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CONFOUNDING THE PARADIGM: ASIAN AMERICANS AND RACE PREFERENCES

LANCE T. IZUMI*

INTRODUCTION

For supporters of government race-preference programs, there has been an almost irresistible urge to paint opponents of race preferences as acting not on principle, but on base opportunism. For example, California Governor Pete Wilson's opposition to race preferences is frequently cited as owing more to politics than to firmly held belief.¹ And anti-preference African Americans, such as University of California Regent Ward Connerly, have been accused of trying to curry favor with Wilson and other powerful anti-preference officials.² Yet, impugning the motivations of race-preference opponents cannot extinguish the fact that real injuries have resulted from government race-preference programs. These injuries have been felt by others besides white males. Indeed, in many cases Asian Americans, more than white males, have been the primary victims of government race-preference schemes.

Oddly, however, Asian-American civil rights advocates have attempted to ignore or belittle the negative impact of such schemes on Asian Americans. For example, Dennis Hayashi, Director of the Office of Civil Rights at the U.S. Department of Health and Human Services, has said:

[M]easuring the value of affirmative action solely by examining who benefits from a defined zero-sum game is shortsighted. Affirmative action's value is tied not just to an individual job or educational slot, but to the overall health and stability of a corporation, business, campus, or society

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1. Corinne Maekawa Kodama, *Broadening the Scope of the Affirmative Action Debate*, 6 ASIAN AM. POL'Y REV. 62 (1996).

2. *Id.*

and to an acknowledgment that discrimination remains an ongoing problem.³

In other words, even if individual Asian Americans are hurt by government race-preference programs (the "zero-sum game"), Asian Americans should look beyond individual injuries caused by race preferences to the greater good that race preferences supposedly promote. Asian Americans, thus, are the odd men out in a race paradigm that still essentially focuses on a black-white dichotomy.

In this article, I will explore the Asian-American experience with race-preference programs in California. In this exploration, I will examine the empirical research concerning admissions to the University of California's medical schools, the implications of this data with regard to constitutional principles, and the Asian-American experience which confounds the conventional black-white paradigm of race preferences. In those few cases where Asian Americans are assisted by race-preference programs, I will argue that Asian Americans cannot have it both ways: they cannot oppose race preferences when they are injured by them and support preferences when they are benefited by them.

THE EVOLUTION OF AFFIRMATIVE ACTION

Today's web of government race-preference programs is a departure from America's historical response to discrimination against minority groups. Previously, discriminatory practices were simply eliminated. For example, the Thirteenth Amendment to the Constitution eliminated the government-protected institution of slavery.⁴ When state governments interfered with the right of minority citizens to vote, the Fifteenth Amendment was passed to ensure that government did not abridge that right.⁵

Starting in the 1970s, however, this focus on eliminating discriminatory practices shifted. Interestingly, it was the Nixon administration that made the initial attempt to implement affirmative action policies that gave preferences to certain so-called "under-represented" minority groups.⁶ All levels of government eventually followed the federal lead.

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

4. U.S. CONST. amend. XIII.

5. U.S. CONST. amend. XV.

6. See Paul Craig Roberts & Lawrence M. Stratton, *Proliferation of Privilege*, NAT'L REV., Nov. 6, 1995, at 41.

UNINTENDED VICTIMS

Although only privileged white males were meant to be inconvenienced by the new policy, a new class of victims was unintentionally created: the non-under-represented minorities. These latter minorities, which included Asian Americans, performed well on objective indicators such as standardized tests. Because of their relatively high performance, the number of Asian Americans in selection pools for university admission and certain government employment was also relatively high. As a result, Asian Americans were often not included in race-preference programs meant to benefit those racial minorities with low numbers in selection pools.⁷

Although bureaucratic defenders of race preferences, like Mr. Hayashi, may argue that individuals must sacrifice their own interests for the greater good, such an argument is hard to sustain when one looks at exactly who is being asked to make such sacrifices. For example, every year in Sacramento, California, the local Vietnamese-American community sponsors a popular event that honors young Vietnamese-American students who have earned top grades in school. The comments of these students, many of whom are either immigrants themselves or are the sons and daughters of recent immigrants, demonstrate that, despite the cynical nature of the age in which we live, the time-honored notion of the American Dream (which is based on equality of opportunity and individual initiative) is far from dead.

