Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans

Adrian Liu

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AFFIRMATIVE ACTION & NEGATIVE ACTION:
HOW JIAN LI'S CASE CAN BENEFIT ASIAN AMERICANS

Adrian Liu*

In October 2006, Asian American student Jian Li filed a civil rights complaint against Princeton University claiming that Princeton's affirmative action policies were discriminatory. Li argues that affirmative action gives preferences to non-Asian minorities at the expense of Asian students. Li's case aligns the interests of Asian Americans with Whites who challenge affirmative action and suggests that such policies are inherently discriminatory because they exclude students based on race and sacrifice merit.

This Article argues that Li's exclusion is not due to affirmative action but is likely due to "negative action," the unfavourable treatment of Asian Americans relative to Whites. Affirmative action is not discriminatory because it considers a multitude of factors, including race, to achieve a diverse student population. Nor does affirmative action sacrifice merit; rather, it redefines merit in a way that can benefit students of all racial groups. On the other hand, negative action is discriminatory and prevalent. Whether it takes the form of legacies, admission limits or racial group comparisons, negative action discriminates against Asian Americans based on their race and contributes to existing inequalities in admissions. Framing Li's case as a claim against negative action instead of affirmative action is a more accurate analysis that attacks ongoing discrimination in admissions, but preserves affirmative action's benefit for all racial groups.

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I. Introduction

In October 2006 Jian Li, a freshman at Yale University, made headlines when he filed a federal civil rights complaint against Princeton University.1 Li alleges that he was denied admission to Princeton because the university’s admissions process discriminates against Asian Americans.2 It is difficult not to be impressed by Li’s credentials—he had a perfect SAT score of 2400 and near-perfect scores on the SAT II, performed community service in Costa Rica, and boasted high rankings on his high school math and physics teams.3 Li claims that he was rejected because Princeton’s affirmative action policies unfairly penalize students of Asian descent. Since Asian Americans are overrepresented at many elite colleges, Li asserts that many schools place ceilings on the number of Asian Americans they admit.4 At the same time, these schools give preferential

2. See 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, 2 n.4 (1996). In this Article, I use the terms “Asian American,” “African American,” “Hispanic,” “Native American” and “White” to refer to racial groups, irrespective of the terms used by a particular university’s admissions program. I capitalize all terms to illustrate their similarity as social constructions of race.
4. Timothy Egan, Little Asia on the Hill, N.Y. TIMES, Jan. 7, 2007, at 4A, available at http://www.nytimes.com/2007/01/07/education/edlife/07asian.html?pagewanted=1&_r=1&ei=5087&em&en=d4d9e47a90eb63c0&ex=1168491600. Li cites a 2005 study conducted by Princeton researchers who claim that if elite schools did not consider race in their admissions, Asian Americans would fill four out of every five spots that now go to African Americans or Hispanics. Li uses this to argue that affirmative action effectively raises the bar for admissions for Asian Americans. See Thomas J. Espenshade & Chang Y. Chung, The Opportunity Cost of Admission Preferences at Elite Universities, 86 SOC. SCI. Q. 293, 304 (2005). Their results are disputed in William C. Kidder, Negative Action Versus Af-
treatment to other minority groups, such as African Americans and Hispanics. As a result, Li claims he has been squeezed out—because Asian Americans are already admitted in significant numbers, and because spots must be made available for other non-Asian minorities.¹

Shortly after Li’s complaint was filed, the Daily Princetonian, the student-run daily newspaper at Princeton, published its annual joke issue. The issue contained a thinly-veiled parody of Li’s case.² Drawing from a variety of stereotypes about the Chinese—their superior math abilities, their “greasy food,” and an apparent lack of grammatical skills—the parody poked fun at Li for complaining about his rejection from Princeton. “Hi Princeton!” the column began, “Remember me? I so good at math and science. Perfect 2400 SAT score. Ring bells?”³ The newspaper claimed that the column was meant to satirize Asian stereotypes, but many readers didn’t get the message. Students, faculty and administrators all condemned the article for its racist language.⁴ The Princetonian’s editorial staff subsequently issued a formal apology, but for some, the damage was already done.⁵ The episode unearthed racial tensions in Princeton’s student body,

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¹ lawrence kidder, affirmative action: asian pacific americans are still caught in the crossfire, 11 mich. j. race & l. 605 (2006) [hereinafter kidder, negative action].
² kate carroll, rejected applicant alleges bias against asians, daily princetonian, nov. 13, 2006, at 1, available at http://www.dailyprincetonian.com/archives/2006/11/13/news/16544.shtml (describing li’s claim that princeton’s policies are discriminatory “because they advantage other minority groups, namely african americans and hispanics, legacy applicants and athletes at the expense of asian american applicants”). princeton has denied that it discriminates against asian americans. see infra note 45.
³ lian ji, princeton university is racist against me, i mean, non-whites, daily princetonian, jan. 17, 2007, available at http://www.dailyprincetonian.com/archives/2007/01/17/opinion/17109.shtml (containing many unambiguous references to jian li’s case, including a byline of “lian ji,” references to the speaker’s perfect 2400 SAT score, and his description of princeton as “the super dumb college, not accept me.”).
⁴ id. the article continues, in part, “what is wrong with you no color people? yellow people make the world go round. we cook greasy food, wash your clothes and let you copy our homework.… my mom from same province as general tso. my dad from kung pao province. … hey, what about yellow fever? heard that’s hot on this campus. this is as diverse as you can get.”

we did not seek to offend, and we sincerely regret having upset some of our readers. many criticisms of the column, however, do not recognize its purpose. using hyperbole and an unbelievable string of stereotypes, we hoped to lampoon racism by showing it at its most outrageous … [a]t its worst, the column was a bad joke; at its best, it provoked serious thought about issues of race, fairness and diversity.
supplying an ugly sequel to the issues that Li's complaint raised in the first place.

Li's case, as well as the parody that followed, are the latest developments in the broader controversy over affirmative action throughout the United States. Within the last decade or so, affirmative action has been attacked in political, legal and social circles. In the fall 2006 midterm elections, Michigan voted in favor of ending race-based “preferences” at the University of Michigan and other state entities. Michigan's move follows in the steps of California, which dismantled affirmative action more than ten years ago, as well as Texas, Florida and Washington. Ward Connerly, a vocal critic of affirmative action, has announced his intention to campaign for similar initiatives in several other states. Within the courts, in June 2007 the Supreme Court handed down two important decisions limiting the use of race in public school enrollment in Seattle and Louisville, Kentucky. As predicted, the Court invalidated these programs by simply

The apology also mentioned that the column was written by a "diverse group of students" that included Asian Americans. See also Arenson, supra note 3 (quoting April Chou, chairwoman of the Asian American Alumni Association of Princeton, for saying "[t]he damage has been done, and we now all face the collective task of repairing our civil discourse and salvaging our university's reputation").

10. CNN.com, AmericaVotes2006: Key Ballot Measures, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/ (last visited Apr. 22, 2007). Proposition 2 "prohibit[s] the University of Michigan and other state universities, the state, and all other state entities from discriminating against or granting preferential treatment based on race, sex, color, ethnicity or national origin." It passed with a margin of 58% approval.


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declaring that the use of race amounted to discrimination and was therefore unconstitutional. It is speculated that banning race-conscious policies in public schools will threaten the viability of affirmative action in higher education. And in the realm of public opinion, the popularity of affirmative action has declined in recent years. In 2003, polls indicated that 54% of Americans favored affirmative action in education, but by 2006 that number had decreased to 36%.

Challenges to affirmative action are nothing new. Since the 1970s, the courts have considered numerous constitutional challenges to affirmative action in higher education. In several high-profile cases, White students claimed that they were discriminated against as a result of these policies. They argued that affirmative action gave priority to minority applicants at the expense of equally-qualified White applicants. According to the plaintiffs, this constituted "reverse racism"—racial discrimination that was directed against Whites instead of other minority groups, but discrimination nonetheless. On one level, Li's case against Princeton can


15. Although the Seattle and Louisville cases were argued as desegregation cases, the Court's invalidation of such race-based admissions policies may threaten the use of race in university admissions. If it is unconstitutional to consider race in order to desegregate public schools, it may be unconstitutional to consider race to achieve diversity in universities and colleges.

16. Poll: US. Favors Affirmative Action, CBS News, Jan. 23, 2003, http://www.cbsnews.com/stories/2003 /01/23/opinion/polls/main537753.shtml (last visited Mar. 18, 2007) (reporting that 54% of respondents said that affirmative action programs in hiring, promoting and college admission should be continued, while 37% said they should be abolished); PollingReport.com, Race and Ethnicity, CBS News Poll (Jan. 5-8, 2006), http://www.pollingreport.com/race.htm (reporting that 36% of respondents said affirmative action programs should be continued, 33% said they should be phased out, 12% said they should be ended now, while 19% were unsure).

17. These constitutional challenges are based on the Equal Protection Clause in the Fourteenth Amendment, which provides: "No State shall make or enforce any law which ... den[ies] to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1.

18. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003). See also Hopwood v. Texas, 236 F3d 256 (2000) (declaring that race could not be considered in diversity-seeking admissions programs; this was effectively overruled by the Supreme Court's holding in Grutter; Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate admissions policies because their use of an automatic 20-point bonus for minority applicants was too mechanistic).

be viewed as the latest version of these affirmative action challenges. Like the White plaintiffs, Li claims that the university's affirmative action program discriminated against him on account of his race.

But on another level, Li's claim is different because he is a member of the Asian American minority. Unlike the White applicants, Li does not belong to a racial group that has historically enjoyed unfettered access to elite universities. On the contrary, Asian Americans have been subject to numerous forms of legal, social and political discrimination that have effectively excluded them from many facets of American life, including post-secondary education. Indeed, Asian Americans were and continue to be the beneficiaries of affirmative action programs that provide more equitable access to education as well as employment and public contracting. In light of this, Li's case presents a conundrum: if affirmative action was meant to equalize opportunities for minority groups, can it nonetheless discriminate against members of such groups? And from a broader perspective, should we commend Li for challenging discrimination against Asian Americans, or should we be concerned that his claim seeks to eliminate affirmative action altogether?

These questions are neither pedantic nor inconsequential. Opponents of affirmative action have increasingly turned to the Asian American example to bolster their position. Race-conscious policies are harmful to the Asian American community, as evidenced by the numerous forms of discrimination they have endured. These issues have been extensively discussed in the literature, particularly in the works of Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Towards a Community of Justice, A Policy Analysis of Affirmative Action, 4 ASIAN PAC. AM. L.J. 129, 143–48 (1996) (discussing discrimination against Asian Americans); Eric K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001) (citing cases in which Asian American discrimination played a role); Dana Y. Takagi, From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy, 37 SOC. PROBLEMS 578 (1990) (discussing post-secondary education in particular).


See also Althea K. Nagai, Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan, Oct. 17, 2006, at 1, available at http://www.ceousa.org/content/view/521/100. This is a study by the Center for Equal Opportunity, an anti-affirmative action organization, which found that Asian Americans admitted to the University of Michigan in 2005 had median SAT scores that were 50 points higher than Whites, 140 points higher than Hispanics, and 240 points higher than African Americans. See also Janine Young Kim, Are Asians Black?: The Asian American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 YALE L.J. 2385, 2409 (1999) (describing affirmative action opponents' use of the Asian American experience to argue that affirmative action harms non-Whites as well as Whites); Frank H. Wu, Neither Black
not only to White applicants, the argument goes, but to minority applicants like Asian Americans as well. Moreover, the way in which Li frames his argument against Princeton will have a serious impact on the legal and moral justifications for affirmative action. On one hand, arguing that Li was excluded because of affirmative action for African Americans and Hispanics suggests that affirmative action is inherently discriminatory. On the other hand, making a meaningful distinction between affirmative action and discrimination gives Li the ability to vindicate his rights without undermining affirmative action in principle.

