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Assuring Equal Access of Asian Americans to Highly Selective Universities

Grace W. Tsuang

In the post-Bakke era, many institutions of higher education have sought to maintain their commitment to minority admissions programs without the use of explicit racial quotas. In Bakke, Justice Powell deemed the Harvard Admissions Program, which considers race or ethnic background a "plus" in evaluating the applicant, the ideal means to achieve ethnic diversity. Recently, critics have alleged that a new type of quota, established under the auspices of diversity, sets an upper limit on the number of Asian Americans admitted to highly selective institutions.

This Note discusses the legal basis for a claim by an Asian American applicant denied admission to a public or private university due to an upper limit quota. An Asian applicant would not challenge the legality of preferential admissions nor allege that a Black or Hispanic had gained entrance in place of a better qualified Asian. Instead, the basis of the claim and, thus, the bulk of the data presented here, would focus on the treatment of Asian Americans compared with Caucasians, a group never intended to be the beneficiaries of affirmative action. An Asian applicant would not seek special consideration because of her race, but equitable treatment regardless of her race.

The statistics presented in Section I provide an overview of the Asian

1. In Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), a Caucasian applicant to the University of California (U.C.) at Davis Medical School claimed that the special admissions program, which reserved 16 places in a class of 100 for minorities, violated his rights under the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In a complicated plurality opinion, Justice Powell, with Justices Stevens, Burger, Stewart, and Rehnquist concurring in the judgment in part, held that the racial classifications used in the admissions program failed the "strict scrutiny" test and violated the equal protection clause. Id. at 305, 320. However, Justice Powell, with Justices Brennan, White, Marshall, and Blackmun concurring in the judgment in part, next held that race can still be considered a factor in admissions decisions. Id. at 320.

2. Justice Powell, however, was the sole member of the Court to justify preferential admissions on the basis of "diversity." Id. at 315-19 (Powell, J.).

3. Since the term "Asian Americans" encompasses individuals from a variety of cultural, historic, and ethnic backgrounds, it raises the definitional problem of who should be included in the group, and whether "Asian Americans" should be viewed as a group at all. While these are important issues, most universities, with the exception of the U.C. system, collect data only on "Asian Americans" and/or "Oriental Americans," and thus, treat Asians as a single group. For the purposes of this Note, "Asian Americans" or "Asians" refers to Americans of Chinese, Japanese, Korean, Filipino, Taiwanese, Vietnamese, Cambodian, Lao, Asian Indian, Pacific Islander, and Thai descent.
admissions problem as exemplified by four universities and outline the type of evidence plaintiffs should seek during discovery to challenge a university's admissions practices. Section II analyzes available legal theories and sets forth the type of allegations that should be included in a complaint against any institution. Finally, Section III offers suggestions for fashioning a remedy that would enhance the fairness of admissions practices and reduce the obstacles faced by Asians seeking entrance to the nation's highly selective universities.

I. EVIDENCE OF QUOTAS ON ASIAN AMERICAN ADMISSIONS

This Section focuses on the admissions criteria used at the University of California at Berkeley (Berkeley), Stanford, Harvard, and Brown Universities, and considers possible explanations for the lower numbers of Asian Americans admitted.

A. The Evolution of Upper Limit Quotas on Asian Americans

In the early 1970's, major universities adopted affirmative action programs for minority admissions which included Asian Americans within their guidelines. The number of Asian American students increased gradually until the 1980's, when the size of the Asian applicant pool escalated dramatically as a result of liberalized immigration policies and an overall rise in the number of potentially qualified Asian applicants. At present,
Berkeley and Stanford do not consider Asians a protected minority,\footnote{Berkeley excludes from its “protected programs” all Asians, as defined in supra note 3, except for Filipinos. REPORT BY THE AUDITOR GENERAL OF CALIFORNIA, A REVIEW OF FIRST-YEAR ADMISSIONS OF ASIANS AND CAUCASIANS AT THE UNIVERSITY OF CALIFORNIA AT BERKELEY 5 (Oct. 1987) [hereinafter AUDITOR GENERAL’S REPORT]. Stanford’s catalogue states: “Given our goal of achieving a richly diverse student population, we do make special efforts to attract, [and] admit . . . students who are Black, Mexican American, and American Indian.” STANFORD UNIVERSITY, STANFORD TODAY 1988-89, at v (1988) [hereinafter STANFORD TODAY].} Brown does not address their status in the admissions process,\footnote{Brown, however, lists Asians in its compilation of minority admissions. BROWN UNIVERSITY, REPORT TO SCHOOLS 5 (Sept. 1987).} and Harvard gives “positive weight” to Asian applicants.\footnote{In a confidential document, Harvard’s Dean of Admissions stated, “The Admissions Committee gives positive weight . . . Asian-Americans because of [their] particular . . . ethnic and cultural experiences . . . .” HARVARD UNIVERSITY, ASIAN-AMERICANS AT HARVARD: BEYOND REPRESENTATION 4 (Nov. 1987) [hereinafter HARVARD REPORT] (unpublished draft report) (on file with author).} Admissions programs at many institutions granted preferences to racial minorities in the selection process,\footnote{Preferential admissions was sanctioned by five Justices in Bakke. See supra notes 1-2.} which frequently resulted in high admit rates\footnote{From Class of 1982 to Class of 1990, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].} for minority groups compared to Caucasians. Statistics from the Brown Admissions Office reflected such patterns.\footnote{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].} Beginning with the Class of 1985, however, Asian Americans were admitted at a lower rate than Caucasians, and the disparity continued until the Class of 1987, when only 14% of Asian applicants, compared to 19% of Caucasian applicants, were accepted for admissions. Although the number of Asian applicants continued to escalate, the number of Asian candidates accepted remained fairly constant,\footnote{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].} suggesting the existence of an upper limit quota. Similar disparities in admit rates occurred at Harvard\footnote{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].} and Stanford,\footnote{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].} suggesting a trend at the nation’s highly selective institutions.