Hien Vu, a student at Hiram Johnson High School, described the way in which he met the challenges posed by his new homeland:

When I first came to this country three years ago, people made fun of me—they said I was stupid because I couldn't speak English well—so I made a commitment that I'd get ahead of them. Most of the people who risk their life to come here for freedom try harder.⁸

7. According to University of California Regent Stephen Nakashima, only 5% of all African-American high school graduates and 4% of Hispanic graduates met the minimum eligibility requirements for UC admission in 1994-95, versus 35% of Asian Americans and 12.5% of whites. In order to increase African-American and Hispanic admissions, eligibility standards were lowered for these groups. This policy, according to Regent Nakashima, forced "Asians and white males to overcome the burdens of a tilted field." See S. Stephen Nakashima, *UC Regent Nakashima: "Get Under-represented Minorities to Playing Field Before College,"* *RAFU SHIMPO*, July 28, 1995, at 3.

8. Steve Magagnini, *Vietnamese-American Kids Honored for Good Grades*, *SACRAMENTO BEE*, Aug. 6, 1995, at B1.

Vu, who now has a 3.7 grade-point average, observed with satisfaction, "Now the other kids don't tease me."⁹

Sally Nguyen, who graduated from Florin High School with an A-plus grade-point average and who plans to study pre-med at UC San Diego, noted the rigor of her normal routine saying, "From 5 to 8 p.m. we'd do homework together. Every single night my dad would not only make me do my homework but help me correct it. I don't see that a lot with my American friends."¹⁰ In all, the Sacramento Vietnamese-American community in 1995 honored 110 students with grade-point averages of 4.0 or better.¹¹

Unfortunately, until the University of California Board of Regents recently eliminated race preferences in the university system's admissions process,¹² many of these high-achieving Vietnamese-American students would have found that their common-sensical view that hard work and good results are rewarded was incorrect. Indeed, the UC Board of Regents banned race-preferential admissions policies in large part because of the undeniable evidence that individuals of Asian descent were hurt by the UC's race-preference policies.¹³

Using admissions data from the UC Office of the President, a study conducted by the Pacific Research Institute for Public Policy (PRI) found that race-based preferences in admissions policy did indeed assist under-represented minorities such as African Americans, Hispanic Americans, and Native Americans. Those injured by the policy, however, included not just members of the white majority, but also, and especially, Asian Americans.¹⁴

For example, in 1993, the UC Davis School of Medicine accepted African Americans at thirteen times the rate of Japanese Americans (28 out of 243 African-American applicants were accepted, but only 1 out of 90 Japanese-American applicants was accepted).¹⁵ Native Americans were accepted at five times the rate of Chinese Americans, and Mexican Americans were accepted at nearly fourteen times the rate of Korean Ameri-

9. *Id.*

10. *Id.* at B6.

11. *Id.*

12. The Regents voted to eliminate race preferences in admissions and contracting at their July 20, 1995 meeting. For comments made by UC Regent Stephen Nakashima immediately after the meeting, see *UC Regent Explains Vote*, *RAFU SHIMPO*, July 25, 1995, at 1.

13. Nakashima, *supra* note 7, at 3.

14. Michael Lynch, *Race-Based Admissions at University of California Medical Schools*, *PAC. RES. INST. FOR PUB. POL'Y BRIEFING*, June 1995.

15. *Id.* at 8.

cans.¹⁶ The comparison between Mexican Americans and Korean Americans is especially interesting because UC Davis had virtually the same number of applicants from each ethnic group—235 Mexican Americans and 241 Korean Americans—yet 40 Mexican Americans were accepted while only 3 Korean Americans were accepted.¹⁷ Although UC Davis contended that it gave no special preferences based upon race and ethnicity, the probability that this many under-represented minorities could be randomly accepted to the medical school over a two-year period was less than one in a million.¹⁸