The purpose of this Article is to demonstrate that Li’s exclusion is not due to affirmative action but can be attributed to the separate phenomenon of “negative action” which disadvantages Asian Americans relative to Whites. In part II, the Article presents an overview of the affirmative action litigation and how Li’s case fits in. Although Li’s claim appears to extend the anti-affirmative action arguments, his exclusion may be due to negative action rather than the use of race-conscious admissions policies. Part III analyzes the concepts of affirmative action and negative action in greater detail. It is argued that affirmative action reduces discrimination in admissions by enlarging the notion of merit in a way that benefits all groups. In contrast, negative action disadvantages Asian Americans on the basis of race and maintains the discriminatory effects of traditional admissions policies. In part IV, the Article considers how Li should frame his case against Princeton. The argument that Li was discriminated against because of affirmative action is inaccurate and threatens to undermine race-conscious programs for other groups, as well as Asian Americans who stand to benefit from such programs. In contrast, arguing that Li was discriminated against because of negative action directly attacks the discriminatory practices that disadvantage Asian Americans, and shows that calling for the elimination of affirmative action is the wrong choice of remedy.

II. THE CONTEXT OF AFFIRMATIVE ACTION LITIGATION

A. Introduction

To grasp the significance of Li’s case, it is necessary to first situate it within the context of the affirmative action litigation that preceded it. Since the 1970s, the courts have considered several constitutional


23. The term “negative action” was coined by Jerry Kang. See Kang, supra note 2, at 3.
challenges to affirmative action in education, usually in the context of admissions to highly-competitive programs at well-known colleges. In these cases, the plaintiffs all argued that affirmative action was discriminatory because it denied admission to White applicants on the basis of their race. Li's case potentially furthers these arguments since he suggests that affirmative action discriminates against Asian Americans as well. But at the same time, Li can be distinguished from the previous cases because his exclusion may be the result of negative action against Asian Americans, which disadvantages Asians relative to Whites.

It is important to locate Li's claim within the existing framework because there has been a lack of attention to the Asian American perspective on affirmative action. Despite the intensity of the debate over affirmative action in the past several decades, the voices of Asian Americans have rarely been heard. Although students of Asian descent were among the original beneficiaries of affirmative action, the issue has been largely framed as one between Whites and African Americans. The polarization of affirmative action into a Black/White issue has distorted the debate and prevented other racial minorities from participating. Many commentators have sought to present the Asian American perspective, arguing that courts and policymakers ought to take account of the fact that affirmative action affects Asians in unique ways. In light of this background, Li's case has the potential to open the door for Asian Americans to participate directly in


26. See generally Choy, supra note 24, at 561 (arguing that the diversity rationale in Grutter overlooks the unique situation of Asian Americans); Harvey Gee, Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate, 32 GONZ. L. REV. 621, 636–38 (1996–1997).


28. Specifically, polarization forces other racial groups to “choose a side” in the debate and reinforces the racial hierarchy. See Gee, supra note 11, at 7–8 and Wu, supra note 22, at 248–49.

29. See Wu, supra note 22, at 253–54 (arguing that a bipolar understanding of equal protection is poorly suited to Asian Americans’ situations); Harvey Gee, From Bakke to Grutter and Beyond: Asian Americans and Diversity in America, 9 Tex. J. C.L. & C.R. 129, 141 (2004)(arguing that “[t]he racialization of Asian Americans as immigrants, foreigners, or as model minorities” ought to be incorporated into existing racial discourse). But see Asian American Politics, Colleges, http://www.asianam.org/colleges.htm (last visited March 14, 2008) (arguing that affirmative action is “reverse discrimination” against Asian Americans).
the affirmative action debate. For this reason, it is important to pay attention to what his arguments are and how they are presented.

B. The Background of Affirmative Action Litigation

The first challenge to affirmative action in university admissions reached the Supreme Court in 1978. In Regents of the University of California v. Bakke, the Court considered the constitutionality of a race-conscious admissions program at the University of California–Davis Medical School. Representing a plurality of the court, Justice Powell held that the university’s special admissions program, which reserved 16 spots out of 100 for minority applicants, was a racial quota that was impermissible under the Fourteenth Amendment. The special program set aside a specific number of seats for racial minorities that Whites could not compete for. As such, the special program effectively gave seats to minority applicants at the expense of White applicants. No matter how well qualified Bakke was, he was precluded from being considered under the special program because he did not belong to one of the specified racial groups. Since Bakke was excluded because of his race, the court found that the university’s special program was discriminatory and therefore unconstitutional. However, Justice Powell indicated that it may be permissible to consider race if it was simply one factor in the admission decision. Race-conscious policies can be justified by the substantial state interest in promoting diversity at schools. Accordingly, admissions policies that only consider race as a “plus” factor are constitutionally permissible in order to attain a diverse student body.

31. See id. at 289–90. Note that, for his part, Justice Powell explicitly remained undecided as to whether “quota” was an appropriate term to describe the university’s program. The minority groups considered under the special program included African Americans, Hispanics, Native Americans and Asian Americans. The university’s policy used the terms “Black,” “Chicano,” “American Indian,” and “Asian,” but I use my terms for the sake of consistency.
32. See id. at 305 (“[P]etitioner’s special admissions program ... prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats ...”).
33. The special program failed to satisfy strict scrutiny, which requires that the program be precisely tailored to serve a compelling governmental interest. Id. at 299. Specifically, Justice Powell found that the purpose of remedying past discrimination was not a sufficiently compelling state interest. Id. at 310. Although diversity was an acceptable interest, the special program’s use of a quota failed to be properly tailored to that interest. Id. at 319.
34. Id. at 311–12. It is noteworthy that Justice Powell linked the university’s selection of its student body to notions of academic freedom and the university’s First Amendment rights. This was reiterated in Grutter v. Bollinger, 539 U.S. 306, 329 (2003).
35. Bakke, 438 U.S. at 317–18 (“No ... infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against
Since Bakke, the courts have affirmed that affirmative action policies can be constitutional if they consider race but do not make it determinative. In Grutter v. Bollinger, the court upheld a race-conscious admissions program at the University of Michigan. Although the university sought to obtain a “critical mass” of racial minorities, the flexibility of its policy distinguished it from a strict quota. Since the program considered a multitude of other factors in addition to race, it met constitutional scrutiny.

The existing jurisprudence establishes which forms of race-conscious policies are valid and which are not. It is clear from Bakke that racial quotas discriminate against the excluded groups and are therefore unconstitutional. According to the Court, it is irrelevant that the quota is meant to benefit or ameliorate the condition of minority groups. Justice Powell indicated that all racial classifications are likely to be resented by the groups affected. Moreover, since quotas set aside seats that are only open to applicants of certain races, it sacrifices spots that could otherwise be given to other races. In this way, a quota is necessarily a trade-off: it limits the admission of one group in order to admit another group. On the other hand, affirmative action policies that consider race as a “plus” do not have this obvious effect. When diversity is the goal, students of many different backgrounds receive special consideration but one group is not necessarily advantaged over another. Since diversity, not race, is the pri-

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other elements—in the selection process”). In this regard, Justice Powell approved of Harvard University’s admissions policies, which gave special consideration to students of disadvantaged economic, racial and ethnic groups but did not set quotas. See id. at 316-17.

36. Grutter, 539 U.S. 306. Notably, the university did not seek a “critical mass” of Asian Americans. See id. at 316.

37. Id. at 335–36. The program considered a host of “soft variables” such as the quality of the applicant’s undergraduate school and the difficulty of his or her undergraduate courses. The program also considered that African Americans, Hispanics and Native Americans were historically discriminated against and that a “critical mass” of such students would “ensur[e] their ability to make unique contributions to the character of the Law School.” Id. at 315–16 (alteration in original).

38. Id. at 337.

39. Bakke, 438 U.S. at 298. Justice Powell commented that “it may not always be clear that a so-called preference is in fact benign,” and the danger of preferential programs is that they may only “reinforce common stereotypes holding that certain groups are unable to achieve success.” In other words, it is doubted whether a benign racial quota could ever be truly benign. See also infra note 68.

40. Bakke, 438 U.S. at 294–95 n.34 (“All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened”). While Justice Powell opined that those burdened by the classification are likely to resent being penalized for being a member of a majority group, it has been argued that even the purported beneficiaries suffer stigma from the racial preference. See City of Richmond v. Croson, 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm”); Shelby Steele, Affirmative Action: The Price of Preference, in The Content of Our Character 111, 115–16 (1991).

41. In Bakke, Justice Powell emphasized that diversity includes many factors in addition to racial or ethnic diversity. See Bakke, 438 U.S. at 315; infra III.A.3.
mary criterion, it is unlikely that any particular racial group will be systematically favored or disfavored. Therefore, the case law indicates that affirmative action programs must consider race along with other factors indicating diversity in order to be constitutional.

C. Jian Li: Just Another Bakke or Grutter?

At first glance, Li’s case appears to be simply another version of the affirmative action challenges. Like Bakke, Li claims he was denied admission because the university’s admissions policy gives special consideration to other racial groups. By suggesting that Asian Americans are disadvantaged because of racial “preferences” for African Americans and Hispanics, Li argues that affirmative action discriminates against Asians. The spots that would otherwise go to Asian Americans are, under affirmative action, given to these other minorities because of their race. Moreover, Li extends the Bakke argument because he is attacking an admissions policy that does not use strict quotas. Like most universities, Princeton’s admissions program seeks to admit applicants with a wide range of backgrounds and race is only one of many factors that are considered. Nevertheless, by pointing out that Asian American admission is being limited under such policies, Li suggests that even properly-structured affirmative action programs can have discriminatory effects. As long as special consideration

42. This fact was emphasized in Grutter, in which the Court found that the university’s policy did give special consideration to other factors besides race, so that non-minority applicants who are diverse in other ways receive special consideration. See Grutter, 539 U.S. at 338, 341. See also Gee, supra note 29, at 154.

43. Carroll, supra note 5. Li is not the first Asian American student to bring a complaint against a university for its affirmative action policy. In 1996, Arthur Hu filed a complaint against the University of California at Berkeley for using quotas against Asian Americans. See Michelle Malkin, Arthur Hu: One Man’s Fight for “Fairness in Diversity,” SEATTLE TIMES, Mar. 26, 1996, at B4. However, Li’s attack on race-conscious policies that do not use explicit quotas distinguishes his case from these previous claims.

44. See Wu, supra note 22, at 269 (quoting testimony by William B. Reynolds, former Assistant Attorney General for Civil Rights, in which he said that affirmative action creates “pressure to squeeze out Asian Americans in order to make room for other minorities (or for whites) ... the phenomenon of a ‘ceiling’ on Asian American admissions is the inevitable result of the ‘floor’ that has been built for a variety of other, favored groups.”).