\footnote[8]{Berkeley excludes from its “protected programs” all Asians, as defined in supra note 3, except for Filipinos. REPORT BY THE AUDITOR GENERAL OF CALIFORNIA, A REVIEW OF FIRST-YEAR ADMISSIONS OF ASIANS AND CAUCASIANS AT THE UNIVERSITY OF CALIFORNIA AT BERKELEY 5 (Oct. 1987) [hereinafter AUDITOR GENERAL’S REPORT]. Stanford’s catalogue states: “Given our goal of achieving a richly diverse student population, we do make special efforts to attract, [and] admit . . . students who are Black, Mexican American, and American Indian.” STANFORD UNIVERSITY, STANFORD TODAY 1988-89, at v (1988) [hereinafter STANFORD TODAY].}

\footnote[9]{Brown, however, lists Asians in its compilation of minority admissions. BROWN UNIVERSITY, REPORT TO SCHOOLS 5 (Sept. 1987).}


\footnote[11]{ Preferential admissions was sanctioned by five Justices in Bakke. See supra notes 1-2.}

\footnote[12]{E.g., admit rates for Class of 1982 were 47% for Asians, 26% for Caucasians; 26% Asian versus 23% Caucasians for Class of 1983; and 23% Asian versus 20% Caucasian for Class of 1984. BROWN CORP. COMM. ON MINORITY AFFAIRS, STATISTICAL SUMMARY BY THIRD WORLD CATEGORIES FOR CLASSES ’79-’87 (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].}

\footnote[13]{From Class of 1982 to Class of 1990, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World CATEGORIES for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].}

\footnote[14]{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].}

\footnote[15]{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].}

\footnote[16]{From Class of 1982 to Class of 1991, the number of Asian applicants grew from 307 to 1627, a 430% increase, while the number of Asians admitted to Brown rose from 141 to 245, a 74% increase. \textit{Brown Corp. Comm. on Minority Affairs, Statistical Summary by Third World Categories for Classes ’79-’87} (June 3, 1983), \textit{reprinted in} ASIAN AMERICAN STUDENTS ASSOCIATION (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY Tables 2a, 2b (Oct. 11, 1983) [hereinafter AASA REPORT].}
B. Academic Qualifications and Asian Admit Rates

One possible explanation for the disparity between Asian and Caucasian admit rates is that Asian applicants are less academically qualified than Caucasian candidates. At Berkeley, the Auditor General of California found that from 1981 to 1987, Caucasians gained admission to Berkeley's five colleges at rates generally higher than those of Asians, even though Asian applicants overall had higher grade point averages and standardized test scores. While each of Berkeley's five colleges has its own admissions formula, applicants to each college are evaluated according to a two-tiered system adopted in 1985. Students in the first tier are admitted solely on the basis of scholastic criteria (grade point average, SAT scores, and three achievement tests), while students in the second tier are evaluated both on scholastic and non-academic criteria (supplemental criteria) or are admitted through various "protected programs." From 1985 to 1987, the Auditor General found that for the College of Letters and Science, which accounts for seventy-eight percent of the student body, "the Tier 1 admission rates of Asians were higher than the admission rates of Caucasians" in all three years, while "the Tier 2 admission rates of Caucasians were higher than the Tier 2 admission rates of Asians in all three years." This finding suggests that Asian applicants perform better than Caucasians on strictly academic criteria and implies that the use of Tier 2 methodology has a detrimental impact on Asians.

A confidential Harvard report of applicants from the Class of 1982 to Class of 1990 similarly undercuts the scholastic qualifications argument. Harvard's Admissions Office predicted that an average of 30% of Asian applicants compared to 24% of Caucasian applicants would graduate with high honors from Harvard and concluded that Asian candidates were stronger academically. While Harvard, Brown, and Stanford do not claim that they admit applicants exclusively on the basis of scholastic ability, academic qualifications presumably play a significant role in the selec-

17. AUDITOR GENERAL'S REPORT, supra note 8, at P-722, S-4.
18. Id. at 9-15.
19. Id.
21. AUDITOR GENERAL'S REPORT, supra note 8, at 48.
22. According to the admissions criteria established by the state legislature, 15.8% of 1986 Caucasian high school graduates, compared to 32.8% of Asian graduates, were eligible for freshmen admissions to the U.C. system. CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, ELIGIBILITY OF CALIFORNIA'S 1986 HIGH SCHOOL GRADUATES FOR ADMISSION TO ITS PUBLIC UNIVERSITIES 15 (Mar. 21, 1988). See infra text accompanying notes 113-14.
23. HARVARD REPORT, supra note 10, at Table 2. Harvard's academic ratings are based on high school grades, recommendations, essays, and standardized test scores. Id. at 8. Stanford bases its academic ratings on grades, rigor and quality of high school programs, and test scores. A confidential study found that even when the academic ratings of Asians and Caucasians are equal, Asians are admitted at a lower rate. STANFORD UNIVERSITY, CUAFA SUBCOMMITTEE REPORT ON ASIAN-AMERICAN ADMISSIONS Table 5 (Feb. 23, 1986) [hereinafter CUAFA SUBCOMMITTEE] (on file with author).
tion process. The available evidence on academic performance of Asians undermines this presumption and suggests that scholastic ability cannot account for the discrepancy in admit rates.

C. Non-academic Qualifications of Asian American Applicants

Some university officials argue that while Asian Americans score high on academic ratings, they perform less well on personal ratings. According to these administrators, Asian candidates tend to concentrate in the sciences or seek admissions to highly selective programs, are less well-rounded, and generally score lower on non-academic qualifications. Each of these claims is based on questionable racial stereotypes.

1. Intended Majors

An applicant's intended major is not an explicit criterion for admissions to Stanford, Harvard, or Brown. Even if the tentative selection of a competitive major was to account for the low Asian admit rate, the rates for Asian applicants should be approximately equal to admit rates for Caucasians within that major. A confidential Stanford report found, however, that for every category of intended majors, Asian Americans had a lower admit rate than Caucasians for the Class of 1989.

Brown's Director of Admissions has stated that the low Asian admit rate is caused by the overwhelming number of Asians applying as "pre-meds." In response, the Asian American Students Association has alleged that the Director has never defined what constitutes a "pre-med," instead, he bases his determination on subjective considerations and stereotypes of Asian applicants. Brown's Faculty Committee on Minority Affairs (COMA) rejected the myth that there are too many Asian "pre-

24. E.g., "The primary criterion for admission is academic excellence." STANFORD TODAY, supra note 8, at 108.

25. "An applicant's intended major is not taken into account when we make our admissions decisions." STANFORD TODAY, supra note 8, at vi. "[A] student's academic preference does not limit his chances for admission." HARVARD REPORT, supra note 10, at 10. "University policy dictates that no candidate for admissions be denied solely on the basis of the degree program for which he or she seeks consideration." BROWN APPLICATION, supra note 25, at 16.