Sizable disparities were also found at the other UC medical schools. At the UC San Francisco School of Medicine, African Americans were admitted at 3.2 times the rate of Asian Americans.¹⁹ At the UC Irvine School of Medicine, Mexican Americans were admitted at 3.1 times the rate of Vietnamese Americans.²⁰ At most of the UC medical schools, applicants from under-represented minority groups were awarded 20-30% of the admissions, although they made up only 9-10% of the applicant pool.²¹

Some race-preference supporters have tried to discount these figures by arguing that one cannot accurately compare the acceptance rates of various racial and ethnic groups because the members of these groups attended different undergraduate institutions. To address this consideration, part of the PRI study looked at those applicants who had received their undergraduate degrees at UC Irvine in 1993. Among these UC Irvine graduates, applicants from under-represented minority groups were nearly three times more likely to be accepted to a UC medical school than Vietnamese-American applicants who, as a group, had a GPA of 3.8, the highest of any group.²² In fact, the mean grade-point average of two-thirds of the Vietnamese-American applicants who were denied admission was higher than the mean grade-point average of the under-represented minority applicants who were admitted.²³

Furthermore, the race of the applicants to UC schools seemed to matter much more than their disadvantaged economic status. UC Regent Ward Connerly, who authored the resolution that eliminated race preferences in UC admissions, has

16. *Id.*

17. *Id.* at app. 2.

18. *Id.* at 8.

19. *Id.* at 12.

20. *Id.* at 9.

21. *Id.* at 8-12.

22. *Id.* at 15.

23. *Id.*

noted that under-represented minorities "who score very low in academic achievement but who are from relatively affluent families get boosted towards the front of the line on race alone."²⁴ Conversely, says Mr. Connerly, "Asians and whites who score in the top levels on academics and who are from relatively poor families are dropped way down the admissions line based solely on race."²⁵

The numbers in the PRI study support Regent Connerly's assertion. In the UC Irvine graduate pool examined in the PRI study, non-poor applicants from under-represented minority groups were admitted at four times the rate of poor Vietnamese-American applicants (9 out of 37 non-poor under-represented minorities were admitted, but only 3 out of 49 Vietnamese-American applicants who were poor received admission).²⁶ In other words, the son or daughter of a wealthy African-American businessman would have a much better chance of getting into a UC medical school than the son or daughter of an impoverished Vietnamese boat refugee.

ADARAND AND CONSTITUTIONAL PRINCIPLE

Not only do the statistics cited above offend one's inherent sense of fairness, they also violate constitutional principle. In the landmark *Adarand* case,²⁷ the U.S. Supreme Court effectively struck down a U.S. Department of Transportation requirement that federal highway contracts contain financial incentives for the principal contractor to hire minority subcontractors. *Adarand Constructors, Inc.*, a non-minority subcontractor, submitted the lowest bid for a guardrail contract, but lost the contract to a minority-owned construction business. Although the minority-owned business had submitted the higher bid, it was awarded the guardrail contract because of the financial incentive program. *Adarand* filed suit alleging a violation of its equal protection rights under the Fifth Amendment.²⁸

Although the facts of *Adarand* involved race preferences in government contracts, the majority opinion was clearly directed at all race-based classification schemes instituted by any government body: "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental

24. *Black U.C. Regent Scores Liberal Racism*, HUMAN EVENTS, Aug. 4, 1995, at 3.

25. *Id.*

26. Lynch, *supra* note 14, at 16.

27. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

28. *Id.* at 2101.

actor, must be analyzed by a reviewing court under strict scrutiny."²⁹ In overruling its own previous reasoning in *Metro Broadcasting, Inc. v. FCC*,³⁰ the Supreme Court in *Adarand* stated:

[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.³¹

Justice O'Connor, writing for the majority, says that holding supposedly "benign" state and federal racial classifications to a different standard would violate this long-held view of equal protection.³² Thus, only a compelling state interest could justify such a classification scheme.

The Court's explicit statement that the Constitution protects persons, not groups, directly contradicts Mr. Hayashi's (and by implication, the Clinton administration's) contention that the greater good outweighs individual rights. The Fifth and Fourteenth Amendments were designed precisely to prevent government's notion of the greater good from depriving individuals of their right to equal protection of the laws. Under the Constitution, it is the constitutional rights of the individual, not the stability of a corporation, business, campus, or society, that are paramount.