45. Princeton’s undergraduate admissions policy considers “a wide representation of interests, backgrounds and special abilities” and has an anti-discrimination policy. See Princeton Undergraduate Announcement—2006–07, Admission, Financial Aid, Fees, available at http://www.princeton.edu/pt/catalog/ua/06/015.htm (last visited April 6, 2007); Princeton University Policy and Procedure Manual, Equal Opportunity Policy, available at http://www.princeton.edu/hr/policies/statement/sor.htm (last visited April 6, 2007). Princeton has denied Li’s allegations that it discriminates against Asian Americans. See Carroll, supra note 5 (quoting Cass Clatt, a spokesperson for Princeton, as saying the school “treat[s] each application individually and [does] not discriminate on the basis of race or national origin. To the contrary, we seek to enroll and do enroll classes that are diverse by a multitude of measures.”); Egan, supra note 4, at 4.
is given to race, it is likely that certain racial groups will be unfairly denied admission.\textsuperscript{46}

Li's case is particularly compelling in several ways. Unlike the previous plaintiffs, Li is not a White student who claims that affirmative action unfairly penalizes the White majority.\textsuperscript{47} On the contrary, he is a member of the Asian American minority, a group that has suffered from numerous forms of past and present discrimination.\textsuperscript{48} Li is not complaining about affirmative action because he has traditionally enjoyed unfettered access to elite schools like Princeton and wishes to be restored those privileges. Instead, his claim is about the negative effects of affirmative action on another historically disadvantaged group.\textsuperscript{49} Since Li is unlikely to be interested in maintaining the status quo of White privilege, his case seems to be a more sympathetic challenge to affirmative action.\textsuperscript{50} Indeed, Li casts greater doubt on the merits of affirmative action because he alleges that these programs impact some minority groups in a negative way. His argument is that when universities provide affirmative action to African Americans and Hispanics, they must discriminate not only against Whites, but against Asian Americans as well. Although it could be argued that Whites should shoulder the burden of affirmative action due to their historically privileged position, it seems less fair for Asian Americans to share the burden, as they too have experienced past discrimination.\textsuperscript{51} The suggestion that affirmative action disadvantages one racial minority in order to benefit others implies that the policy fails on its own terms—that is, it

\textsuperscript{46} This echoes the petitioner's argument in \textit{Grutter}, which claimed that the university's use of race for the purposes of diversity was a "fundamental departure" from notions of equality. See Brief for Grutter, supra note 25, at 19.

\textsuperscript{47} See Carroll, supra note 5 at 1 (describing Li's case as "a new twist, . . . since previous complaints about universities' racial preference policies have been filed by white students alleging bias").


\textsuperscript{49} Grutter also advanced this argument. See Brief for Grutter, supra note 25, at 39 ("[D]isadvantage on the basis of race works not only against Caucasian Americans, but also against other groups, including minority groups historically discriminated against, especially Asian Americans") (emphasis added).

\textsuperscript{50} See Wu, supra note 22, at 272-74 (describing how Asian Americans are portrayed as the "innocent victims" of affirmative action, in place of Whites, and how this plays into the model minority idea).

\textsuperscript{51} Some argue that Whites can justifiably bear the burdens of affirmative action because they do not necessarily deserve the privileges they enjoy. E.g., Stanley Fish, \textit{Affirming Affirmative Action}, SALT EQUALIZER, June 1995, at 7. Others argue that whatever its costs, affirmative action should be accepted by all groups since it "moves us towards a more just society that benefits all Americans," Chin et al., supra note 20, at 134.
fails to improve the opportunities of disadvantaged groups overall. It suggests that affirmative action cannot achieve its goal of benefiting minorities without also harming some minorities along the way. In this way, Li’s case suggests that affirmative action is inherently flawed because it cannot avoid discriminating against some minority groups.

D. Looking at Li’s Case in Terms of Negative Action

However, there is an important distinction to be drawn between Li’s case and the past affirmative action cases. In his claim against Princeton, Li asserts that Asian Americans are held to a higher standard than all other groups, including Whites. Specifically, Li has evidence that he was not admitted even though less qualified White applicants were. Thus, Li contends that he was disadvantaged in the admissions process in relation to Whites as well as other non-Asian minorities. While the preferences for other minorities could be attributed to affirmative action, there must be other preferences in place that give Whites a systemic advantage over Asian Americans. Indeed, although Li identifies affirmative action as the main reason for his exclusion, he also challenges the university’s use of legacies and athletic preferences. Legacies give special consideration to applicants with family members who are alumni or who have contributed financially to the school, while athletic preferences apply to students with special athletic abilities. Legacies, which pre-date the use of affirmative action and exist at many educational institutions, likely contribute to why Asian Americans are evaluated differently than Whites.

52. See Carroll, supra note 5, at 2 (quoting Princeton Professor Robert George, who noted that Li’s case involves “two different categories of minority whose interests are allegedly in conflict”). This, in turn, produces problems in coalition-building between Asian American and African American advocacy groups. See generally Harvey Gee, Claiming America: Towards a New Understanding of Assimilation, Pluralism, and Multiculturalism, 7 ASIAN L.J. 161, 167-68 (2000).
53. Golden, supra note 1. At first, the Office for Civil Rights rejected Li’s complaint because of “insufficient” evidence. Li subsequently appealed and produced evidence of a White high-school classmate who was admitted to Princeton with lower test scores and grades. The Office is currently investigating Li’s claim. Id.
54. Id. Specifically, Li’s complaint asks for Princeton’s federal funding to be suspended unless it “discontinues discrimination against Asian Americans in all forms by eliminating race preferences, legacy preferences, and athlete preferences.” Id.
56. See Editorial, Preserve Universities’ Right to Shape Student Community, USA TODAY, Jan. 26, 2004, at 12A. Legacies have an extensive history in universities across the United States. Id. At Princeton, the legacy admission rate is 35%, compared to 11% for non-legacy admits. Ronald Turner, The Too-Many-Minorities and Racegating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond, 30 HASTINGS CONST. L.Q. 445, 505 (2003). Legacies were originally introduced in order to give advantages to Whites
candidates may not benefit from affirmative action as a group, they are significant beneficiaries of these kinds of preferential policies. There is evidence that legacies, in particular, primarily benefit White applicants because they are more likely to have family members who are alumni of the university.\textsuperscript{57} As such, it can be argued that the reason why Li was denied admission was because of these other policies that exist apart from affirmative action.

The distinction between affirmative action and other admissions policies provides a basis for disassociating Li's case from the usual affirmative action challenges. The fact that Li fared worse than equally-qualified Whites shows that aside from affirmative action, there are systematic ways in which Asian Americans are disadvantaged in the admissions process. Specifically, Li's claim may be evidence of "negative action"—a term coined by Professor Jerry Kang to refer to the unfavorable treatment of Asian Americans in relation to Whites.\textsuperscript{58} Negative action exists where an Asian American student would have been admitted if he or she was White.\textsuperscript{59} This phenomenon points to the ways in which Asian Americans are disadvantaged in the admissions process, apart from the effects of affirmative action. Indeed, negative action may provide a better and more accurate basis for Li's case against Princeton. Li suggests that Asian Americans are discriminated against in the admissions process by affirmative action programs that benefit African Americans and Hispanics. However, this does not explain why he was also disadvantaged vis-à-vis Whites. The possibility that there are other policies that negatively act against Asian Americans suggests that they are the reason for Li's exclusion, instead of affirmative action.

The negative action argument provides a clear basis for distinguishing Li's case from the previous affirmative action cases. Upon closer examination, Li shows that Asian Americans are not in the same position as students like Bakke and Grutter. Instead, Asian Americans are in a less advantageous position than White applicants. The fact that Li was excluded in comparison to equally-qualified Whites shows that there are policies other than affirmative action that disadvantage Asian Americans. As such, Li's case does not necessarily fit under the existing rubric of affirmative action cases. While his case appears to provide further evidence over Jewish American applicants. See Ann C. McGinley, The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race Conscious Decision Making Under Title VII, 39 Ariz. L. Rev. 1003, 1041 n.237 (1997).

\textsuperscript{57} See Chin et al., supra note 20, at 140 (noting that in 1995, Harvard University admitted more students under legacies than the total number of African American, Mexican American, Puerto Rican and Native American students admitted); Gee, supra note 26, at 654.

\textsuperscript{58} Kang, supra note 2, at 3. To clarify, negative action refers to unfavorable treatment, based on race, of Asian Americans as compared to Whites. See also Chin et al., supra note 20, at 159.

\textsuperscript{59} Kang, supra note 2, at 3.
of affirmative action's discriminatory effects, it actually highlights separate forms of discrimination that have yet to be addressed.

III. THE DISTINCTION BETWEEN AFFIRMATIVE ACTION AND NEGATIVE ACTION

In his claim against Princeton, Li identifies three policies that potentially discriminate against Asian Americans in university admissions: affirmative action (which Li refers to as racial "preferences"), legacies and athletic preferences. Not surprisingly, the attack on affirmative action has received the most attention. Li argues that racial preferences for Africans Americans and Hispanics result in the discriminatory treatment of Asian Americans, a claim that adds "new life" to the anti-affirmative action movement. Yet Li points out that legacies and athletic preferences also potentially discriminate against Asian Americans. Legacies have received relatively little attention in the media, but have been the subject of much criticism amongst legal scholars. Legacies and other admissions practices are examples of negative action that disadvantage Asian Americans relative to Whites. It is necessary to examine the meaning of affirmative action and negative action in more detail to determine which phenomenon was the more likely cause of Li's exclusion.

A. Affirmative Action

1. Arguments Against Affirmative Action

Affirmative action is often equated with racial preferences. Critics of affirmative action argue that whenever race is considered, applicants will effectively be favored or disfavored according to their race. Racial
preferences, then, should be prohibited because race is an inherently suspect basis of classification, too readily capable of fostering stereotypes and prejudices. Granting preferences to African Americans, for example, assumes that African Americans are less qualified and need preferences in order to be admitted, while excluding Whites assumes that Whites have sufficiently high qualifications. Either way, race serves as a proxy for questionable assumptions, and should therefore not be considered in the admissions process.

Indeed, the problematic nature of racial classification is reflected in the Equal Protection jurisprudence. Beginning in Korematsu v. United States, the courts have held that racial classifications are inherently suspect and require the most stringent scrutiny. The danger inherent in considering race is also illustrated by the courts’ refusal to differentiate between benign and invidious uses of racial classification. The concern is that it is too difficult to determine which considerations of race are truly benign and which are actually tainted by prejudicial beliefs. Regardless of the purpose of a racial distinction, the use of race is potentially dangerous in and of itself. Therefore, critics argue that all race-conscious programs, even those based on diversity, should be forbidden.

The rejection of race as a valid consideration in admissions policies is also related to prevailing notions of merit. Some argue that race is simply irrelevant to the determination of which candidates deserve to be admitted to college. Schools should admit those who are most qualified,

=149&Itemid=54. Roger Clegg is the President and General Counsel of the Center for Equal Opportunity, an anti-affirmative action organization.