26. "The vast majority of Asian-Americans applying here, 70 to 75 percent, are premedical students," according to Brown's Director of Admissions. "The question is not one of race, it's academic balance." ASIAN-AMERICANS QUESTION Ivy League's Entry Policies, N.Y. Times, May 30, 1985, at B1, col. 3. Brown's internal statistics reveal that only 39% of Asian applicants for the Class of 1986 were premedical students. AASA REPORT, supra note 13, at Table 7.

27. "The majority of Asian-Americans applying here, 70 to 75 percent, are premedical students," according to Brown's Director of Admissions. "The question is not one of race, it's academic balance." ASIAN-AMERICANS QUESTION Ivy League's Entry Policies, N.Y. Times, May 30, 1985, at B1, col. 3. Brown's internal statistics reveal that only 39% of Asian applicants for the Class of 1986 were premedical students. AASA REPORT, supra note 13, at Table 7.

BROWN UNIVERSITY, REPORT TO THE CORP. COMM. ON MINORITY AFFAIRS FROM ITS SUBCOMM. ON ASIAN AMERICAN ADMISSIONS 3 (Feb. 10, 1984) [hereinafter COMA REPORT].
32. The disparity in admit rates between Asian and Caucasian Engineering applicants varied from a high of 10.7% in 1983, to a low of 2.2% in 1987. AUDITOR GENERAL’S REPORT, supra note 8, at 58-65.
33. Statistics from UCLA also reveal that the Asian admit rate to the School of Engineering is consistently lower than the Caucasian admit rate. Nakanishi, supra note 4, at 22.
35. COMA REPORT, supra note 30, at 9.
36. CUAFA SUBCOMMITTEE, supra note 23, at Table 5.
37. A Department of Education study of 58,000 high school students found that 13% of Asian Americans participated in band or orchestra compared to 14% of Caucasians. Asians had a 30% participation rate in varsity athletics compared to 34% for Caucasians. The rates for debating or drama were 9% and 13%, respectively. Asians, however, had higher participation rates for student government (21% versus 16% for Caucasians) and honorary clubs (28% versus 17% for Caucasians). PENG, SCHOOL EXPERIENCES AND PERFORMANCE OF ASIAN-PACIFIC AMERICAN HIGH SCHOOL STUDENTS Table 9 (1984) (U.S. Dept. of Education publication). Profiles of SAT candidates also indicated that “Asian-American students [were] more likely to participate in social, ethnic, or community organizations” than other SAT candidates. THE COLLEGE BOARD, PROFILES, COLLEGE-BOUND SENIORS, 1985, at xix [hereinafter 1985 SAT PROFILES].
38. COMA REPORT, supra note 30, at 4.
school recommendations, and reports of interviews conducted by admissions officers or college alumni. Brown's COMA discovered that Asian applicants received comparatively low personal ratings, but concluded that the "unjustified low ratings are due to the cultural biases and stereotypes which prevail in the admissions office. Such biases and stereotypes prevent admissions officers from appreciating and accurately evaluating the backgrounds and nuances of the Asian American cultural experience."39

Stanford's Committee on Undergraduate Admissions and Financial Aids (CUAFA) found that academic and extracurricular ratings, declared majors, legacies, athletics, and geographic origin could not account for the low Asian admit rate.40 Implicitly, the only remaining explanation was that Asians received lower personal ratings. The Committee concluded that there were real or perceived differences in the subjective materials and/or that "unconscious biases have influenced the admissions decisions."41

While colleges may pursue legitimate goals through their admissions processes, the use of personal ratings has a disparate impact on Asian applicants. Such criteria should be a principal focus of a legal challenge.

II. LEGAL ANALYSIS

An Asian American plaintiff could predicate her cause of action on either a statutory or a constitutional theory. Supreme Court jurisprudence suggests that a case filed under Title VI regulations, which incorporate a disparate impact standard, would offer the greatest possibility of success. The admissions practices of the three private universities serve as examples for this legal theory, although a suit against a public institution should also include a Title VI disparate impact claim.

The constitutional theory, based on the equal protection clause of the Fourteenth Amendment,45 is another means for attacking upper limit quo-
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A claim would require a demonstration of discriminatory intent. While the constitutional analysis will focus on Berkeley's admissions policies, its significance for private universities should not be disregarded, since a suit filed on the basis of Title VI, as distinguished from Title VI regulations, would require a showing of intent identical to the constitutional standard.

A. The Legacy of Racial Discrimination

Both the equal protection clause and Title VI are designed to protect against discrimination on the basis of race or national origin. While Asian Americans are entitled to such protection, these formal rules have not been applied as rigorously to safeguard the rights of Asian Americans throughout most of American history. For example, in Korematsu v. United States, the Court purportedly applied strict scrutiny, the most exacting level of judicial review, but nonetheless upheld the mass internment of 110,000 Japanese Americans during World War II on the basis of "military urgency." In stark contrast, Germans and Italians were subject to individual review. This fact, combined with the legacy of state-sponsored discrimination against Asians, forms the backdrop to the allegations of upper-limit quotas on Asian American applicants.


46. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1982). See infra note 64.

47. Thus, a suit against a private university that receives federal funds would be based on Title VI and Title VI regulations. A suit against a public university, in contrast, would be filed under the equal protection clause, Title VI, and Title VI regulations. This Note does not address the alternative of seeking administrative review under Title VI. See 34 C.F.R. § 100.7-8 (1987).