The Court's emphasis that even supposedly "benign" racial classifications be held up to strict scrutiny is also critical. The arguments of race-preference supporters are often laced with references to the noble motivations of the program. For example, Kent Wong, president of the Asian Pacific American Labor Alliance, AFL-CIO, has noted that:

In some instances, affirmative action guidelines have required a diverse pool of applicants or have set forth hiring and promotional guidelines that would help to achieve racial and gender equity. Affirmative action has also raised awareness and greater sensitivity among decision makers

29. *Id.* at 2113.

30. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (holding "benign" racial classifications to only an intermediate level of scrutiny).

31. *Adarand*, 115 S. Ct. at 2112-13 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

32. *Id.* at 2113.

who have become more responsive to diversity in the workplace.³³

While it may be commendable that race-preference programs raise people's sensitivities, such beneficial side effects cannot be allowed to obscure the fact that the main effect of such programs is to cause harm to specific individuals solely because they are members of a disfavored race. Justice Powell, in his *Bakke* opinion,³⁴ observed that, "despite the surface appeal of holding 'benign' racial classifications to a lower standard, . . . it may not always be clear that a so-called preference is in fact benign."³⁵ Justice Thomas recognized this point in his concurring opinion in *Adarand*:

It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called "benign." Accordingly, whether a law relying on racial taxonomy is "benign" or "malign," either turns on "whose ox is [being] gored. . . ."³⁶

Given the adverse impact that race-preferential admissions has had on Asian Americans, it is hard to imagine, for example, that the high-achieving Sacramento Vietnamese-American students mentioned earlier view race preferences as "benign." UC Regent Stephen Nakashima, a Japanese American who voted to eliminate UC's race-preference policies, illustrated this point by analogizing race preferences to the internment of Japanese Americans during World War II:

What it was depended on how you looked at it. From the outside looking into Poston III, where I was, it's an internment camp. But if you're inside behind barbed wire and armed guards looking out, it's a concentration camp. The same goes with respect to affirmative action. It depends on how it affects you personally.³⁷

For Asian-American students denied entry into a public university's medical school because of race-preference admissions policies favoring lower achieving under-represented minorities,

33. Kent Wong, *Why Asian American Workers Support Affirmative Action*, 6 ASIAN AM. POL'Y REV. 84 (1996).

34. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.).

35. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995) (quoting *Bakke*, 438 U.S. at 298).

36. *Id.* at 2120 (quoting *Bakke*, 438 U.S. at 295 n.35).

37. J.K. Yamamoto, *JACL Hears Both Sides of Affirmative Action Debate*, HOKUBEI MAINICHI, Aug. 31, 1995, at 2.

such a violation of their equal protection rights cannot be outweighed by amorphous claims of group benefits (e.g., increasing diversity or raising people's sensitivities). On that score, the Constitution's equal protection guarantees are clear. As the U.S. Court of Appeals for the Fifth Circuit observed in *Hopwood v. Texas*:³⁸

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.³⁹

And it is as individuals that the Hien Vus and Sally Nguyens of this world wish to be judged.

HISTORICAL DISCRIMINATION

If the Constitution cannot countenance violation of equal protection rights of individuals in the name of government's conception of diversity and the greater good, it also cannot countenance such a violation in the name of general claims of historical discrimination. Justice Ginsburg, in her *Adarand* dissent, argued that race preferences were needed to "counteract discrimination's lingering effects".⁴⁰

Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals.⁴¹

Justice Ginsburg's observation and her citation of studies and reports comparing differential treatment of whites versus blacks⁴² postulates a simplistic two-race white-black paradigm.

38. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 115 S. Ct. 2581 (1996).

39. *Id.* at 945.

40. *Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting).

41. *Id.*

42. Justice Ginsburg cites several studies including Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991), and Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L. REV. 420 (1988), which mostly focus on treatment of blacks versus whites. See *Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting).

Under this paradigm, it is assumed that individual whites must endure injury to pay their race's debt to African Americans for the history of slavery and racial discrimination.