66. Korematsu v. United States, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . Courts must subject them to the most rigid scrutiny.”). Korematsu was a constitutional challenge to the military exclusion orders that led to the mass internment of Japanese Americans during World War II. Despite the flagrant racial distinction and the strict scrutiny standard, the Supreme Court upheld the orders under the 14th Amendment. Although Korematsu’s conviction was vacated in 1983, the case remains good law today. See Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). See generally YAMAMOTO ET AL., supra note 20, at 159–63. The use of strict scrutiny was affirmed in Shaw v. Reno, 509 U.S. 630 (1993) and Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

67. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 295–96 (1978). In contrast, Justice Brennan’s opinion would have upheld the university’s special program because it was not based on the premise that one race is inferior to another. Id. at 357–58.

68. See City of Richmond v. Croson, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry . . . there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”; “Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race . . . .”). See generally R. Richard Banks, Essay, The Benign-Invidious Asymmetry in Equal Protection Analysis, 31 HASTINGS CONST. L.Q. 573 (2003).

and this does not entail the consideration of race. This argument assumes that race and merit are mutually exclusive. Merit is based on academic achievement, test scores and other traditional criteria, but it is not based on an applicant's race. Because the consideration of race is both irrelevant and dangerous, it is argued that merit is best determined under a color-blind system. Conversely, when affirmative action programs take race into account, they abandon the concept of merit and admit unqualified applicants. This concern is reflected in the Court's ambivalent posture towards diversity-based affirmative action. In Grutter, Justice O'Connor recommended that race-conscious admissions policies should expire 25 years from the date of the court's decision. Since the use of race is a deviation from normal and presumptively equal admissions policies, it was desirable to add a "sunset clause" to affirmative action programs. In this way, the court implies that affirmative action sacrifices proper ways of evaluating merit. Even constitutionally-sound, diversity-driven policies such as the one upheld in Grutter are not the ideal ways of measuring merit and should therefore be dismantled as soon as they are no longer necessary.

2. Affirmative Action Redefines Merit to Benefit All Groups

The above arguments misunderstand the concept of merit in several ways. First, the opponents of affirmative action assume that merit is a static, objective standard. But commentators have pointed out that merit

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Li's belief in the irrelevance of race is demonstrated by his deliberate failure to answer questions about his ethnicity or place of birth on his college applications. According to Li, race "seemed very irrelevant to me, if not offensive." Golden, supra note 1. Furthermore, "I grew up thinking that in America race should not matter." Egan, supra note 4, at 6.

70. See Marty B. Lorenzo, Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest, 2 Mich. J. Race & L. 361, 405-06 (1997); Chin et al., supra note 20, at 141 ("The choice is not between 'merit' and 'affirmative action.' More accurately, the choice is between different conceptions of merit.").

71. Abram, supra note 65, at 1322-23.

72. Id. at 1319; Nagai, supra note 22.

73. Grutter v. Bollinger, 539 U.S. 306, 343 (2003). The suggestive nature of Justice O'Connor's recommendation is revealed by her statement, "[W]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [i.e., diversity] approved today." For a critical discussion, see Joel K. Goldstein, Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter, 67 Ohio St. L.J. 83 (2006).

74. See Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of "Affirmative Action," 94 Cal. L. Rev. 1063, 1081 (2006) (noting opponents' claims that affirmative action deviates from merit). Notably, Justice Ginsburg's concurrence in Grutter questioned the need for a sunset clause. Given the well-documented presence of unconscious race bias, she opined that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." Grutter, 539 U.S. at 346 (emphasis added).
is, like many other methods of evaluation, a social construct that reflects the values and beliefs of those who create and impose the standard.\textsuperscript{75} For example, the reliance on standardized test scores and GPAs rests on the assumption that students and schools have equal resources to excel at these measures. However, the reality is that students have unequal access to test preparation courses and other resources that could help them attain better scores.\textsuperscript{76} The fact that a minority student achieves a certain score may therefore demonstrate greater academic ability than other students with comparable scores.\textsuperscript{77} Moreover, there is substantial literature questioning the validity of standardized test scores and GPAs as predictors of success in college.\textsuperscript{78} There is evidence that standardized tests, in particular, are culturally biased and produce artificially lower scores amongst minority groups.\textsuperscript{79} Thus, the reliance on conventional indicators of merit reinforces existing racial inequalities in university admissions.

Even if the conventional criteria are reliable measures of merit, this does not mean that other criteria are not equally valid. A rigid adherence to traditional definitions of merit runs the risk of ignoring other criteria that can also indicate merit, such as student leadership or community service.\textsuperscript{80} After all, the definition of merit in one context may not be the same in another context.\textsuperscript{81} In the context of university admissions, merit can encompass a broader range of characteristics than just test scores and GPAs. Schools may value a student's academic potential but also his or her ability to contribute to student organizations and the university commu-
nity. Thus, factors such as demonstrated leadership, community involvement and cultural participation are valid considerations in the admission decision. Within the affirmative action jurisprudence, the courts have recognized the need for a broader definition of merit through their development of the diversity rationale. By approving a school's interest in attaining a diverse student population, the courts accept that diversity itself is part of the meaning of merit.\textsuperscript{82} For example, in \textit{Grutter} the Court accepted social science evidence of the educational benefits of a diverse classroom.\textsuperscript{83} Schools therefore have a valid reason for seeking to admit students from diverse backgrounds. In addition, the courts have recognized that universities ought to have considerable discretion in determining what their definition of merit is. Schools may legitimately value students with diverse backgrounds if they believe such diversity will contribute to their institutional goals.\textsuperscript{84} For all these reasons, affirmative action does not sacrifice merit nor substitute it with irrelevant criteria. Rather, affirmative action redefines merit so as to recognize the different ways in which candidates may be well-qualified. By expanding the definition of merit to include all relevant factors, affirmative action is not a deviation from merit but in fact a more effective way of determining which applicants are the most deserving of admission.

3. Defending the Diversity Rationale

More importantly, the opponents of affirmative action mischaracterize how affirmative action really works. Diversity-based admissions policies open up the concept of merit in a way that potentially benefits all groups, irrespective of race.\textsuperscript{85} As discussed above, the courts emphasize that

\textsuperscript{82} \textit{Grutter v. Bollinger}, 539 U.S. 306, 330–31 (2003) (noting that diversity produces livelier classroom discussions, better prepares students to work in an increasingly diverse and global society, and exposes them to other cultures, ideas and viewpoints); Chin et al., supra note 20, at 140; Kennedy, supra note 69, at 716–17. \textit{But see} Lawrence, infra note 92 (criticizing diversity rationales and arguing for social justice rationales).


\textsuperscript{84} Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (discussing diversity and the “robust exchange of ideas”). Schools’ educational missions are also owed considerable deference. \textit{See} \textit{Grutter}, 539 U.S. at 328.

\textsuperscript{85} See Harris & Narayan, supra note 27, at 131 (arguing that in different contexts, affirmative action policies can use multiple criteria of inclusion that benefit both minorities and White working-class men); Brief of National Asian Pacific American Legal Consortium et al. at 6 as Amici Curiae Supporting Respondents, \textit{Grutter v. Bollinger}, 288 F.3d 732 (6th Cir. 2002) (Nos. 02-241 & 02-516) [hereinafter Brief of NAPALC].
diversity includes a wide array of factors. A school may consider an applicant's economic status, geographic background, leadership potential, a history of overcoming disadvantage, or other qualities that produce unique perspectives that will in turn enrich students' learning experiences.\textsuperscript{86} As Justice Powell asserted, diversity is not limited to racial diversity—in fact, if it were, the admissions program would likely be unconstitutional.\textsuperscript{87} As such, diversity is not limited to benefitting members of racial minorities. White applicants who exhibit diversity in attributes such as geographic background or socio-economic status are also given special consideration. In this way, affirmative action does not exclusively benefit racial minorities at the expense of Whites or any other racial group.\textsuperscript{88} Since these policies are expansive, flexible ways of evaluating candidates, they are capable of benefitting all racial groups.\textsuperscript{89} Moreover, affirmative action is beneficial because it gives candidates highly individualized assessments. As Justice Powell emphasized, the main problem with racial quotas like the one in\textit{Bakke} was that they failed to evaluate applicants on an individual basis.\textsuperscript{90} Diversity-based, race-conscious policies offer highly individualized assessments by considering the specific and multiple ways in which an applicant possesses merit, whether in terms of his or her diverse background or other non-conventional indicators of merit.\textsuperscript{91} In fact, the traditional criteria of test scores and GPAs are more clearly based on categorical distinctions since they group candidates according to their scores and ignore any individual factors behind these measures. Therefore, affirmative action redesigns the admissions process in order to evaluate candidates on a truly individual basis.

It has been argued that despite the court's endorsement, diversity is a problematic rationale for affirmative action.\textsuperscript{92} Since diversity is such an

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\item \textsuperscript{86} \textit{Bakke}, 438 U.S. at 314 ("[A] particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body.").
\item \textsuperscript{87} \textit{Id.} at 315.
\item \textsuperscript{88} See Gee,\textit{ supra} note 29, at 154 ("Affirmative action does not inflict specific racial harm . . . .").
\item \textsuperscript{89} To put it another way, to the extent that affirmative action creates costs, it can be structured to distribute those costs evenly.\textit{ Id.} at 154.
\item \textsuperscript{90} \textit{Bakke}, 436 U.S. at 320 ("The fatal flaw in [the university's] preferential program is its disregard of individual rights . . . .");\textit{Grutter v. Bollinger}, 539 U.S. 306, 337 (2003).
\item \textsuperscript{91} For example, the University of Michigan's program that was upheld in\textit{Grutter} was found to be individualized enough to take into account the experience of being a Vietnamese boat person. See\textit{ Grutter v. Bollinger}, 288 F.3d 732, 747 (6th Cir. 2002) (quoting the Law School's admission policy).
\item \textsuperscript{92} Another critique of the diversity rationale is advanced in Charles R. Lawrence III,\textit{Two Views of the River: A Critique of the Liberal Defense of Affirmative Action}, 101 COLUM. L. REV. 928 (2001). Lawrence attacks the diversity rationale as a façade for perpetuating the interests of the White majority. By emphasizing the benefits in terms of livelier classroom discussion or the improved ability to work in an increasingly diverse society, diversity simply translates into benefits for the existing elites and maintains the status quo.
\end{itemize}
open-ended concept, it can refer to any way in which individuals differ from one another. While differences in racial membership or socio-economic status are the most common indicators of diversity, there is no reason why a school could not also seek students with different political affiliations, musical abilities or even different eye colors. The problem is that there is no principled way of determining which differences matter. A school can attain diversity by accepting more racial minorities but also by accepting more neo-conservatives or left-handed tennis players. Although this criticism is well-founded, the fact is that race remains one important factor in the definition of diversity. According to the court's formulation, diversity does not include every possible difference. A diverse student body is valued for its ability to contribute to students' learning experiences, not merely for having many different students. The differences that matter are those that contribute to individuals' possessing different viewpoints and perspectives that will in turn enrich the learning environment for all students. This principle clearly excludes trivial kinds of differences, but it also requires a school to examine its existing student composition. A school must actively determine which attributes will improve students' learning experiences and which attributes are already sufficiently represented. Diversity is not difference, for its own sake, but those differences that enlarge the notion of merit to advantage all racial groups.

In a similar vein, it has been argued that the concept of diversity has adverse effects on Asian Americans. If Asian Americans are already being admitted in substantial numbers, the diversity rationale actually works against them and limits their admission. Since diversity lacks an objective, precise definition, it can be formulated to unfairly exclude Asian American applicants. However, placing caps on the admission of Asian Americans. He argues that the rationale for affirmative action should be based on racial justice and ending class privilege. Id. See also Egan, supra note 4, at 3 (quoting Li's complaint that Princeton's policy is "a calculated move by a historically white institution to protect its racial identity while at the same time maintaining a façade of progressivism.").