49. Id. at 223.


51. Since the 1850's, Asian Americans have been repeatedly subjected to state-sponsored discrimination. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco laundry ordinance held unconstitutional); Queue Ordinance (1871) (cropping hair of every male prisoner contrary to Chinese customs); Cubic Air Ordinance (1870) (requiring lodging houses to provide space exceeding average footage in Chinatown); Chinese Head Tax (1852) (taxing all Chinese over age 18 who were not already paying a tax). See E. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 50-55 (1939). In People v. Hall, 4 Cal. 399 (1854), Chinese were prohibited from testifying against Caucasians in either civil or criminal proceedings; thus, crimes perpetrated against Chinese residents went unpunished if no Caucasian would act as a witness. At the federal level, immigration laws deemed Chinese and Japanese immigrants "aliens ineligible for citizenship" and excluded immigrants from both nations. See E. SANDMEYER, supra, at 96-105; Hune, supra note 6, at 283-86. In education, the "separate but equal" doctrine for Asian Americans in education was sanctioned by the United States Supreme Court in Gong Lum v. Rice, 275 U.S. 78 (1927). States such as California did not repeal statutes segregating Asian students until 1947. Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971). See V. LOW, THE UNIMPRESSIBLE RACE: A CENTURY OF EDUCATIONAL STRUGGLE BY THE CHINESE IN SAN FRANCISCO (1982). Recent incidents of violence directed against Asian Americans, while not state-sponsored, indicate the persistence of anti-Asian sentiments in the United States. U.S. COMMISSION ON CIVIL RIGHTS, RECENT ACTIVITY AGAINST CITIZENS AND RESIDENTS OF ASIAN DE-
Quotas on the admissions of identifiable minorities are also a part of America's past. The current claims bring to mind the quotas imposed on Jewish students at Harvard, Yale, Princeton, and Columbia beginning in the 1920's. University officials used similar techniques such as personal ratings, and stated similar reasons such as the need to preserve college traditions and student body diversity to justify the limitations. Historic discriminatory practices are now directed at the newest immigrant group to challenge the racial composition of highly selective institutions.

B. The Standard for a Title VI Claim

The legislative history of Title VI fails to provide clear guidance on the meaning of "discrimination," but subsequent Supreme Court decisions, beginning with Lau v. Nichols, have clarified the standard for a Title VI claim. The Lau Court adopted the effects test for Title VI, relying on regulations issued by the Department of Health, Education, and Welfare. Although Bakke cast doubt on the continuing validity of Lau, seven Justices in Guardians Association v. Civil Service Commission of New York agreed that the Title VI standard is identical to the constitutional standard—both require proof of discriminatory intent. However, five Justices concluded that proof of disparate impact is sufficient to estab-
lish a violation under the regulations adopted pursuant to Title VI. A unanimous Court in Alexander v. Choate clarified the apparent contradiction by reading Guardians to hold that "Title VI itself directly reached only instances of intentional discrimination," but "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."

Although Title VI applies to the admissions practices of private universities that receive federal funds, an Asian plaintiff would stand a greater chance of success by filing a suit under Title VI regulations. Since Guardians, six circuits have stated that a cause of action premised on Title VI regulations does not require proof of discriminatory intent.

1. Admissions Practices of Private Universities Subject to Attack

An Asian American plaintiff must allege that specific admissions practices or policies have a disparate impact on Asian applicants; this Section examines two such practices.

a. Personal Ratings

An Asian plaintiff could plead that the facially nondiscriminatory personal ratings employed by Stanford, Harvard, and Brown have a disparate impact on Asian candidates and are not related to educational performance. An applicant could also rely on the findings of investigations at

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61. Id. at 592-93 (opinion of White, J.); id. at 618-24 (Marshall, J., dissenting); id. at 642-43 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).
62. 469 U.S. 287 (1985) (consideration of § 504 of Rehabilitation Act, which Congress modeled after Title VI, prompted review of scope of Title VI).
63. Id. at 293 (footnote omitted).
64. Congress amended the "program or activity" language of Title VI to "mean all the operations of . . . a college, university, . . . or a public system of higher education." Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 606, 102 Stat. 28-32 (1988). Admissions practices of private universities are part of their overall operations and could fall within the scope of the Act.
65. See supra note 44 and text accompanying notes 62-63. Universities are also prohibited from treating "an individual differently from others in determining whether he satisfies any admissions, enrollment . . . or other requirement." 34 C.F.R. § 100.3(b)(1) (1987).
66. See Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1986) (IQ tests with discriminatory effect on enrollment of Black children violated Title VI regulations). Five other circuits have acknowledged the availability of a claim under Title VI regulations, but plaintiffs failed to allege specific practices or policies which caused the disparate impact. Latinos Unidos de Chelsea v. Secretary of Hous., 799 F.2d 774, 784-85 n.20 (1st Cir. 1986) ("under the regulations, plaintiffs must show a discriminatory impact"); Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986) ("Title VI action can now be maintained ... in the guise of a disparate impact case ... [where] proof of discriminatory intent is not necessary"); Craft v. Board of Trustees of Univ. of Ill., 793 F.2d 140, 142 (7th Cir.), cert. denied, 107 S. Ct. 110 (1986) ("Title VI reached non-intentional discrimination because agency regulations implementing Title VI prohibited the expenditure of federal funds in a manner that had a discriminatory impact"); Mahay v. State Bd. of Community Colleges, 813 F.2d 311, 317 n.6 (10th Cir. 1987) ("a bare majority of the Supreme Court [in Guardians] upheld the validity of Title VI regulations incorporating a disparate impact standard"); Georgia State Conference of Branches of NAACP v State of Ga., 775 F.2d 1403, 1417-18 (11th Cir. 1985) (In Guardians, "five Justices were of the opinion that the regulations promulgated under Title VI permit the filing of suits alleging a disparate impact theory").
Brown\(^{67}\) and Stanford\(^{68}\) if she were to file suit against either institution. Both reports, based on testimonies of admissions officers, acknowledge the existence of conscious or unconscious biases against Asian applicants, as reflected in low personal ratings, and suggest that such biases may influence admissions decisions at other universities.

b. **Benchmark System**

Some highly selective universities have used "historic benchmarks" or target systems\(^{69}\) to determine the composition of each entering class. A Brown study\(^{70}\) revealed that the use of such benchmarks by the admissions office served to perpetuate the existing racial composition of the university, to the detriment of rapidly expanding groups within the applicant pool. Each fall, the admissions office establishes a set of enrollment goals based on the structure of previous year's matriculating freshman class. The number of admittees is monitored throughout Brown's admissions season to ensure that the relative proportions of identifiable groups, such as athletes, minorities, and alumni children, remain fairly constant from year to year. However, this type of admissions process fails to account for demographic changes. As a result, the use of benchmarks at Brown\(^{71}\) has a detrimental impact on Asians, the fastest growing applicant group.\(^{72}\)