Yet, when race-preference programs injure Asian Americans, the paradigm collapses. When the son or daughter of an impoverished Vietnamese refugee is denied entrance into a prestigious public university merely because he or she is not a member of a preferred racial or ethnic group, how is this harm justified by appeals to historical discrimination or "lingering effects?" In many cases, the Vietnamese-American student is much less socially advantaged than the middle-class or upper-middle-class African American who is frequently the beneficiary of race preferences. Furthermore, Asian Americans have been the victims of historical discrimination. The explicit anti-Asian laws passed in the early part of this century and the internment of Japanese Americans during World War II are just two obvious examples.⁴³ Asian Americans have also been increasingly common victims of racial hate crimes (an indication of a more hostile social environment). Thus, it is hypocritical to say that historical discrimination can be a justification for preferences for one race, but not another.

Asian-American supporters of race preferences often decry the "invisibility" of Asian Americans in the affirmative action debate.⁴⁴ Yet, the black-white paradigm used by race-preference supporters consigns Asian Americans to "invisible" status. By ignoring Asian Americans, this paradigm also ignores the important lessons that can be learned from the Asian-American experience. In his testimony to the UC Board of Regents supporting the elimination of race preferences, Assemblyman Nao Takasugi, for years the only Asian-American member of the California state legislature, said that the principle underlying the anti-Asian discrimination of yesteryear and the race discrimination of today is the same:

During the internment, I saw families torn apart, ruined and deprived of their rights as Americans. Let us be clear, what we are discussing today with UC's special preferential admissions policy is nothing more or nothing less than

43. Anti-Asian laws in the U.S. included: an 1854 law that prevented Asians from testifying against white men; the 1882 Chinese Exclusion Act that restricted Asian immigration into the U.S.; the 1908 Gentleman's Agreement that restricted Japanese immigration into the U.S.; and the 1913 Alien Land Act that prevented Asians from owning land in California. For a discussion of these laws, see THOMAS SOWELL, *ETHNIC AMERICA* 133-79 (1981).

44. Helen H. Hyun, *Invisibility and Overrepresentation: Affirmative Action and the Asian American Paradox*, 6 *ASIAN AM. POL'Y REV.* 71 (1996).

state-mandated discrimination based on race, the same discrimination that locked me and my family away in the prison of injustice in [the internment camp at] Gila River, Arizona.⁴⁵

There is no room in the black-white paradigm for a race that has been the victim of historical discrimination and yet is the victim of race-preference policies supposedly meant to remedy that discrimination. Because it cannot accommodate the Asian-American experience, both yesterday and today, the black-white paradigm, and the race-preference schemes based on it, must be discarded.

The historical discrimination argument is also flawed in ways other than failing to take into account the Asian-American experience. For instance, while the Supreme Court in *Wygant*⁴⁶ and *Croson*⁴⁷ did say that remedying past discrimination may be a compelling state interest that would satisfy the strict scrutiny test, the Court also emphasized the narrowness of this application.⁴⁸ According to the Court in *Wygant*, there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."⁴⁹ In other words, California advocates of race preferences must demonstrate that the University of California system (with regard to undergraduate admissions) and the specific UC graduate schools (with regard to graduate admissions) have been guilty of documented discrimination against under-represented minorities in the relatively recent past, and that the impact of such discrimination still lingers and affects current circumstances.⁵⁰

California advocates of race preferences are thus in the same position as the University of Texas in the *Hopwood* case.⁵¹ In that case, the University of Texas Law School argued that the state's

45. Nao Takasugi, statement to the University of California Board of Regents, July 20, 1995.

46. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (involving a school board's race-preference plan regarding teacher layoffs).

47. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (involving a city plan to award 30% of its contracting work to minority-owned businesses).

48. A governmental actor may only classify individuals based on race where there is a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

49. *Wygant*, 476 U.S. at 274.

50. The "present effects of past discrimination" test is outlined in *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) and *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992)).

51. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

past history of discrimination in education should be viewed as a compelling reason for allowing the law school to use a race-preference admissions program. The court of appeals, however, pointed out that under the compelling state-interest test in *Wygant* the appropriate unit of analysis was not the entire Texas public education system, but the law school itself. And because there was no evidence of discrimination in law school admissions in the recent past, historical discrimination in the state's education system could not justify the present consideration of race in law school admissions.⁵² Since there is a similar lack of evidence of discrimination against under-represented minorities at California's public higher education institutions, there can be no compelling state interest in having race-preferential admissions programs.

Further, the "lingering effects" argument suffers from the inherent problem of determining what is "lingering." In *Podberesky v. Kirwan*,⁵³ which involved a race-preferential scholarship program, the defendant university argued that its long-ended practice of not admitting African Americans and the generally hostile atmosphere perceived by African Americans on campus were sufficient reasons for the program. The U.S. Court of Appeals for the Fourth Circuit, however, accurately noted:

[M]ere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this.⁵⁴

The problem with using historical discrimination as a justification for race-preference programs is perhaps best summed up by Justice Antonin Scalia in his concurring opinion in *Adarand*:

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or

52. *Id.* at 954. The Fifth Circuit observed that racial tension at the University of Texas Law School could not be used as a reason for race preferences because that tension "is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions." *Id.* at 953. It should be noted that the University of Texas Law School did practice de jure discrimination against African Americans until 1950. However, the U.S. Supreme Court struck down the law school's discriminatory practices in *Sweatt v. Painter*, 339 U.S. 629 (1950).

53. 38 F.3d 147 (4th Cir. 1994).

54. *Id.* at 154.

debtor race. That concept is alien to the Constitution's focus upon the individual.⁵⁵

In their history, Asian Americans have suffered discrimination, yet are now treated as a race that owes something to under-represented minority groups. Of all people, then, Asian Americans should welcome the opportunity to be treated simply as individuals protected by the rights and guarantees of the Constitution.

ASIAN AMERICANS IN PUBLIC EMPLOYMENT

According to exit polls, Asian Americans supported California's Proposition 209 (the anti-race-preference California Civil Rights Initiative) in greater numbers than any other minority group.⁵⁶ Much of that support was likely due to the adverse impact that race-based university admissions has had on Asian-American applicants.

Supporters of race preferences within the Asian-American community have attempted to focus attention not on public education, but on public employment and public contracting. For example, attorneys for the Asian Pacific American Legal Center have claimed that race preferences are needed to overcome the racial disparity within the Los Angeles Police Department (4.6% of LAPD's personnel are Asian American, while 10% of the city's population is Asian American).⁵⁷

The problem with such arguments is that the numbers put forward to support the position of race-preference proponents fail to take into account the choices made by Asian-Americans in the job market. Relatively low Asian-American representation in the LAPD may be a function of the historically low level of Asian-American applicants to the LAPD rather than any conscious hiring discrimination by the department. Much of the growth in the Asian-American population in California has taken place just over the last decade and a half. It is unrealistic to expect that Asian-American representation in the LAPD would have risen congruently with the rise in the Asian-American population in general. Many new Asian immigrants are suspicious of the police as a result of the corruption and heavy-handedness of police

55. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring).

56. Proposition 209 was supported by 39% of Asian-American voters, while only 26% of African-American voters and 24% of Hispanic voters supported the initiative. See *State Propositions: A Snapshot of Voters*, L.A. TIMES, Nov. 7, 1996.

57. Bonnie Tong et al., *Asian Americans Will Not Become a Wedge Group*, L.A. TIMES, May 31, 1996, at B9.

agencies in the immigrants' home countries. In many cases, police in the U.S. have a difficult enough time getting new Asian-American immigrants to talk to officers (even when they have been victimized by crime), let alone convince them to apply to the police academy. Thus, historically, Asian-American parents have urged their children to find careers in the professions or in business, with few encouraging their offspring to go into police work. In other words, Asian Americans simply may have exercised their freedom to choose careers in areas other than law enforcement.