94. See id. at 109.
95. Id. at 130.
96. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").
97. Id. at 314.
98. Id. at 317–18 ("[T]he weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.").
99. Choy, supra note 24, at 569–70.
100. Id. at 565.
American students is not a negative consequence of diversity, but a misunderstanding of the meaning of diversity itself. Diversity-based, race-conscious admissions policies do not require placing caps on the admission of any particular racial group. In fact, such caps would be examples of negative action against Asian Americans rather than a proper implementation of affirmative action. Part III.B.3 of this Article discusses limitations on Asian American admissions in greater detail.\textsuperscript{101}

The argument against considering race in admissions is based on the misconception that any consideration of race inevitably results in racism.\textsuperscript{102} Given the numerous instances where race has been used to perpetuate stereotypes and other inequities, it is understandable that drawing racial distinctions is, as a practice, subject to suspicion. However, like many factors considered during the admissions process, race is meaningful primarily because it serves as a proxy for other underlying qualities. Standardized test scores, for example, are used because they purport to correlate to the likelihood of success in college.\textsuperscript{103} Test scores are not valued in and of themselves, but for their ability to predict future academic success. Similarly, it can be argued that race can be used as a proxy for applicants who have overcome disadvantage or systemic barriers to achieve the credentials they have. An applicant's race can add a "plus" to his overall application since it is likely to indicate that he has the aptitude for academic success, given what he has achieved already.\textsuperscript{104} Furthermore, the distinction between race and racism does not depend on the purpose behind the racial distinction. It is often argued that affirmative action's benign or ameliorative intent cannot immunize it from claims of discrimination because the purpose may not be truly benign or the mere use of race could be based on negative stereotypes.\textsuperscript{105} However, affirmative action is not only meant to carry out the benign purpose of benefiting certain racial groups.\textsuperscript{106} Rather, race is used for its ability to identify can-

\begin{enumerate}
\item See infra III.B.3.
\item See Chin et al., supra note 20, at 141–42. The court in Grutter seemed to accept that acknowledging race does not necessarily denote racism, by referring to how military recruitment programs cannot achieve a diverse officer corps unless they consider race. See Grutter v. Bollinger, 539 U.S. 306, 331 (2003).
\item The validity of standardized test scores has been questioned. See supra III.A.2.
\item This is not to say that the consideration of race is a categorical distinction and fails to achieve individualized assessments. Rather, it illustrates how race is used, along with a myriad of other criteria, to indicate merit. At the same time, it is recognized that schools cannot make absolutely individualized assessments and must rely on categories to some extent. After all, schools must be discriminating in its choice of students, only it cannot be discriminatory.
\item See supra III.A.1.
\item This is not to say that affirmative action does not have an ameliorative purpose. Certainly, the origins of affirmative action were based on the need to eliminate racial bias and equalize opportunities for racial minorities, particularly African Americans. For a his-
\end{enumerate}
didates who possess meritorious qualities that may be overlooked when race is ignored. Apart from the ameliorative purpose of affirmative action—which has been advanced as a compelling reason to distinguish it from ordinary discrimination—there is a less contentious purpose involved, and that is simply to use race to redefine merit. The consideration of race is not racist because its purpose is to improve the definition of merit in a way that benefits all groups.

Furthermore, it is not clear that, in the absence of affirmative action, existing admissions policies would be non-discriminatory. Opponents of affirmative action argue that traditional admissions programs are fair and would admit meritorious candidates of all races. However, there is evidence that traditional programs actually have a disproportionately negative impact on the admission of racial minorities. Given their rigid definitions of merit and other biases, traditional admissions policies have a tendency to exclude qualified minority students. Therefore, eliminating affirmative action does not ensure that admissions policies will provide equal opportunities to students of all races. Rather, existing admissions policies are fraught with discriminatory effects on minority students. By redefining merit, affirmative action reforms admissions policies so that they are truly non-discriminatory. Affirmative action can therefore be understood as a way of correcting racial inequalities, instead of introducing them.

In summary, affirmative action is not discriminatory because it does not simply benefit one racial group at the expense of another. Diversity-based, race-conscious admissions policies consider the many ways in which candidates are meritorious, of which race is only one, albeit important, indicator. Based on its redefinition of merit and its multi-faceted approach to assessing candidates, affirmative action can benefit all candidates, regardless of their race. Moreover, there is evidence that traditional admissions policies negatively impact minority applicants. This challenges


107. It has been argued that the ameliorative purpose of affirmative action distinguishes it from other racial classifications, so that it should be subject to less strict levels of scrutiny. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Where Justice Marshall argued that race-conscious programs are permissible for the purpose of remedying past discrimination); Chin et al., supra note 20, at 135; Dong, infra note 119, at 1051 (arguing that affirmative action for minorities should only receive intermediate scrutiny); Kennedy, supra note 69, at 737; Egan, supra note 4 (quoting Cass Cliatt, a spokesperson for Princeton, as saying “[l]ooking at the merits of race is not the same as the opposite [— discrimination].”).


the assumption that admissions programs would treat all candidates fairly in the absence of affirmative action. Instead, there seems to be pre-existing biases in the admissions system that disadvantage minority groups.

B. Negative Action

As described above, negative action refers to the unfavorable treatment of Asian Americans relative to Whites. It refers to practices, both formal and informal, that result in Asian American applicants having decreased chances of admission as compared to White applicants.\(^{110}\) Negative action exists in many forms—it can involve outright discrimination against Asian Americans, existing bias in admissions policies that disadvantage Asian Americans relative to Whites, or admission limits on Asian Americans in the name of maintaining diversity.\(^{111}\) Whatever its form, negative action is discriminatory because it disadvantages a group based on race. More importantly, negative action is empirically and conceptually distinct from affirmative action. Having affirmative action for some groups does not necessitate negative action against others, and the effects of negative action persist even in the absence of affirmative action.

The use of White students as the comparison group is meant to distinguish negative action from affirmative action.\(^{112}\) Whether or not affirmative action is in place, there is no obvious reason why Asian Americans would be disfavored as compared to Whites. Critics assert that in the absence of affirmative action, traditional admissions policies would treat all candidates fairly, irrespective of race.\(^{113}\) However, the fact that Asian American students are less likely to be admitted than equally-qualified Whites suggests that there are existing biases in the system that are race-based. Similarly, it is argued that under affirmative action, the targeted groups of African Americans and Hispanics benefit while other groups do not. Yet this does not explain why Asian Americans are less likely to be admitted than Whites. If both groups were being disadvantaged in the same way by affirmative action, there should not be a discrepancy be-

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110. Kang, supra note 2, at 3 n.8 (clarifying that the comparison is between equally-qualified Whites and Asian Americans).
111. Id. at 3–4 (stating that negative action can consist of either "hard" numerical quotas or "soft" holistic assessments).
112. Id. at 3, n.10. Kang makes it clear that the comparison is not between Asian Americans and other racial minorities, because that would be "irrelevant to the specific question [of] whether negative action against Asian Americans is in place." Instead, the comparison is with Whites because they act as a baseline of non-preferential treatment. Although this Article disputes whether Asian Americans are in fact disadvantaged relative to other racial minorities, Kang seems to assume that such disadvantages are possible.
113. See Culp supra note 108.
tween their admission rates. Of course, affirmative action is not devoid of benefits for Whites or Asian Americans. Yet it does not explain the discrepancy between these two particular racial groups. Although affirmative action recognizes race as a factor, it does not mean that all members of any one racial group are systematically advantaged over another group, and certainly not that Whites would be systematically advantaged over Asian Americans. Therefore, the differences between Asian Americans and Whites cannot be attributed to affirmative action but indicates that there are other biases at work. There is a separate phenomenon of negative action that disadvantages Asian Americans, in particular, relative to Whites.

1. Past Examples of Negative Action

Past instances of negative action have occurred where schools adopted policies that explicitly discriminated against Asian American students. Studies have found that Harvard University historically accepts Asian Americans at a lower rate than Whites despite Asian students' higher test scores and grades. In 1990 Harvard admitted that it had discriminated against Asian American applicants by subscribing to stereotypes about Asian personality traits and affinity for math and science. At around the same time, other schools such as Brown University and the University of California-Berkeley also came under scrutiny. Both Brown and Berkeley acknowledged that Asian Americans were treated unfairly in the admissions process. These examples illustrate how negative action has been directly applied to Asian Americans. Although not formulated at the level of official policy, these schools adopted stereotypes about Asian Americans that effectively disadvantaged them in the admissions process. Such practices were

114. Harris & Narayan, supra note 27, at 129 (describing how affirmative action benefits White women and White working-class men). See also Kidder, supra note 4, at 623 (describing how affirmative action benefits certain Asian American sub-groups, such as Filipinos and Pacific Islanders).

115. Takagi, supra note 20, at 578 (describing how, in the 1980s, schools such as Harvard, Yale, Princeton, Stanford, the University of California-Berkeley and the University of California at Los Angeles were all charged with discriminating against Asian Americans in admissions).


117. Harvard admissions officers used stereotypical descriptions of Asian applicants such as “he’s quiet and, of course, wants to be a doctor.” Interestingly, Harvard was eventually cleared of discrimination charges because its exclusion of Asian Americans was found to be because of preferences for legacy students and recruited athletes. Shea, supra note 3. Apparently, this was not viewed as a problem. See also Karen De Witt, Harvard Cleared in Inquiry on Bias, N.Y.TIMES, Oct. 7, 1990, §1, at 35.

clearly discriminatory because they applied specifically to Asian Americans and thereby decreased their chances of admission as compared to Whites.

Outside the context of higher education, public schools have applied negative action against Asian Americans in order to attain racial diversity. In the 1990s, public schools in the San Francisco Unified School District were under court-approved consent decrees to enroll students from a variety of racial groups such that no group formed more than either 40 or 45 percent of the total enrollment.119 As a result of this policy, Chinese students were held to higher admission standards than Whites or any other minority group.120 In this case, negative action was more subtle: instead of using explicitly racist stereotypes against Asian Americans, elevated admission standards were used for the purpose of maintaining court-sanctioned racial diversity at schools. Nevertheless, the effect was the same—Asian Americans were singled out for disadvantageous treatment that was not applied to any other group. This case demonstrates that misapplied admission standards can be a form of negative action, as well as the perception that negative action is a consequence of racial diversity programs. The suggestion is that in order to give spots to certain groups, other groups must be disadvantaged in the process—in other words, that negative action is an inevitable result of affirmative action. This argument is also found in the context of higher education: where there is affirmative action for minority groups, Whites or Asian Americans will be penalized. However, it is erroneous to assume that racial diversity necessarily means that some groups must be disadvantaged. Rather, negative action is a separate form of discrimination that goes against the goals of affirmative action.

