. The more you sound like this person, the more likely admissions officers will be to treat you as part of the "Asian invasion" and reject your application, or at the very least make you compete against other Asian applicants with similar characteristics, rather than against the applicant pool as a whole.

If you share traits with Asian Joe Bloggs you should probably pay careful attention to the following guidelines:

If you're given an option, don't attach a photograph to your application and don't answer the optional question about your ethnic background. This is especially important if you don't have an Asian-sounding surname. (By the same token, if you do have an Asian-sounding surname but aren't Asian, do attach a photograph.)

Work on your verbal SAT score, take some literature and history courses, and get involved in activities other than math club, chess club, and computer club.

Do not write your application essay about the importance of your family or the positive/negative aspects of living in two cultures. These are Asian Joe Bloggs topics, and they are incredibly popular. Instead, write about something entirely unrelated to your ethnic background.

Don't say you want to be a doctor, and don't say you want to major in math or the sciences. You don't have to lie. If you have lousy SAT verbal scores, saying you want to be an English major isn't going to help you, either. Just say you're undecided. The point is to distance yourself as much as possible from the stereotype.<sup>96</sup>

In other words, Asian students are advised to pass as white when possible, and to diminish their racial and cultural heritage if they cannot pass as white. Asians adopted by white families, half-Asians with white fathers,<sup>97</sup> and other Asians with white-

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96. THE PRINCETON REVIEW, *CRACKING COLLEGE ADMISSIONS* 174–76 (John Katzman et al. eds., 2d ed. 2004).

97. See Associated Press, *Some Asians' College Strategy: Don't Check 'Asian'*, USA TODAY (Dec. 4, 2011), <http://usatoday30.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1> [https://perma.cc/GJ27-54WA] ("Lanya Olmstead was born in Florida to a mother who immigrated from Taiwan and an

sounding surnames such as Lee,<sup>98</sup> have names that would allow them to pass as white in the admissions process, but not every Asian can adopt this strategy. For the children of immigrants like myself, with ethnic surnames such as Liu or Patel, there is little we can do to escape from our racial prison in the admissions process. We are shackled to our racial identity by the admissions committee, enslaved as representatives of our race, with no chance of being treated simply as individual human beings with unique talents and experiences.

Even when Asian students succeed in gaining admission by hiding their race, the process of having to airbrush evidence of their race from their application is a demeaning and dehumanizing experience. Aaron Mak, an Asian student who admits to having gained admission to Yale University by crafting his application to pass as white, reflected that he was “deeply affected” by racial preferences “in ways that have made me who I am,” because “I’d held in my mind an image of Asian American identity and then ran as far away from it as I could.”<sup>99</sup> Continuing his reflection, Mak wrote:

I avoided participating in the future doctors’ association, ping-pong club, the robotics team, and the Asian culture group. I quit piano, viewing the instrument as a totem of my race’s overeager striving in America. I opted to spend much of my time writing plays and film reviews—pursuits I genuinely did find rewarding but which I also chose so I wouldn’t be pigeonholed. I enrolled in a Mandarin course during my senior year of high school, never having learned a Chinese dialect as a kid, but I dropped it a few weeks in. I told people it was because I was too busy, but in actuality I didn’t want

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American father of Norwegian ancestry. Ethnically, she considers herself half Taiwanese and half Norwegian. But when applying to Harvard, Olmstead checked only one box for her race: white.”).

98. The confusion over whether the name “Lee” is white or Asian came to the forefront when an Asian sports announcer for ESPN named Robert Lee was removed from coverage of a football game at the University of Virginia after a violent incident at the campus involving a white nationalist rally opposing the removal of a statue of Confederate general Robert E. Lee. See Matthew Haag, *ESPN Pulls Announcer Robert Lee from Virginia Game Because of His Name*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/business/media/robert-lee-university-virginia-charlottesville.html> [https://perma.cc/9YWH-XPC9] (detailing the circumstances surrounding ESPN’s decision to pull Robert Lee as an announcer). The tragedy of race-based affirmative action is that a descendant of Robert E. Lee would benefit in the admissions process by clearly identifying himself as white so that he would not be confused for an Asian.

99. Aaron Mak, *The Price of Admission*, SLATE (Dec. 5, 2017), [http://www.slate.com/articles/life/education/2017/12/the\\_price\\_of\\_college\\_admission\\_for\\_asian\\_americans.html](http://www.slate.com/articles/life/education/2017/12/the_price_of_college_admission_for_asian_americans.html) [https://perma.cc/JP8N-PCQ2].