An analogy can be made to women in the job marketplace. It is often argued by proponents of gender preferences that such preferences are needed because of the supposed "glass ceiling" that women face in getting into upper management at large corporations. Yet, the "glass ceiling" is a myth. One of the main reasons for the relatively low number of women corporate CEO's is that the pool of women qualified for those positions has historically been low. In 1960, women received only 19% of bachelor's degrees.⁵⁸ Thus, currently relatively few women are of the right age and hold the right credentials to hold a top level corporate position. As one study noted:

A typical corporate career lasts 40 to 45 years, which spans two generations. The people who run today's largest corporations were in their twenties in the 1960s. But . . . the National Longitudinal Survey shows that, as late as the 1960s, only 30% of women expected to be working at age 35. Since most women didn't expect even to be working at 35, it is doubtful that many of them prepared to be CEO's at 55.⁵⁹

The available pool of qualified women is increasing significantly. By 1995, 55% of bachelor's degrees went to women.⁶⁰ The percentage of MBA's earned by women increased from 3.6% in 1970 to 35.6% in 1993.⁶¹ However, it is still important to note that by 1990, while nearly one in four men holding a bachelor's or advanced degree had earned that degree in business management, fewer than one in eight women who held a bachelor's or advanced degree had earned that degree in business management. The concentration of women's degrees has been in educa-

58. Sally C. Pipes & Michael Lynch, *Smart Women, Foolish Quotas*, POL'Y REV., July/Aug. 1996, at 32.

59. Michael Lynch & Katherine Post, *What Glass Ceiling?*, PUB. INTEREST, Summer 1996, at 33.

60. Pipes & Lynch, *supra* note 58, at 32.

61. Lynch & Post, *supra* note 59, at 34.

tion (one in four bachelor's or advanced degrees).⁶² Thus, while women will likely increase their numbers in corporate senior management, those numbers will still lag behind men, not because of discrimination, but because women are voluntarily choosing a non-business career.⁶³

Similarly, the historic paucity of Asian-American applicants to the LAPD and other law enforcement agencies may turn around over time as Asian Americans become more assimilated and begin to look at police work more favorably as a career choice. For example, according to Los Angeles city personnel statistics, from July 1995 to June 1996, the LAPD had 10,065 applicants. Of these, 900, or 8.9%, were Asian Americans. During this same period, the LAPD hired 118 Asian Americans, or 9.4% of the total number of hirees (a figure that was more than double the current 4.6% Asian-American representation in the LAPD).⁶⁴ In other words, over time, Asian Americans will likely increase their numbers significantly in the LAPD, but only because Asian Americans will be making the voluntary choice to become police officers. Once again, race-preferential hiring is not needed.

PUBLIC CONTRACTING

The area upon which Asian-American supporters of race preferences prefer to focus is public contracting. In contrast to their treatment in university admissions, Asian Americans are often included as an under-represented minority entitled to special preference in the awarding of such contracts because of their

62. *Id.* at 29-30.

63. Women also make free choices about other quality of life issues. For example, research has borne out the common-sense notion that there is a strong connection between job seniority (years spent working) and wage levels. Other things being constant, ten years of job seniority raises the wage of the typical worker by over 25%. In view of such findings, it naturally follows that because women spend on average less time in the work force (according to a 1984 Census study, men spent only 1.6% of their work years away from work, while women spent 14.7% of their work years away from work) they end up with less job seniority and lower wages. The reason women spend more time away from work often involves their free choice to spend more time with their children, especially when the children are very young. It is this free choice of life-options, rather than systematic gender-based wage discrimination, that explains much of the aggregate wage gap that exists between women and men. Indeed, separate research studies by Thomas Sowell and June O'Neill found that women in their thirties without children who worked continuously either earned slightly higher or nearly the same income as men. *See* Lynch & Post, *supra* note 59, at 31-32.

64. Statistics quoted to author by Gail Thomas, Los Angeles city personnel officer.

low historical participation in the government contracts market. In the federal program that was challenged in the *Adarand* case, the Department of Transportation (DOT) required a certain amount of public contracts be awarded to "small business concerns owned and controlled by socially and economically disadvantaged individuals."⁶⁵ The DOT used the Small Business Administration's definition of "socially and economically disadvantaged individual," which includes Asian Pacific Islanders (e.g., Chinese Americans, Japanese Americans, etc.), in addition to African Americans, Hispanic Americans, Native Americans, and miscellaneous others.⁶⁶

Again, however, regardless of whether Asian Americans are advantaged or disadvantaged by a race-preference program, a racial preference program must be judged by its adherence to constitutional requirements. Equal protection analysis cares only that individuals, of whatever race, are spared injury by governmental race-classification schemes. Asian Americans may be among those injured or they may not, but as long as there are any individuals of any race injured by such a program there is a likely violation of equal protection of the law.