2. Legacies: Negative Action Against Asian Americans and Other Minorities

Current examples of negative action may be less visible but are no less insidious. Although schools are unlikely to have explicit policies disadvantaging Asian Americans, there are subtle ways in which existing preferences can have a negative effect on Asians. As Li points out, many universities including Princeton have legacies, whereby special consideration is given to children of alumni or those who have made significant financial contributions to the school.121 Legacies show that traditional ad-

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120. Id. Ultimately, the schools adopted a policy in which diversity was still the goal, but neither race nor ethnicity were the primary consideration.
121. It is noteworthy that Princeton has defended its practice of giving preferences to children of alumni and athletes. See Shea, supra note 3, at C3.
missions programs are not without systematic preferences for certain
groups. While legacies may not explicitly refer to race, they effectively
give White students an advantage in university admissions. Since White
applicants are more likely to have family members who are alumni or
who have contributed financially to the school, they are more likely to be
the beneficiaries of legacies. As such, legacies tend to benefit White stu-
dents over Asian Americans, as well as other minority groups who are also
less likely to have alumni family members. In this way, legacies are a
form of negative action that is neutral on its face, but causes Asian Ameri-
cans to be less likely to be admitted than Whites.

Legacies provide an illuminating example of the way in which tradi-
tional admissions policies are racially biased and are not solely based on
merit. Legacies benefit students whose family members previously at-
tended elite universities or are of sufficiently high socio-economic status
that they can contribute to universities. In other words, legacies tend to
apply to groups who have been able to access post-secondary education
or high-paying jobs in the past. In contrast, racial minorities like Asian
Americans have historically experienced discrimination that limited their
access to education, employment and other opportunities for financial
wealth. Despite their present inclusion in well-known universities and
professional occupations, they do not have the same historical representa-
tion in those groups that would allow them to benefit from legacies in the
same way. Thus, legacies illustrate how past discrimination can affect pre-
sent opportunities for education. Apart from the broader societal effects
of historic discrimination and the presence of implicit racism today, there


123. Legacies are a form of negative action because they advantage Whites over Asian Americans, but they also advantage Whites over other minority groups.

124. See Lamb, supra note 122, at 509-10.

125. Dong, supra note 119, at 1048 (describing the history of segregation of Asian Americans in public schools). See Wong Him v. Callahan, 119 F. 381, 382 (C.C. Cal. 1902) and Gong Lum v. Rice, 275 U.S. 78, 85-86 (1927) (upholding laws requiring Asian American children to attend separate schools). Although it could be argued that recent Asian immigrants have not experienced past discrimination, they would still be unfairly affected by legacies that give preferences to alumni children. See also Wu, supra note 22, at 245 (describing the disparate financial wealth of Asian Americans).

126. For examples of past discrimination perpetuating existing inequalities in other areas such as home ownership and personal wealth, see Chin et al., supra note 20, at 132 and Thomas M. Shapiro, The Hidden Cost of Being African American: How Wealth Perpetuates Inequality 1 (2004). See generally Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America (2005).
are direct ways in which past discrimination negatively affects one’s current chances of admission.

In addition, legacies demonstrate that existing admissions policies are not entirely based on merit. The special consideration for legacy students is not related to any notion of merit, whether defined under the traditional criteria or the redefined criteria of diversity. Legacies simply prefer applicants based on their affiliation with certain kinds of individuals. While a university may have a financial incentive to offer legacies, this purpose is not related to a school’s interest in a meritorious student body. Giving advantages to those students whose family members were alumni or have contributed financially to the school not only has nothing to do with academic potential; it harks to nepotism and reinforces the notion that higher education is accessible only to the wealthy and privileged. Therefore, legacies demonstrate how past discrimination can negatively affect a candidate’s present chances of admission, regardless of his or her qualifications. While legacies operate to disfavor Asian Americans relative to Whites, they also have a negative impact on other minority groups who were historically excluded from education and employment opportunities. Since legacies perpetuate racial inequalities in university admissions, they ought to be challenged as discriminatory policies that negatively act against Asian Americans and other minority groups.

3. Other Forms of Negative Action: Admission Limits and Within-Group Comparisons

Apart from legacies, which disadvantage all non-White groups, there are other ways in which a school can act negatively against Asian Americans in particular. It has been argued that schools place limits on the number of Asian Americans that are admitted or compare Asian American applicants with each other in the admissions process. The cap on Asian

127. For example, financial interests do not fall under a school’s “four essential freedoms,” which include the right to decide “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

128. Chin et al., supra note 20, at 140 (“[A]n applicant’s ‘legacy’ status ... is irrelevant to personal achievement or academic promise.”); Turner, supra note 56, at 506.

129. Indeed, legacies have been called “affirmative action for whites,” Wu, supra note 22, at 278, or a “white preference,” Blumenkrantz et al., supra note 122, at 414. However, it is unclear how the courts would rule on legacies. In his dissenting opinion in Grutter, Justice Thomas expressly stated that legacy policies are acceptable under the Equal Protection Clause. See Grutter v. Bollinger, 539 U.S. 306, 368 (2003).

130. Arenson, supra note 3 (describing Li’s claim that Princeton holds down the number of Asian Americans admitted). There is no direct evidence but some columnists have speculated that schools utilize quotas or other kinds of limits against Asian Americans. See, e.g., Jay Matthews, Should Colleges Have Quotas for Asian Americans?, Wash.
American students respond to the observation that many schools have "too many Asians" on their campuses.\textsuperscript{131} Statistics indicate that although Asian Americans form approximately five percent of the US population, they make up significantly higher proportions of college student bodies.\textsuperscript{132} At Princeton University, Asians represent 13\% of the undergraduate student population, while at Stanford and MIT they constitute upwards of 24–27\%.\textsuperscript{133} Since it appears that Asian Americans are overrepresented at many elite institutions, it has been suggested that schools must limit their admission in order to maintain a racially diverse population. In other words, these limits are attributed to the requirements of affirmative action. Since Asian Americans are already admitted in such high numbers, it is argued that their admission must be curbed in order to make spots available for other minority applicants.

However, affirmative action neither requires nor condones placing specific limits on the admission of any particular racial group.\textsuperscript{134} As discussed above, the goal of affirmative action is to achieve a diverse student body, of which racial diversity is one dimension. The assumption that the substantial presence of Asian American students means that Asians no longer contribute to diversity wrongly equates race with diversity. Under diversity-based policies, students are valued not only because they belong to a racial minority but because they possess other kinds of diverse attributes that enable them to improve the learning environment. As such, the fact that there are substantial numbers of Asian American students does not mean that Asian students cannot continue to contribute to a school's diversity in terms of their economic status, geographic backgrounds or religious beliefs. If diversity encompasses a broad range of characteristics, as Justice Powell insisted it does, there should not be an automatic limit on Asian American students simply because their race is sufficiently represented.\textsuperscript{135}

\textsuperscript{131} The overrepresentation of Asian Americans at elite colleges has been regularly reported in the media. See Shea, \textit{supra} note 3 (including mention of a student columnists' view that Asian Americans are "over represented" at Princeton).

\textsuperscript{132} Egan, \textit{supra} note 4, at 3 (noting that Asian American enrollment is "near an all-time high" at many elite universities). Although statistics concerning Asian American enrollment at US schools are difficult to obtain, some data is available on a website operated by Don W. Joe. Asian American Politics, http://www.asianam.org/ (follow "Colleges," "Medical School," and "Law Schools" hyperlinks) (last visited April 13, 2007). Readers should be aware that the website has an anti-affirmative action stance.

\textsuperscript{133} Egan, \textit{supra} note 4, at 3.

\textsuperscript{134} Chin et al., \textit{supra} note 20, at 159.

\textsuperscript{135} \textit{Id.} at 155–56 (arguing that parity or over-parity does not necessarily mean there is no discrimination). On this point, it is ironic that in a footnote in \textit{Bakke}, Justice Powell
Rather, diversity ought to enable the admission of students of many different backgrounds, of which race is one, but not the only determinative factor.

In fact, the observation that there are "too many Asians" belies several problematic assumptions. First, it indicates that Asian Americans are viewed primarily in terms of their race. The sufficient representation of Asian Americans, by itself, seems to imply that a school has met its diversity goals as far as Asians are concerned. This ignores the fact that Asian Americans, as individuals, possess numerous other kinds of characteristics that can contribute to a school's diversity. The narrow-minded focus on race trivializes the meaning of diversity because it is not race that is the ultimate consideration, but the inclusion of students with diverse backgrounds to combat pre-existing biases in admissions policies. Furthermore, the statement that there are "too many Asians" reveals the assumption that Asians of all ethnicities are the same and can be treated accordingly. Commentators have pointed out that most Asian American students at elite colleges are Chinese, Korean or Japanese in origin and that the Southeast Asian, Filipino and Hmong communities are chronically underrepresented. The failure to differentiate between Asian subgroups overestimates the successes of Asian Americans but, more importantly, it misapplies the diversity rationale. Instead of seeking diversity in all its forms, the singular focus on the significant racial representation of Asian Americans overemphasizes race and unfairly penalizes Asian Americans in the process. Thus, it is erroneous to assume that the sufficient numbers of Asian American students means that their admission must be limited in order to attain diversity.

The argument that negative action against Asian Americans is an inevitable consequence of affirmative action for other groups arises from a remarked that the inclusion of Asian Americans in the University of California-Davis' special program was "especially curious in light of the substantial numbers of Asians admitted through the regular admissions process." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 n. 45 (1978). In this statement, Powell falls prey to the idea that sufficient numbers means sufficiently diverse, contradicting himself on the definition of diversity.

136. See Dong, supra note 119, at 1053–54 (arguing that the remark that there are "too many Asians" has racist undertones).

137. See Choy, supra note 24, at 566.

138. Id. at 566–67; Wu, supra note 22, at 245–46.


140. This responds to Choy's argument that diversity adversely affects Asian Americans since they are already well-represented. See Choy, supra note 24, at 549, 560–70.
fundamental misunderstanding about the nature of affirmative action.\textsuperscript{141} This claim assumes that affirmative action entails some sort of racial balancing whereby Whites, Asian Americans, African Americans and other groups must be maintained in numbers proportionate to their representation in the general population.\textsuperscript{142} It assumes that there is a finite number of minorities that can be admitted, such that saving spots for African Americans necessarily involves withholding spots from Asian Americans.\textsuperscript{143} But affirmative action does not involve attaining any particular racial composition of students. To be sure, racial diversity is part of the goal, but such policies do not bar the admission of a candidate simply because his or her race is sufficiently represented. In fact, racial balancing approximates the kind of quota that was struck down in \textit{Bakke} because it presumes that diversity entails a certain number of students from each racial group. Following the courts' rulings, admissions programs that use race to achieve a specific racial composition are unconstitutional. By categorizing candidates based on race, they suffer from the further flaw of failing to evaluate candidates as individuals. The perceived need for a cap on Asian American admission arises from the assumption that spots for certain minorities must come at the expense of other minorities. Admission is viewed as a "zero-sum game" whereby spots for minorities are simply reallocated according to which groups are being favored. While the "zero-sum game" is a dubious concept in and of itself, this view masks the spots that are already reserved, through existing preferences, for Whites. Affirmative action should be accomplished by taking away those policies that unfairly advantage Whites, and not by arbitrarily constraining the admission of other minorities. Therefore, limiting Asian American enrollment distorts the meaning of affirmative action and fails to address pre-existing biases in admissions programs.