2. **Potential Defenses of Private Universities**

The defenses which highly selective universities may assert are unknown since this sort of claim has not yet been litigated. However, several likely defenses can be anticipated.

a. **Personal Ratings Serve an Educational Purpose**

Once a prima facie case has been established, the burden of proof shifts to universities to "demonstrate that the requirement which caused the dis-
proportionate impact was required by educational necessity."\textsuperscript{3} Highly selective universities may argue that one of their major objectives is to train future leaders,\textsuperscript{74} and that subjective standards permit admissions officers to evaluate this potential. If so, personal ratings should bear some correlation to this goal. However, it is not clear that interviews, personal essays, or recommendations can adequately evaluate personal traits, much less predict an applicant's future contributions to society. In fact, studies have demonstrated that personal ratings used by admissions offices have little predictive power for assessing a candidate's future success.\textsuperscript{75} Furthermore, the history of Jewish admissions reveals that while similar reasons were used to support the adoption of subjective criteria in the 1920's, universities intended to use the measures for exclusionary purposes.\textsuperscript{76}

b. \textit{Legacy and Athletic Admissions}

Harvard and other selective universities have stated that low Asian admit rates result partially from the "very few Asian-Americans in our applicant pool who are alumni/ae children or prospective varsity athletes."\textsuperscript{77} The relationship between an athletic program and the institutional purpose of a highly selective college is ambiguous, although a winning football team may induce alumni donations to the general fund.\textsuperscript{78} Admissions of alumni children, however, may be justified by legitimate financial concerns because these admissions often encourage alumni contributions. While catering to current alumni without weighing the future contribu-

\textsuperscript{73} Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1986). In the context of Title VII, the Supreme Court recently held that disparate impact analysis may be applied to subjective employment criteria. A plurality opinion, though, stated that only the burden of production, not proof, shifts to the em-
ployer. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988). However, the Court has been reluctant to consider Title VII and Title VI as interchangeable. \textit{See, e.g.}, Johnson v. Transpor-
tation Agency, 107 S. Ct. 1442, 1450 n.6 (1987) ("Title VII and Title VI, therefore, cannot be read \textit{in pari materia}.")

\textsuperscript{74} Harvard and Stanford catalogues specifically refer to the goals of leadership training and student body diversity. \textit{Harvard Register, supra} note 25, at 19; \textit{Stanford Today, supra} note 8, at 108.

\textsuperscript{75} For a summary of studies and criticism of the use of non-academic variables, see R. Klit-

\textsuperscript{76} In 1926, the Harvard Board of Overseers recommended that "the rules for the admission of candidates be amended to lay greater emphasis on selection based on character and fitness and the promise of greatest usefulness in the future." M. Synnott, \textit{supra} note 52, at 109. President Lowell stated that any test of character "passed with the intent of limiting Jews should not be . . . applicable to Jews and Gentiles alike." \textit{Id.} at 63.

\textsuperscript{77} \textit{Statement on Asian-American Harvard-Radcliffe Admissions}, Harvard Gazette, Jan. 22, 1988, at 5, col. 3; \textit{Asian-Americans Question Ivy League's Entry Policies, supra} note 28, at B4, col. 3 (discussing Princeton). The admit rate for legacies and athletes to Brown's Class of 1991 was 46% and 56% respectively. \textit{Undergraduate Admissions, supra} note 14, at 30–31. In contrast, Stanford concluded that "the overrepresentation of whites among special groups such as alumni legacies, faculty/staff children, and athletes did not work to account for the differential rate of admission except in a relatively minor way." \textit{CUAFA Report, supra} note 16, at 14, col. 2.

\textsuperscript{78} While sports victories are correlated with contributions to the universities' athletic programs, several studies have found that there is "no significant relationship" between wins and increased alumni donations to the universities' general funds. \textit{Do Winning Teams Spur Contributions?}, Chronicle Higher Educ., Jan. 13, 1988, at A32, col. 3.
tions of potential Asian alumni is shortsighted, this may be the strongest defense available to a university.79

Despite the strength of this argument, universities may hesitate to use this defense because efforts to justify the rejection of competitive Asian applicants solely on the basis of legacy and athletic admissions would portray highly selective universities as institutions that cater to their alumni and football coaches in pursuit of increased donations. This concession could severely undermine the image of a meritocratic admissions process which highly selective universities seek to project to society at large.80

c. Diversity

Justice Powell advocated diversity81 as a legitimate justification for preferential admissions on the ground that a diverse student body promotes an "atmosphere of 'speculation, experiment and creation.'"82 Since Bakke, universities have successfully relied upon diversity to validate such programs,83 and they are likely to raise diversity as a defense to allegations of an upper limit on Asian Americans.84 According to an assistant dean at Harvard, admissions officers at prestigious institutions have contended that "further increases of Asians would diminish the diversity of students for which [these universities] strive" and have suggested that the Asian applicant pool is "too homogeneous."85

Such statements distort the concept of diversity; Justice Powell advocated a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."86 Such a program would not grant or deny admissions solely on the basis of an

79. A plaintiff could, however, allege that alumni preferences "perpetuate past patterns of discrimination," giving preferences to "rich and powerful" groups which include a disproportionately small number of minorities. Dershowitz & Hanft, Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext, 1 Cardozo L. Rev. 379, 410 (1979).
80. See supra notes 24-25.
83. DeRonde v. Regents of the Univ. of Cal., 28 Cal. 3d 875, 172 Cal. Rptr. 677, 625 P.2d 220, cert. denied, 454 U.S. 832 (1981) (minority admissions program at Davis Law School upheld to ensure diversity of student body or to mitigate effects of past discrimination). U.C. successfully argued that "an appreciable minority representation in the student body will contribute 'to a valuable cultural diversity for both faculty and students . . . .'" 172 Cal. Rptr. at 680, 625 P.2d at 223; see also McDonald v. Hegness, 92 Wash. 431, 598 P.2d 707, 713 n.8 (1979), cert. denied sub nom. McDonald v. Gerberding, 445 U.S. 962 (1980) (university's statement in defense of its minority admissions program reflected "a purpose of promoting diversity in the student body").
84. One Harvard admissions officer stated, "It is the diversity element that hurts most of the Asian applicants because many who apply are pre-medical, science, technical types." Ho & Chin, Admissions Impossible, Bridge, Summer 1983, at 8. See supra notes 28-33 and accompanying text.
86. Bakke, 438 U.S. at 317 (Powell, J.).
applicant's race, but would consider a "broader array of qualifications and characteristics." 7 Using diversity as a justification for limiting Asians, however, implies that an Asian applicant's contribution to diversity derives solely from her race, and that her value is negated by the presence of too many others of her color; her "plus" ceases to exist and instead acts as a negative. For institutions that purport to base admissions decisions on individual attributes, this is a clear contradiction.