Mandarin on my transcript and as a second language on my application, which I feared could be a red flag for the admissions committee. There would be plenty of time to take Mandarin in college after my acceptance.

I often think about what I would say if I had a chance to speak to that teenage Aaron while he was plotting a course to gain admission to an elite college. I would sympathize with his calculus—a prestigious diploma can pay lifelong dividends that might outweigh the seemingly trivial choices of what classes to take and activities to pursue. But I'd also encourage him to consider the real weight of contorting his identity to win an Ivy League acceptance letter. I would warn him that his attempts to pass as white wouldn't be just cynically checking boxes on an application—it would involve excising most anything he deemed as superficially “Asian” or meaningfully Chinese from his high school experience. I would give my teenage self a look into his future after college, proudly informing him that I've just graduated with a Yale diploma and a wealth of opportunities before me. But I'd also confess that I may never be able to shake the thought nagging in the back of my mind: I'm a sellout.<sup>100</sup>

The racist and bigoted process of comparing Asian applicants to the stereotypical Asian student “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,” to quote *Brown*.<sup>101</sup> During the college application process, I experienced fears about the consequences of my race that mirrored those of Aaron Mak, except that my obviously Chinese surname Liu made it impossible for me to deny my race. If my family name had been Mak or Lee, I may very well have been tempted to pass as white in order to avoid racial discrimination. For Asians such as Mak and myself, the experience of our nation's most prestigious universities holding our name, appearance, and cultural heritage against us is a demeaning slap in the face and a life-altering encounter with the bamboo ceiling that still affects us years after our graduation from college.

It is not surprising that anti-Asian discrimination in the college admissions process would have such a deep psychological effect on its victims. As the Supreme Court recognized in *Brown*:

Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of

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100. *Id.*

101. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>102</sup>

Education represents a once-in-a-lifetime opportunity for the children of Asian immigrants to forge a better life for themselves, yet we are systematically denied equal access to this opportunity, solely on account of our race. Universities rely on and perpetuate racist and bigoted stereotypes about Asians in order to justify holding us to a higher standard for admission. They assume that we have little more to contribute to campus life besides our test taking abilities, and they impose a quota on the number of Asians that they will admit. Racial preferences diminish the accomplishments of Asians and stamps us with a badge of inferiority, treating us as second-class citizens in our own country. As such, it is antithetical to the logic and reasoning of *Brown*.

### C. Outdated and Antiquated Classifications

In addition to perpetuating harmful and demeaning stereotypes of Asians, the use of race in university admissions also perpetuates and legitimates an arbitrary and antiquated system of racial classifications. As discussed earlier, the term Asian covers more than half the world's population and combines disparate populations that many people do not recognize as belonging to the same racial group. Similarly, the category Hispanic—which is technically an ethnicity, not a race—covers all people from Spanish-speaking countries. In other words, white Europeans from Spain are just as Hispanic as Mexicans or Venezuelans. If most Americans do not recognize or use these outdated and antiquated racial categories, why should they be used to determine our children's educational destiny?

Another problem with racial classifications is the increasing prevalence of mixed-race families. When the case involving Michigan's ban on racial preferences was at the Sixth Circuit, Judge Danny Julian Boggs noted that it is "not fanciful in today's world" that an applicant might, "in today's conventional terms, be held to be one-half Chinese, one-fourth Eastern European Jewish, one-eighth Hispanic (Cuban), and one-eight general

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102. *Id.* at 493.



North European, mostly Scots-Irish.”<sup>103</sup> An acquaintance of mine similarly remarked: “I’m Indian and my girlfriend’s black. If we get married and have children, how will schools treat them in the admissions process? Will they get a boost in their chances because they’re black, or a penalty because they’re Asian?”

A related problem is the question of how much minority ancestry is necessary for a person with white ancestry to claim minority status. When I was going through the college application process, one of my classmates who looked white and had an obviously Irish surname returned to class one day after missing class the previous day. When I asked him where he had been, he replied that he’d received an all-expense paid trip to an elite liberal arts college in the Northeast. When I asked him how he received the opportunity, he replied that he was partly Hispanic. Assuming that my classmate was telling the truth and that he was indeed part Hispanic, was it fair for someone who easily passed as white to benefit from this opportunity?

Consider also U.S. Senator Elizabeth Warren’s claim of Native American ancestry as a young law professor on her job applications to law schools, despite being a blonde-haired, blue-eyed woman. A Cherokee woman, Rebecca Nagle, recently wrote in a progressive blog:

The controversy over Warren’s identity stems from the 1990s, when Warren was a professor at Harvard Law School. The university promoted her and celebrated her as the first minority woman to receive tenure. When the Boston press dug up these reports during Warren’s campaign for Senate in 2012, she stated she didn’t know why Harvard had promoted her as Native American. It appears that Warren categorized herself as minority when it served her career and later dropped the marker after gaining tenure.

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Warren’s misrepresentation of her heritage has major consequences for Native Americans, who have little visibility not only in politics, but in American culture at large. Warren’s claims of Cherokee identity make her the only representation of Cherokees that the average American will likely ever see. I challenge non-Native readers to name another Cherokee leader in elected office. Or any Native American holding elected office in the United States. Or a contemporary Native

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103. *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. v. Regents of the Univ. of Mich.*, 701 F.3d 466, 493 (6th Cir. 2012) (Boggs, J., dissenting).

American author. A Native American movie star. A Native American athlete. Or *any* famous Native people who are alive today. What is beyond maddening is that, as Native people, we are relegated to being invisible, while Warren is not.<sup>104</sup>

Native Americans are the only racial group that is arguably less represented in American public life than Asians, and Nagle's outrage at Senator Warren's opportunism is entirely understandable.<sup>105</sup>

Approaching the same issue from a slightly different angle, consider the story of Craig Cobb, a white nationalist and white separatist from North Dakota. In 2013, on an episode of *The Trisha Goddard Show*, Cobb espoused his petty and venomous views on race, explaining that he wished to buy enough properties in Leith, North Dakota, to create an all-white community.<sup>106</sup> At the end of the segment, the host Trisha Goddard reveals that Cobb had taken a DNA ancestry test, and the test showed that he was 14% sub-Saharan African.<sup>107</sup> As the audience erupts in laughter, the viewer cannot help but laugh along at the absurdity of a white nationalist discovering that he is black. Yet, if Craig Cobb is black, isn't it true that he or his children could truthfully claim the benefits of racial preferences? Is it fair for a white nationalist to benefit from racial preferences? If not, how can universities prevent this from occurring, given that they rely entirely on students' carefully manicured applications and self-identified race? Should applicants be required to take a DNA ancestry test, and if so, what percentage ancestry should be required for a student to receive a racial preference?

These problems all stem from universities' reliance on, and perpetuation of, an arbitrary and antiquated system of racial

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104. Rebecca Nagle, *I Am a Cherokee Woman. Elizabeth Warren is Not.*, THINK PROGRESS (Nov. 30, 2017), <https://thinkprogress.org/elizabeth-warren-is-not-cherocsee-c1ec6c91b696/> [<https://perma.cc/ULJ7-SSS9>].

105. For another example of a white person who succeeded in convincing others that she was of a different race, see the story of Rachel Dolezal, who became President of the Spokane chapter of the NAACP and a university instructor in African-American studies based on the false claim that she was black. See Richard Pérez-Peña, *Black or White? Woman's Story Stirs Up a Furor*, N.Y. TIMES (June 12, 2015), <https://www.nytimes.com/2015/06/13/us/rachel-dolezal-naacp-president-accused-of-lying-about-her-race.html> [<https://perma.cc/6SSA-F4DU>] (detailing the public reaction to Rachel Dolezal claiming she was African-American).

106. Matt Pearce, *White Supremacist Takes DNA Test, Finds Out He's Part Black*, L.A. TIMES (Nov. 12, 2013), <http://articles.latimes.com/2013/nov/12/nation/la-na-nn-white-supremacist-dna-20131112> [<https://perma.cc/3E9G-MRZT>].

107. *Id.*

classification. Why should the children of President Trump or the Rock—the world's highest paid actor in 2016, who is black and Samoan—receive a racial preference over the children of Asian immigrants? Should the Rock's children receive a preference because they are black, or a penalty because they are Asian? Some Pacific Islanders have sought to distance themselves from being characterized as Asian in an effort to avoid anti-Asian discrimination,<sup>108</sup> and there is now some evidence that schools are focusing their efforts on penalizing particularly disfavored groups of Asians.<sup>109</sup>

White students with tenuous connections to minority groups and Asians who can pass as white gain preferential treatment over Asian immigrants with ethnic surnames such as Liu or Patel. These children of Asian immigrants are harmed the worst by racial preferences because they have no way to hide their race, even if they decline to self-identify as Asian. To insist that Asians accept an elevated standard for admission solely on account of their race, in order to sustain a system of racial preferences that is rife with potential for abuse, is an affront to their dignity and the equal-protection principles of our Constitution.

#### CONCLUSION

There are ongoing debates about the aims of education and whether a university should focus on building an academically elite student body, extending opportunities to underprivileged communities, or achieving some other goal in the admissions process. The California Institute of Technology is a famous example of a school that prioritizes elite academics.<sup>110</sup> The University of Texas at Austin, after the legislature enacted the Top 10% Plan, went in the opposite direction by granting automatic admissions to students graduating in the top 10% of their high-school class, even if their high school might not

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108. GOLDEN, *supra* note 80, at 204.

109. See AACE Urges Common App Organization to Stop Discriminatory Subdivision of Asian American Applicants, ASIAN AM. COAL. FOR EDUC. (Nov. 8, 2017), [http://asianamericanforeducation.org/pr\\_20171108/](http://asianamericanforeducation.org/pr_20171108/) [<https://perma.cc/3RHN-JJXH>] (announcing a letter issued by the AACE urging the Common Application Organization to “stop its dividing of Asian American applicants into 10 subcategories in the Common Application.”).

110. See Alia Wong, *Asian Americans and the Future of Affirmative Action*, ATLANTIC (Jun. 28, 2016), <https://www.theatlantic.com/education/archive/2016/06/asian-americans-and-the-future-of-affirmative-action/489023/> [<https://perma.cc/K5ET-L9JZ>] (noting that the California Institute of Technology “bases admission strictly on academics”).

otherwise have fielded competitive applicants to the university.<sup>111</sup> Harvard seeks to recruit both academically elite students and students from underprivileged backgrounds,<sup>112</sup> but it also seeks to perpetuate its association with the rich and powerful through legacy preferences.<sup>113</sup>

Just as the Supreme Court has chosen to stay out of the business of deciding educational policy for universities, it is beyond the scope of this Article to discuss the educational mission that best fits a particular university. It is not the purpose of this Article to argue that students must be admitted to universities based on grades and test scores alone. Rather, I have merely sought to demonstrate that, of all the possible educational goals that a university might wish to achieve, producing a particular racial composition is not a legitimate goal, and any process designed to achieve such a goal would unfairly discriminate against applicants on the basis of race. For Asians, the process of racial balancing stamps them with a badge of inferiority by diminishing their achievements, perpetuating demeaning stereotypes, and reducing them to representatives of their race. Such a policy divides Asians from not only the white majority, which benefits at the expense of Asians, but also other racial minorities.

In a case of Freudian projection, defenders of racial preferences have accused its critics of using Asians to drive a wedge between people of color, when the reality is that racial preferences themselves are driving a wedge between people of color by redistributing educational opportunity from Asians to students of other races. The defenders of racial preferences who claim that Asians are being “used” by whites are intentionally ignoring the multitude of Asians who sincerely oppose racial preferences, such as the Asian American Coalition for Education, which filed the complaint against Harvard that is being investigated by the Department of Justice.<sup>114</sup> By ignoring

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111. See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 305 (2013) (“[T]he Top Ten Percent Law grants automatic admission to any public state college, including the University [of Texas at Austin], to all students in the top 10% of their class at high schools in Texas that comply with certain standards.”).

112. Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F. R. D. 39 (D. Mass. 2015) (No.14-cv-14176).

113. GOLDEN, *supra* note 80, at 44–48 (discussing Charles Kushner’s \$2.5 million donation to Harvard and Jared Kushner’s admission to Harvard despite having an academic record below Ivy League standards).

114. See Melissa Korn & Nicole Hong, *Harvard Faces DOJ Probe Over Affirmative-Action Policies*, WALL ST. J. (Nov. 21, 2017), <https://www.wsj.com/articles/harvard-faces-doj->

the concerns of these Asians, it is the defenders of racial preferences themselves who are exposed as selectively giving voice to Asians only when it advances their political agenda.<sup>115</sup> The truth is that racial preferences are driven and sustained by racial animus towards Asian Americans. That is why California Assemblywoman Cristina Rodriguez stated that she wanted to “punch the next Asian person I see in the face” after Asians opposed an effort to repeal California’s ban on racial preferences.<sup>116</sup>

Race is an arbitrary system of classification, and regardless of whatever connection the racial makeup of a class may have to the educational experience of a university, the harm inflicted by relying on poisonous stereotypes to classify students is contrary to the logic of our equal-protection jurisprudence as established in *Brown*. Until universities abandon their racially discriminatory admissions policies, our country will never achieve the dream that Dr. Martin Luther King Jr. famously described in 1963 at the March on Washington: “I have a dream that my four little children will one day live in a nation where they will not be

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probe-over-affirmative-action-policies-1511260380 [https://perma.cc/JQ9T-YVJF] (noting that the Justice Department opened an investigation “into the use of race in Harvard University’s admissions practices”). Before the Department of Justice revealed that its investigation was based on the complaint of the Asian American Coalition for Education, a number of media outlets sought to portray the investigation as solely about the interests of white applicants. See, e.g., Paul Waldman, *The Trump Administration Takes Up the Cause of Oppressed White People*, WASH. POST (Aug. 2, 2017), [https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/02/the-trump-administration-takes-up-the-cause-of-oppressed-white-people/?utm\\_term=.a67a9bb6224e](https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/02/the-trump-administration-takes-up-the-cause-of-oppressed-white-people/?utm_term=.a67a9bb6224e) [https://perma.cc/AWG3-J4CF] (“The idea that discrimination against whites is such a significant problem that it demands Justice Department action is positively ludicrous. But we should understand that this is exactly the kind of thing many of Trump’s voters wanted him to deliver.”); Elliot Hannon, *The Trump Administration is About to Fight What it Says is Discrimination . . . Against White Kids*, SLATE (Aug. 1, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/08/01/the\\_trump\\_doj\\_to\\_take\\_on\\_perceived\\_college\\_admissions\\_discrimination\\_against.html](http://www.slate.com/blogs/the_slatest/2017/08/01/the_trump_doj_to_take_on_perceived_college_admissions_discrimination_against.html) [https://perma.cc/E8WH-3UGH] (“The forthcoming legal battle seems like the natural culmination of white conservative America’s growing sense of aggrievement and Fox News-fueled belief that they are somehow the victims of reverse racism, particularly under the Obama administration.”).

115. See Chu, *supra* note 85, at 128–29. Chu notes:

[A]ffirmative action advocates have rampantly exploited Asian Americans. Integrating Asian Americans into the debate would undoubtedly raise questions not only about their ‘success’ but also whether they are harmed by affirmative action, as many empirical studies suggest. To avoid addressing these concerns, the left often incorporates Asian Americans only when useful, while largely excluding them from other less convenient situations.

*Id.* at 128.

116. Carla Marinucci, *#MeToo Movement Lawmaker Made Anti-Asian Comments*, POLITICO (Apr. 22, 2018), <https://www.politico.com/story/2018/04/22/metoo-asian-garcia-california-544974> [https://perma.cc/VN4P-9ZTG].

judged by the color of their skin but by the content of their character.”

Earlier in this Article, I referred to Du Bois’s concepts of the veil and double-consciousness in *The Souls of Black Folk*, which describe how race acts as a barrier to mutual understanding between racial minorities and the white majority in the United States. Perhaps the most famous passage from *The Souls of Black Folk* is Du Bois’s description of how a liberal arts education in the Great Books can help us transcend those barriers:

I sit with Shakespeare, and he winces not. Across the color line I move arm and arm with Balzac and Dumas, where smiling men and welcoming women glide in gilded halls. From out of the caves of evening that swing between the strong-limbed Earth and the tracery of stars, I summon Aristotle and Aurelius and what soul I will, and they come all graciously with no scorn nor condescension. So, wed with Truth, I dwell above the veil.<sup>117</sup>

Although we will never live in a perfectly color-blind society, education can help us see beyond superficial distinctions of race and embark on a collective journey to discover the universal truths about what it means to be human. Whatever the mission of the American university may be, part of that mission must surely be to help our students—and our country—transcend the racial barriers that exist between us, rather than amplify them.

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117. DU BOIS, *supra* note 71, at 67.