Comparing Asian American students against one another is another form of negative action that has no relation to affirmative action. This

\textsuperscript{141} Kang argues that the same kinds of justifications for affirmative action could also justify negative action against Asian Americans. Specifically, he analyzes Dworkin's defense of affirmative action, including that it is internally problematic because it would also defend a policy of negative action. Dworkin's defense is premised on the idea that affirmative action is permissible because it is not tainted by racial prejudice. The problem with this approach is that it equates affirmative action with preferences and relies on the ameliorative purpose of such programs, which the courts have rejected as a justification. Kang's example of negative action that would be justified under Dworkin's analysis is a "Look Like America" policy that seeks a racial balance of students. This is also problematic given this Article's interpretation of diversity, which does not entail racial balancing. See RONALD DWORKIN, LAW'S EMPIRE 386-87, 393-97 (1986); Kang, \textit{supra} note 2, at 12, 14-15; Harris & Narayan, \textit{supra} note 27, at 138-39.

\textsuperscript{142} Kang, \textit{supra} note 2, at 14 (describing the example of a "Look Like America" program that establishes targets for each racial group according to their percentage of the national population).

\textsuperscript{143} The "zero-sum game" idea assumes that a spot that is given to one individual is also simultaneously being denied to another individual. See Gee, \textit{supra} note 29, at 153.
practice assumes that affirmative action requires a school to only accept the most qualified candidates from each racial group.\textsuperscript{144} Like admission caps, comparing Asian Americans against each other presumes that there is a certain number of Asians that can be admitted, and therefore only the most qualified should be accepted. While admission should be given to the most meritorious students, as defined by the goals of diversity, it does not require targeting the most meritorious within each racial group. There is no basis for suggesting that affirmative action determines merit by comparing Asian American applicants with other Asians. Rather, affirmative action involves evaluating a candidate's qualifications relative to all other candidates. In fact, under diversity-based policies, comparing a candidate to all other candidates is all the more necessary because there is no one basis on which a candidate is superior to others. An Asian American applicant may have good scores and possess geographic diversity, but he is not necessarily more qualified than an Asian with lower scores and more diverse attributes or a similarly-situated African American applicant. Thus, comparing members of one racial group with one another does not assist in the ultimate determination of who is the most meritorious. Since applicants are assessed for their ability to contribute to the diversity of the school, such assessment must transcend racial categories. Moreover, if within-group comparisons are only applied to Asian Americans, the disadvantages arising from such practices fall exclusively on Asians. In this way, racial comparisons are not related to the goals of affirmative action but instead constitute a form of negative action against Asian Americans.

4. Negative Action Is Discriminatory

The lack of an invidious purpose behind negative action does not detract from the fact that it is discriminatory. As the courts have made clear, there is no meaningful distinction between benign and invidious racial classifications because the use of race itself is suspect.\textsuperscript{145} In the case of negative action, it should not matter that the use of admission caps or racial comparisons was not motivated by an intention to discriminate against Asian Americans. Since these practices are applied specifically to

\textsuperscript{144} This assumption is similar to the rationale underlying "Top 10% Plans," which were utilized at schools in Texas and Florida as an alternative to affirmative action. Under these plans, the top 10% of students in schools are given preferential consideration in university admissions. Like comparing Asian Americans with each other, these plans compare the students of one school with each other to determine who are the most qualified. However, the effectiveness of these plans has been questioned. See Greenberg, supra note 55, at 546.

\textsuperscript{145} See supra note 66. Despite the courts' rulings, it should be noted that scholars have argued that the benign purpose of affirmative action distinguishes it from other racial classifications. See supra note 107. However, this Article argues that a benign purpose is not necessary to vindicate affirmative action, just as it does not absolve negative action.
Asian Americans, schools are conferring disadvantageous treatment on Asians because of their race. Although it could be argued that such practices are, in part, fueled by implicit racial interests in retaining White privilege at elite colleges and preventing campuses from having "too many Asians," these motivations do not affect the discrimination analysis. Following the courts' reasoning, programs that apply disparate treatment on the basis of race are discriminatory, regardless of the purported purpose behind such programs. In this way, an argument advanced by affirmative action opponents can be used to vindicate the rights of Asian Americans. By accepting that purpose is irrelevant, it can be argued that admission caps and within-group comparisons are impermissible even if they are motivated by the benign purpose of affirmative action. Thus, it is consistent with the existing jurisprudence to find that negative action against Asian Americans is discriminatory and therefore unconstitutional.

Empirical evidence supports the notion that negative action is not an inevitable consequence of affirmative action. Specifically, there is research showing that the elimination of affirmative action does not eliminate the effects of negative action. Studies show that in California, where affirmative action was removed over a decade ago, the main group that benefited was Whites, not Asian Americans. While the admittance of Asian Americans increased by one percent and that of other minorities decreased significantly, the admittance of Whites increased by approximately 12 percent. In other words, White candidates appear to have an advantage over Asian Americans when traditional admissions policies are adhered to. This finding undercuts the argument that affirmative action sacrifices seats that would have gone to Asian Americans. In the absence of affirmative action, these seats did not go to Asians but instead disproportionately benefited Whites. Another study found that the main beneficiaries from the elimination of affirmative action would be Whites, not Asian Americans. Following the ban on affirmative action at several

146. Kidder, supra note 4, at 610–11.
148. See Brief for Bakke, supra note 19, at 44 (arguing that the standard of review for racial classifications does not vary according to the asserted purposes of the discrimination, or the race of the person affected).
149. That is, it could be argued that the benign purpose for negative action is to implement affirmative action.
150. Chin et al., supra note 20, at 159–60.
151. Kidder, Situating Asian Pacific Americans, supra note 139, at 45.
152. Id. at 44–45.
153. Kidder, supra note 4, at 606. But see Larry Elder, Asian Students Hit the Diversity Wall, DAILY BREEZE (Torrence, Cal.), Dec. 17, 2006, at A17 (noting that since California’s ban on affirmative action, Asian American enrollment at Berkeley increased from 34.6% to 42% in 2006, and that a similar action in Washington lead to increases at the University of Washington).
competitive schools, the enrollment of Asian Americans saw a modest in-
crease of 12.9% to 14.3%. However, this change can be attributed to the
increase in the number of Asian Americans applying to these schools and
the significant growth of the Asian American population in the US in
general. Thus, without affirmative action, Asian Americans would still be
admitted in lower numbers than they should be under a race-neutral pol-
icy. In this way, the alleged benefits to Asian Americans from the
elimination of affirmative action have been exaggerated. The statistics
demonstrate that even without affirmative action, there are policies that
negatively act against Asian Americans and lower their admission rates.

Given the above discussion, the differences between affirmative ac-
tion and negative action are apparent. Affirmative action is a way of
expanding the notion of merit to include students of all races who are
well-qualified for admission. Diversity-based, race-conscious programs are
not discriminatory because they are not based exclusively on race but
rather define merit in a way that benefits all groups. In contrast, negative
action is discriminatory because it subjects Asian Americans to treatment
that disadvantages them relative to Whites. More importantly, negative
action is not a necessary consequence of affirmative action. The idea that
affirmative action for some groups entails negative action against others is
based on a faulty understanding of affirmative action and hinders the abil-
ity of people like Li to identify the actual causes of discrimination.

IV. Strategies for Li’s Case

This Article has argued that Li’s exclusion from Princeton is due to
negative action, not affirmative action. The discrimination that Asian
Americans experience is not caused by race-conscious admissions policies
that give special consideration to African Americans and Hispanics, but by
legacies and other policies that disadvantage Asians relative to Whites. This
is not to say that affirmative action cannot have contributed to Li’s rejec-
tion from Princeton. Given the goal of diversity, it may be that Li’s
application did not exhibit those qualities that would contribute most to
the diversity of Princeton’s student population. However, the exclusion of

154. Kidder, supra note 4, at 618.
155. Id. at 619; Hispanic and Asian Populations Expand, N.Y. TIMES, Aug. 30, 2000, at
A16.
156. Kidder, supra note 4, at 613.
157. Cf David L. Chambers et al., The Real Impact of Eliminating Affirmative Action in
American Law Schools: An Empirical Critique of Richard Sander’s Study, 57 STAN. L. REV. 1855
(2005) (describing the detrimental effects of eliminating affirmative action on the admis-
sion of African American students into law school). However, the study cited by Li found
that ending legacies and athletic preferences would only boost Asian American enrollment
slightly, while ending affirmative action would result in significant increases in Asian en-
rollment. See Espenshade & Chung, supra note 4.
Li on this basis would not be discriminatory. As argued above, race-conscious policies based on diversity consider race along with numerous other factors and do not simply advantage one racial group over another. If affirmative action did deny Li admission, it was because he did not meet their standard of merit, not because of his race. After all, while admissions decisions should not be discriminatory, they must still be discriminating.

On the other hand, negative action likely did contribute to Li's exclusion in a discriminatory way. Legacies disproportionately favor Whites so that equally-qualified Asian Americans are less likely to gain admission. Likewise, by imposing caps on Asian American admission or comparing Asian students with one another, the university singled out Asian Americans for disadvantageous treatment based on their race. Therefore, Li ought to argue that negative action is the source of the discriminatory treatment that he and other Asian Americans face in university admissions.

A. Advantages to Challenging Negative Action

There are many advantages to arguing Li's case as a challenge against negative action. First, it addresses the problem of discrimination at its root. Legacies are a well-established part of university admissions programs that ought to be criticized more openly. Given their tendency to advantage Whites and reinforce historic patterns of discrimination, legacies have been dubbed as "affirmative action for Whites." The fact that they are longstanding and seemingly unquestioned practices should not immunize them from scrutiny. On the contrary, their historic nature means they have likely contributed to the existing inequities in college admissions that affirmative action seeks to correct. Moreover, legacies and other forms of negative action have been masked by the disproportionate focus on affirmative action. The debate about how affirmative action confers unfair preferences or stirs up racial tension overshadows the more basic and pressing question of whether existing admissions policies are non-discriminatory. By bringing a case challenging the use of negative action against Asian Americans, Li can shift the focus onto these lesser-known policies that are truly discriminatory.

In addition, attacking negative action would better capture the nature of the right that Li is claiming. By arguing that Princeton discriminated against him because of his race, Li claims a right to be evaluated fairly by the university's admissions policies. Li cannot claim the right to be admitted into Princeton because, like many scholars have

158. See generally Lamb, supra note 122 (arguing that legacy preferences should be eliminated).
159. See supra note 129.
noted, one does not possess a right to be given admission to the school of one's choice. Given the competitive nature of admissions, the scarcity of spots, and the discriminating process that schools must undergo to select students, it cannot be said that Li is entitled to be admitted into Princeton. Yet this would be Li's argument if he challenges affirmative action. Since he argues that affirmative action gives spots to African Americans and Hispanics that would have otherwise be given to Asian Americans like himself, he effectively claims that he would have been admitted, but for racial "preferences." This line of reasoning falls prey to the causation fallacy—the assumption that an individual would have been admitted had there not been affirmative action for other groups. Since admission is a complex decision that depends on numerous factors, it is erroneous to presume that one would be admitted if another candidate had not been admitted. In contrast, if Li argues his case under negative action, he is not claiming the right to be admitted into Princeton. Rather, he is arguing that he has a right to be evaluated in a non-discriminatory manner in the admissions process. By attacking negative action, Li simply claims that Asian Americans ought not to be disadvantaged versus equally-qualified Whites. The right not to be discriminated against on the basis of race is clearly recognized and protected under the Equal Protection Clause.

On a more political level, there are good reasons to support affirmative action in college admissions. As many scholars have pointed out, even if Asian Americans do not substantially benefit from affirmative action in higher education, they benefit from similar policies in the areas of employment and public contracting. As a matter of principle, it would be inconsistent to deny the legitimacy of affirmative action in one context, but affirm it in other contexts. As a matter of credibility and coalition-building, little can be gained by supporting a policy only when it provides benefits to one's own racial group and withdrawing such support when it

160. Kang, supra note 2, at 7 (describing Dworkin's argument that there is no moral or constitutional right to be admitted to a university).
161. Princeton claims that it has an extremely selective admissions process, such that only half of those applicants with perfect SAT scores were admitted in 2006. See Carroll, supra note 5 (reporting statistics provided by a Princeton spokeswoman).
162. Golden, supra note 1 ("I was very close to being accepted at [other] schools . . . I was thinking, had my ethnicity been different, it would have put me over the top"). Li appears to believe that affirmative action made all the difference in his evaluation.
163. Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1046 (2002). Since Princeton has such selective procedures, even with applicants with perfect SAT scores, it is unclear whether Li would necessarily have been admitted in the absence of affirmative action.
164. Certainly, Li has made it clear that he is concerned with discrimination, despite his attack on affirmative action.
165. Chin et al., supra note 20, at 154–55 (noting Asian American under-representation in public contracting, but also certain academic fields, such as law, history and sociology); Yip & Narasaki, supra note 11, at 29–32.
Affirmative Action and Negative Action does not.\textsuperscript{166} If affirmative action is truly a non-discriminatory policy that can benefit all groups, Asian Americans' support for it should not depend on whether it produces marginal or substantial benefits for one's own racial group. Moreover, it has been argued that even if Asian Americans do not benefit directly from affirmative action, they can enjoy the benefits of a diverse student body in terms of its ability to improve the classroom environment, achieve a more open atmosphere at schools, and better prepare students for participation in an increasingly diverse society.\textsuperscript{167} In particular, Asian Americans can benefit from diversity at colleges since they are a minority group and are likely to have experienced racial marginalization in other contexts. Indeed, there is an argument to be made about looking beyond one group's self-interest and embracing a policy that is ultimately fairer for all groups. Thus, supporting affirmative action produces significant benefits for Asian American advocacy groups and Asian Americans in general.

In addition, challenging negative action instead of affirmative action preserves the ability of affirmative action programs to help Asian Americans. Apart from the arguments about the greater good or tolerating a "necessary evil," affirmative action has the potential to directly benefit Asian Americans. As discussed above, it is inaccurate to suppose that all Asian Americans, no matter their ethnicity, do not benefit from affirmative action.\textsuperscript{168} Given that race-conscious programs consider many factors, in addition to race, they do not deny admission to an Asian American student solely because of his or her race. Asian American applicants who possess diverse attributes in other areas would also receive special consideration. At the same time, Asian American sub-groups who face barriers to higher education can benefit from affirmative action's attention to ethnicity.\textsuperscript{169} Students of certain Asian backgrounds, such as Southeast Asians, Filipinos or the Hmong, remain underrepresented at many elite colleges and would stand to benefit from affirmative action.\textsuperscript{170} As such, all Asian Americans benefit from the inclusive definition of merit that affirmative action puts forth.

\textsuperscript{166} See Yip & Narasaki, supra note 11, at 33–34.
\textsuperscript{167} Chin et al., supra note 20, at 134–36.
\textsuperscript{168} See Goossen, supra note 139; Joel Rubin, Diversity Program at Beverly Hills High Enrolls Mostly Asians, L.A. TIMES, Apr. 2, 2007, at B1 (describing a high school program aimed at increasing the enrollment of Asian Americans).
\textsuperscript{169} As defined by the courts, affirmative action specifically encompasses ethnic diversity. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).
\textsuperscript{170} See Goossen supra note 139.
B. Disadvantages to Challenging Affirmative Action

1. The "Model Minority" Myth

On the other hand, there are many negative consequences of arguing Li’s case as a challenge against affirmative action. Under this argument, Li suggests that Asian Americans are harmed by affirmative action because spots must be made available for African Americans and Hispanics, despite their lower qualifications. Since Asian Americans have sufficiently high credentials such that they are already being admitted in substantial numbers, their admission must be limited in order to allow for the admission of other minorities.\(^{171}\) While this disparages the abilities of other minorities, it also elevates those of Asian Americans and contributes to the perception of Asians as a "model minority." This term refers to a group that experienced discrimination in the past but has since overcome that disadvantage and succeeded in competing with others on an equal basis.\(^{172}\)

The characterization of Asian Americans as a model minority has an extensive history and focuses on the achievement of Asians in education.\(^{173}\) However, the model minority idea has been heavily criticized as a myth that has racist underpinnings.\(^{174}\) For example, the apparent success of Asian Americans can be attributed to the influx of well-educated Asian immigrants and the growth in the number of Asian American applications to colleges.\(^{175}\) And while Asian Americans are well-represented in elite schools, they are not similarly represented in the workforce, where they occupy a disproportionately low number of managerial or professional positions.\(^{176}\) Furthermore, the concept of a model minority itself has invidious connotations. For one thing, classifying a group as a model minority reinforces the racial hierarchy by implying that some groups are naturally superior over others.\(^{177}\) The model minority idea also essentializes Asian Americans, treating them as a monolithically successful group.

\(^{171}\) Elder, supra note 153, at A17 (describing how the "superior performance of Asian students" has effectively placed them "at the back of the line").


\(^{173}\) For an overview of the history of the model minority concept, see Wu, supra note 22, at 236–40.


\(^{175}\) Chin et al., supra note 20, at 150.


\(^{177}\) Wu, supra note 22, at 248–251.
and ignoring differences in achievement amongst different Asian subgroups. Worse still, the notion of a model minority increases friction among groups by suggesting that non-Asian minorities ought to follow the example of Asians instead of relying on affirmative action.\footnote{178} Given the numerous problems with the concept, Li should strive to avoid supporting the idea that Asian Americans are model minorities.

Additionally, attacking affirmative action in the same way that previous opponents of affirmative action have run the risk of equating the interests of Asian Americans with that of Whites.\footnote{179} By advancing a claim similar to that of Bakke and Grutter, Li seems to portray himself as an Asian American version of these plaintiffs. Yet the suggestion that Asian Americans are just like Whites further reinforces the model minority myth and its implied racial hierarchy. By making a claim similar to that of the White plaintiffs, Li aligns the interests and position of Asian Americans with that of Whites to suggest that Asians are truly the model minority—they even experience the same negative, race-based effects that Whites do. The apparent equivalence of Asian Americans with Whites reinforces the notion of a racial hierarchy, such that only successful or self-sufficient races would experience the adverse effects of affirmative action. Although it may not necessarily be problematic to support the interests of Whites, in the context of affirmative action there are troubling consequences. Since affirmative action involves such contentious racial issues, equating the situation of Asian Americans with Whites ignores the unique forms of past and present discrimination that Asians experience.\footnote{180} Furthermore, the similarity of Li's argument to that of affirmative action opponents threatens to pit Asian Americans against other minorities. Li's case suggests that Asian Americans and Whites are similarly situated and that they are both distinguishable from other, presumably differently-situated minority groups.\footnote{181} The disjunction between Asian Americans and other minorities suggests that other minorities are less capable or less successful than Asians. This will likely create tension amongst racial minorities and impede the ability to form unified coalitions on affirmative action and other racial equality issues.

In contrast, basing Li's case on negative action avoids the problems of the model minority myth. Challenging policies like legacies or deliberate limits on Asian American admission does not place undue emphasis on the academic successes of Asian students. Rather, it simply argues that Asian Americans should not be subject to disadvantageous treatment as compared to equally-qualified Whites. Asian Americans are disfavored under legacies or admission caps not because of their uniformly high test

\footnote{178} McGowan & Lindgren, supra note 174, at 340–41.
\footnote{179} Wu, supra note 22, at 272 (arguing that in affirmative action litigation, Asian Americans act as the "innocent victims" in place of Whites).
\footnote{180} Gee, supra note 26, at 636.
\footnote{181} McGowan & Lindgren, supra note 174, at 341.
scores or GPAs, but because negative action harms a racial group, no matter their qualifications. In this way, arguing that negative action is the real source of discrimination against Asian Americans avoids the problems of lending support to the model minority myth.

CONCLUSIONS

Although Li's case has been framed as an anti-affirmative action case, there is evidence that he is concerned about a broader issue. As this Article has discussed, Li identifies affirmative action as well as legacies and athletic preferences as the causes of discrimination against Asian Americans. In other words, he recognizes there are other policies that contribute to the disadvantages that Asian Americans face in university admissions. Moreover, Li has repeatedly stated that he intends to fight discrimination against Asian Americans and wants to draw attention to the issue. Although he believes that affirmative action is a form of discrimination, he articulates a desire to eradicate discrimination in general. Given that there are numerous other policies that clearly have a discriminatory impact on Asian Americans, it could be argued that Li has the right intention but that he has chosen the wrong targets. If he genuinely wants to attack discrimination against Asian Americans, he should challenge negative action policies that disadvantage Asians relative to Whites instead of attacking affirmative action, which has the potential to benefit all groups.

Indeed, there is evidence that despite its emphasis on affirmative action, Li's case has sparked awareness about discrimination against Asian Americans in general. In February 2007, two students at Brown University formed a campus group called Asian Equality in Admissions (AEA) with the purpose of addressing discrimination against Asians and Asian Americans in admissions. According to its founders, the group alleges that schools utilize stereotypes against Asians in the admissions process, much like the ones that were used by Harvard in the 1980s. More importantly, they explicitly state that they are not opposed to affirmative action. They recognize that "affirmative action...[was] introduced for the very same reason that we constructed our group" and that attacking affirmative action would be tantamount to "implicitly encouraging the very
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discrimination that our group is trying to stop. In this way, the group seems to distinguish itself from Li's challenge to affirmative action. They see a meaningful distinction between speaking out against discrimination against Asian Americans, and an attack on affirmative action in general. Thus, there is potential for Li's case to bring awareness to the more pressing issue at hand: the existence of negative action policies which are truly discriminatory against Asian Americans.

Ultimately, Li's case has the potential to bring Asian Americans into the affirmative action debate. Given the attention that Li's case has received and the fact that it is taking place during a period in which the viability of affirmative action is being seriously questioned, it represents an opportunity for the Asian American perspective to be heard. However, we should be careful about how Li's case is presented. His argument that affirmative action should be eliminated in colleges and universities does a disservice to those Asian Americans who benefit from such policies and, more fundamentally, misunderstands the nature of the policy itself. By advocating its elimination, Li overlooks the fact that affirmative action can benefit all groups, both in terms of admission and being able to receive the benefits of a diverse student population. At the same time, his narrow-minded focus on affirmative action ignores the existence of other policies that actively discriminate against Asian Americans. The use of legacies, admission limits and within-group comparisons are all examples of negative action because they disadvantage Asian Americans in comparison to Whites. Addressing Li's claim of discrimination by challenging negative action is not only more accurate, it helps to clarify the position of Asian Americans within the affirmative action debate. Asian Americans need not be adversaries to other minorities in order to oppose discrimination, but can vindicate their rights by attacking the policies that truly discriminate against them. In this way, Jian Li's quest against discrimination can be respected, only he needs to choose the right arguments to make.

186. Id. at 3.