Furthermore, Justice Powell certainly did not intend diversity to be used as a justification for discrimination against racial minorities. Efforts to limit the number of Asian admittees do in fact "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." 8 Universities have distorted diversity, transforming what was intended to be a shield for preferential admissions 9 into a sword against a minority group seeking admissions.

d. Overrepresentation

One dean at Harvard voiced a related theme, which may be used as a defense against allegations of a quota, by stating that Asian Americans are "no doubt the most over-represented group in the university." 10 The claims of Asian "overrepresentation" suggest that administrators have some ideal racial balance in mind, partially based on census figures and on the benchmark system, but not on the differential SAT test-taking rates between Asian Americans and Caucasians. 11

First, institutions like Harvard fail to apply the concept of national representation consistently, 12 and as history reveals, identical reasons were used to impose a quota on Jewish students. 13 Furthermore, if admissions

87. Id. at 315 (Powell, J.).
88. Id. at 375 (Brennan, White, Marshall, and Blackmun, JJ.). Justice Powell also found this type of "two-track" or "multitrack" system legally impermissible. Id. at 315 (Powell, J.). With a limited number of slots available under a particular "track" or quota, Asian Americans compete against each other for positions and are insulated from other segments of the applicant pool; this practice imposes higher standards on Asian applicants than on Caucasian applicants.
89. Commentators now claim that affirmative action for Blacks and Hispanics accounts for the lower Asian admit rates. Gibney, The Berkeley Squeeze, New Republic, Apr. 11, 1988, at 17. If this were the case, the impact of such programs should fall evenly on both Caucasians and Asians, but see supra notes 14-17 and accompanying text, unless universities are placing a quota on the total number of minorities admitted, so that increases in Black and Hispanic admissions affect only Asians.
91. In 1985, 70% of Asian American 18-year-olds took the SAT, compared to 30% of Caucasian 18-year-olds, and 28% of all 18-year-olds. 1985 SAT PROFILES, supra note 37, at vii. While test-taking rates do not indicate the number of applicants to each institution, they do provide a more accurate picture of the college-age population or potential applicants than the U.S. census.
92. Harvard no longer uses "overrepresentation" to reduce its 25-33% Jewish student population down to the 3% that Jews represent in the general population, nor does it limit the numbers of alumni children to their overall national representation. For a similar observation, see AASA REPORT, supra note 13, at 20.
93. In 1924, Princeton decided not to accept any more than the percentage of Jews in the national population, roughly three percent, and used this quota to reduce by half the number of Jewish stu-
are determined by current census figures, such practices would perpetuate the history of “[r]acism in U.S. immigration policy.”

Using “overrepresentation” to justify limits on Asian admissions perpetuates the denial of equal opportunity for Asian Americans.

B. The Standard for an Equal Protection Claim

The constitutional standard requires evidence of discriminatory intent or purpose in order to establish a violation of the equal protection clause and, following Guardians, Title VI. The decisionmaker must have “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” A plaintiff suing a public university under the equal protection clause must demonstrate that impermissible motives, not the neutral explanations offered, account for the university’s action. The intent requirement is a formidable barrier, raising questions such as whose intent is relevant and how much illicit intent is required. A court will inquire into “circumstantial and direct evidence of intent as may be available,” including whether the official action bears more heavily on one race than another, whether a clear pattern emerges, whether the sequence of events reveals the decisionmaker’s purpose, whether decisionmakers departed from normal procedures or policies, and whether contemporaneous statements by parties involved shed light on motivation and intent.

1. Policies of a Public University Subject to Attack

At Berkeley, the sharp decline in the number of newly enrolled Asian Americans from 1,303 in 1983 to 1,031 in 1984, a 20.9% drop in one year, suggested that new admissions policies may have been adopted.
The Asian community alleged that Berkeley had instituted a minimum 400 SAT verbal score, a policy with a detrimental impact on immigrant Asians, to limit Asian admissions.100 While Berkeley may have a legitimate interest in assuring the English competence of its students, the Chancellor never acknowledged and repeatedly denied the existence of a minimum verbal score.101 Finally, under pressure from the Asian community, the Chancellor admitted that such a policy had indeed been adopted in 1984, but was withdrawn after a brief time.102 The dispute fueled suspicion that Berkeley had covertly adopted guidelines which, though neutral on their face, caused an inevitable or foreseeable drop in Asian American admissions.103

The decline in Berkeley's Asian enrollments can also be attributed to a 1984 decision, made without the participation of the faculty committee on Admissions and Enrollment,104 to remove the "protection" for Educational Opportunity Program (EOP)105 applicants and to "redirect" EOP students "who were not Black, Hispanic or Native American" to other U.C. campuses.106 This was the first time that EOP, a program designed to promote access to Berkeley for all economically disadvantaged students regardless of race, acquired a racial criterion.107 The decision affected three times as many Asians as Caucasians,108 since a larger proportion of Asian applicants come from disadvantaged backgrounds.109 While disparate impact is not "the sole touchstone of an invidious racial discrimination,"110 such policy changes, accompanied by the disparity between Asian and Caucasian admit rates over a seven year period, suggest that Berkeley may have intended to decrease the number of Asians admitted.

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100. A 1983 Berkeley report found that over a five year period, the mean SAT verbal scores of immigrant freshmen who were predominately Asian oscillated around 400, a score at least 100 points lower than all other accepted applicants. N. Tang, Immigrant & Refugee Students Project Report and Recommendations: 1983-84, at Table 3 (Mar. 22, 1985) (unpublished report) (on file with author).
105. Adopted in the 1960's, EOP protects economically and educationally disadvantaged high school students who are U.C. eligible from being rejected or redirected to other U.C. campuses.
108. "The number of Asian EOP applicants who were offered admission dropped from 183 of 197 (92.9 percent) in 1983 to 58 of 167 (34.7 percent) in 1984. Similarly, the number of Caucasians who were offered admission dropped from 41 of 45 (91.1 percent) in 1983, to 29 of 61 (47.5 percent) in 1984." AUDITOR GENERAL'S REPORT, supra note 8, at 48.
109. Berkeley's internal data show that 41% of Asian immigrant freshmen and 18% of all Asian freshmen, compared to 5% of Caucasian freshmen, came from families with parental incomes under $20,000 (definition of economically disadvantaged under EOP). BERKELEY OFF. OF STUDENT RESEARCH, 1985 ENTERING FALL FRESHMEN WITH LOW AND MODERATE ESTIMATED ANNUAL PER- RENTAL INCOME (Oct. 29, 1986).
It is, however, unclear what weight the Supreme Court will give to statistical disparities in determining discriminatory intent. It appears that while statistical disparities can support a claim of discriminatory intent, the disparity has to be quite substantial before the Court will deem the state action violative of the equal protection clause.\textsuperscript{111}

An Asian plaintiff can also allege that sudden policy changes provide evidence of discriminatory intent.\textsuperscript{112} U.C. administrators were aware that Asians performed well academically, but the percentage of students admitted on the basis of scholastic criteria alone declined from 60% in 1985 to 50% in 1986 to 40% in 1987,\textsuperscript{113} without any explanation.

Furthermore, in response to the allegation that supplemental criteria (based on extracurricular activities, personal essays, and English and foreign language requirements) favored Caucasians, the Auditor General reviewed the Tier 2 supplemental criteria scores of 100 Caucasians and 100 Asians who applied to Berkeley in 1985 and 1986. The investigation showed that Asians had marginally higher supplemental scores than Caucasians in both years.\textsuperscript{114} If Asians in the applicant pool as a whole outscore Caucasians on both scholastic and supplemental criteria, no nondiscriminatory reason can account for the disparity in admit rates.

Finally, although he later stated that he was misinterpreted,\textsuperscript{115} the President of the University of California asserted in an interview that Asian Americans “are in the university well above their representation in the high school graduation pool,” while Caucasian students are “underrepresented in the entering freshman classes.”\textsuperscript{116} At another U.C. campus, UCLA’s Director of Admissions explicitly recognized that such efforts to address the “under-representation” of Caucasians will reduce the numbers

\textsuperscript{111} Justice O’Connor, a swing vote on the Court, has suggested in the context of a Title VII reverse discrimination case that overwhelming numbers are required. At the Santa Clara County Transportation Agency, only 12 of 124 technicians, no skilled craft workers, and 1 of 110 road maintenance workers were women. Justice O’Connor deemed the severe statistical disparities sufficient to establish a violation of the equal protection clause, thus permitting the Agency to voluntarily adopt an affirmative action plan. \textit{Johnson v. Transportation Agency, 107 S. Ct. 1442, 1462-63 (1987)} (O’Connor, J., concurring). The \textit{Johnson} majority disagreed with Justice O’Connor, stating that they would only require a showing of “manifest imbalance” before upholding the affirmative action plan. 107 S. Ct. at 1452. It may be inferred, however, that all members of the Court would require more than a “manifest imbalance” in order to support an equal protection claim.

\textsuperscript{112} “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” \textit{Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977)}.\textsuperscript{113}

\textsuperscript{113} When Being Best Isn’t Good Enough, supra note 31, at 25.

\textsuperscript{114} \text{AUDITOR GENERAL’S REPORT, supra note 8, at 50.}

\textsuperscript{115} Asian Task Force Meets with UC President Gardner, East/West News, Mar. 19, 1987, at 1, col. 2.

\textsuperscript{116} UC Fee Formula was Born of Student Fear of Huge Hikes, San Diego Union, Dec. 21, 1986, at C-7. The research coordinator for U.C. admissions services also stated that “Asians are overrepresented by almost three times their high-school population.” Biemiller, supra note 34, at 36. Finally, Berkeley’s Assistant Vice Chancellor warned that “if we keep getting extremely well-prepared Asians, and we are, we may get to the point where Whites will become an affirmative-action group.” Bunzel, \textit{Affirmative-Action Admissions: How It “Works” at UC Berkeley, PUB. INTEREST, Fall 1988, at 127.}
of Asians admitted. While each piece of evidence alone may not be sufficient to establish discriminatory intent, the combination of all such factors may satisfy the constitutional standard.

2. Potential Defenses of a Public University

After an Asian plaintiff establishes a prima facie case, Berkeley will have the opportunity "to rebut the presumption of unconstitutional action by showing . . . permissible racially neutral selection criteria . . . ." Berkeley probably will seek to demonstrate that the use of minimum SAT scores and supplemental criteria, and the redirection of EOPs are necessary to improve academic qualifications or to increase student body diversity. The university may also rely on the athletic admissions and the over-representation defenses. However, the plaintiff need not show that the invidious purpose was the sole motivation, but that the new policies were adopted in part "because of" a desire to limit the number of Asian admittees. The existence of a permissible motive "would not render nugatory the purpose to discriminate . . . ."

III. Remedies

An Asian American plaintiff could seek an injunction against a university, whether public or private, to halt its discriminatory practices against Asian applicants. In certain circumstances, a request for dam-

117. "The campus will endeavor to curb the decline of Caucasian students . . . . A rising concern will come from Asian students and Asians in general as the number and proportion of Asian students entering at the freshman level declines—however small the decline may be." Memo from Rae Lee Siporin, UCLA Director of Admissions to Undergraduate Enrollment Committee (Dec. 10, 1984) (on file with author).

118. "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 (1976).

119. Id. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

120. See supra notes 77–80, 90–94 and accompanying text.


124. Where the suit involves public universities, legislative action can supplement judicial action. Relief sought in a suit against Berkeley, for example, will be affected by Assembly Concurrent Resolution 70, adopted by the California legislature in September 1987, which called for each U.C. campus to: describe its exact admissions policies in its catalogues, create an advisory committee of community members, and ensure multi-ethnic representation on the academic senate committees governing admissions. Aoki, supra note 102, at 261. The California legislature has no direct control over the U.C. system. Cal. Const. art. IX, § 9. However, in adopting California Senate Resolution No. 2126 on March 24, 1988, the legislature exercised its oversight and budgetary powers to create a special committee to investigate Asian admissions at Berkeley and U.C. admissions in general. The senate committee's findings are likely to influence any judicial proceedings involving Berkeley.

125. The conflict will be more effectively resolved in the long run if defendant university participates in drafting the order and shaping the remedies. Parties in Lau v. Nichols jointly appointed a
The following recommendations set forth possible elements of an injunction, to be modified as information concerning the admissions process becomes available through discovery.

A major impediment to increasing Asian American admissions appears to be the use of historic benchmarks. An injunction could require a university to discontinue the use of benchmarks that serve as upper limit quotas on candidates from rapidly increasing applicant pools.

The creation of an Asian recruitment coordinator position could reduce the hurdles faced by Asian applicants in the advocacy admissions process used by some highly selective universities. The Asian recruitment coordinator could be assigned to a region of the country with a large number of Asian candidates and also play an informal role in educating fellow admissions officers in the difficult process of overcoming stereotypes. In addition, as the implications of cross-cultural differences and their effects on the admissions process, are evaluated at trial, a plaintiff task force comprised of school board members, minority community leaders, and educators to study implementation plans. The San Francisco School Board, defendants in Lau, provided funding to hire experts and design future bilingual education programs in compliance with Title VI regulations. Lau v. Nichols, No. 72-6520 (N.D. Cal. May 1974) (consent decree).

126. Damages are available in a suit based on the equal protection clause or Title VI itself. However, the Supreme Court has not conclusively determined the nature of the relief available in a suit based on Title VI regulations. In Guardians, four Justices agreed that both compensatory and prospective relief would be available for intentional and unintentional discrimination. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 635–39 (1983) (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting); id. at 625–34 (Marshall, J., dissenting). Justice White, joined by Justice Rehnquist, asserted that compensatory or "make whole" remedies would not be appropriate without a showing of discriminatory intent. Id. at 596 (opinion of White, J.). The crucial vote, Justice O'Connor, disagreed with "the limitations that Justice White's opinion would place on the scope of equitable relief available to private litigants suing under Title VI," but since she concluded that Title VI required proof of intentional discrimination, she did not discuss the availability of monetary relief. Id. at 612 & n.1 (O'Connor, J., concurring). Three circuits have suggested, when discussing § 504 of the Rehabilitation Act, that only prospective relief is available in a suit filed under Title VI regulations. See Manecke v. School Bd., 762 F.2d 912, 922 n.8 (11th Cir. 1985) ("at least five Justices would not allow compensatory relief to a private plaintiff under Title VI absent proof of discriminatory intent") (emphasis in original); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1357 (5th Cir. 1983) (no damages available absent intentional discrimination); Timms v. Metropolitan School Dist., 722 F.2d 1310, 1318 n.4 (7th Cir. 1983) (Title VI "has been held not to require proof of intentional discrimination except as a basis for compensatory relief"). For a Title VI case, see Craft v. Board of Trustees, 793 F.2d 140, 142, cert. denied, 107 S. Ct. 110 (1986) ("compensatory relief under section 2000d [of Title VI] requires proof of discriminatory intent").

127. See supra notes 69–72 and accompanying text.

128. Benchmarks can be used for both positive and negative purposes. If the court finds at trial that benchmarks have been used to impose a quota or ceiling on Asians, such uses should be eliminated, but progressive uses may still be permitted.

129. This remedy may only be appropriate at universities with a higher than threshold percentage of Asian applicants, a figure to be determined by the court. The Asian recruitment coordinator position should be filled by someone with an understanding of Asian cultural norms and familial backgrounds.

130. "For each candidate, an 'advocate' on the committee presen[es] the case for acceptance," and the committee's perception of the applicant is strongly shaped by the force of that presentation. R. Klitzgaard, supra note 75, at 30.

could consider methods to ameliorate the disparate impact of personal ratings on Asian American applicants. She could seek to modify the use of interviews, personal essays, and recommendation letters.

Furthermore, the university should be required to articulate in its application materials the criteria, specifically the subjective considerations, which serve as the basis for admissions decisions. A task force consisting of admissions officers, university administrators, community leaders, educators, and psychologists could work together to formulate the most suitable admissions standards, and the most effective means to articulate such standards, given the relevant educational objectives. The university also should be required to submit annual reports to the court and to the plaintiff’s attorney documenting the admit rates for Asian Americans compared to Caucasians. A reporting requirement would push a university to be vigilant in its efforts to eliminate discriminatory barriers for Asian applicants and would also provide an external monitoring mechanism.

While such policy changes may not ensure high Asian admit rates, they can serve to eliminate discriminatory and arbitrary barriers to highly selective universities for all applicants.

IV. Conclusion

This Note has provided a framework for examining the allegations of an upper limit quota on Asian American admissions. The four sample universities have illustrated the type of evidence necessary to challenge the admissions process and the legal theories upon which to plead a complaint. A suit can be brought against a public institution based on either the equal protection clause or Title VI, but such a suit would require evidence of discriminatory intent and would encounter difficult proof problems. A more promising approach is to challenge either a public or a private university on the basis of Title VI regulations, incorporating a disparate impact standard. If an Asian plaintiff is successful, a court order could mandate changes in specific admissions practices and require universities to articulate their subjective criteria for determining admissions.

The Asian admissions issue raises complex questions which may be unresolvable, but ultimately, it calls for an affirmation of the principles of racial equality fundamental to the promise of America.


133. Compliance reports are a common requirement in institutional reform litigation. See Special Project, supra note 123, at 824.

134. Such requirements would be similar to those instituted on remand by the district court, which required the Lau school board to submit to the court and to plaintiffs’ attorney an annual publication describing its progress in providing bilingual education to San Francisco area school children. Lau v. Nichols, No. 72-6520 (N.D. Cal. May 1974) (consent decree).