Thus, when race-preference advocates speculate about Asian-American businesses being generally shut out of the public-contract market because of past discrimination, such a broad accusation is irrelevant for constitutional analysis. As discussed above,⁶⁷ any charge of past discrimination must be made against a specific government actor and program, and must involve tangible lingering effects from this past discrimination. General statements about historical wrongs are constitutionally irrelevant as the majority opinion in *Croson* emphasized:

[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority businesses] in Richmond mirrored the percentage of minorities in the population as a whole.⁶⁸

65. Surface Transportation and Uniform Relocation Assistance Act of 1987 § 106(c)(1), 15 U.S.C. § 637 (1997).

66. 13 C.F.R. § 124.105(b)(1) (1994).

67. See *supra* text accompanying notes 50-54.

68. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986)).

Yet, as Asian-American race-preference advocates in the LAPD case would openly admit, their goal is to ensure that such relief is ongoing precisely to force Asian-American percentages either in public employment or in public contracting to mirror Asian-American percentages in the general population. Obviously, that is a prospect that the Court views as clearly wrong.

Unless Asian Americans can meet the compelling state interest requirements under the *Adarand* strict scrutiny test, they have no reason, except blatant self-interest, to insist upon race preferences in public contracting. Asian Americans cannot have it both ways. If they accept equal protection analysis when it helps them (as it does in the university admissions area), then they must also accept it when it seems to deny some Asian-American businesses an unfair advantage in public contracting. UC Regent Stephen Nakashima, in explaining his vote to eliminate race preferences in UC's hiring and contracting practices, said:

[T]he decision to terminate the discriminatory preference accorded to "minority" persons in hiring and contracting resulted from an increasing awareness, prompted by decisions of the United States Supreme Court such as the *Adarand* case, that discrimination should not beget discrimination. Discrimination in any form inflicts unjust injury upon its victims; the injury is no less because the person who, or the institution which, inflicts it purports to act with good intentions.⁶⁹

In the end, Asian Americans would benefit most by living in a world which offers equal protection for all rather than race preferences for some.

CONCLUSION

The experiences of Asian Americans with race preferences are important because they serve to illuminate the intellectual contradictions and political shortcomings of race-preference theory. Empirical evidence demonstrates that Asian Americans are clearly hurt by race-preference policies (at least in the university admissions area).⁷⁰ This injury is especially galling because in many cases Asian Americans are both more qualified (based on objective indicators) and more socio-economically disadvantaged than so-called under-represented minorities.⁷¹ Further, this injury has been dealt to Asian Americans by government officials despite the fact that Asian Americans have suffered undeniable

69. Nakashima, *supra* note 7, at 3.

70. Lynch, *supra* note 14, at 16.

71. *Id.* at 16.

historical discrimination (the supposed reason for race-preference policies). Thus, rather than put their faith in the quixotic benevolence of government bureaucrats, Asian Americans would do better to put their faith in the Fifth and Fourteenth Amendments which set forth the principle of equal protection. Cases such as *Wygant*, *Croson*, *Adarand*, *Hopwood*, and *Podberesky*, therefore, should be viewed by the Asian-American community as good news.

In the areas of public employment and public contracting, Asian Americans must resist the temptation to have it both ways. The long-run benefit of constitutional equal protection (being judged on one's merits, hard work and excellence reaping their just reward, etc.) should dwarf any short-term gains from government-sponsored racial spoils programs.

In the end, Asian Americans would do well to heed the wise words of Justice Scalia, who ended his concurring opinion in *Adarand* with a call for racial unity under a common national identity:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.⁷²

Implementing Justice Scalia's vision would do more to advance the lives of Asian Americans (and, for that matter, Americans of all races) than any race-preference program could ever do.

72. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring).