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## Diasporic Dreams: Law, Whiteness, and the Asian American Identity

Nicholas Loh

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# DIASPORIC DREAMS: LAW, WHITENESS, AND THE ASIAN AMERICAN IDENTITY

*Nicholas Loh\**

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## INTRODUCTION

I am the son and grandson of courageous immigrants who left home and created a new life in the United States. Though my family came to the United States for myriad reasons, one driving factor was the search for a stable economic and political environment. Their lives had seen great political upheaval and societal change — following the fall of the last Chinese dynasty, my grandparents

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\* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2014, Oberlin College. I dedicate this piece to my family, my grandparents in particular, and to the Asian American legal scholars who paved and widened the road for me. I am deeply grateful to Professor Elizabeth B. Cooper for her steady and consistently thoughtful advising, the incomparable editors at the *Fordham Urban Law Journal* for their diligence and care, and Yue Qiu for her encouragement and wisdom.

witnessed the birth of the Chinese Republic, the Japanese occupation, and the founding of the People's Republic of China.<sup>1</sup>

I grew up listening to stories of my family's hard work and sacrifices after they came to the United States.<sup>2</sup> As a doctor, my paternal grandfather never left the hospital during his first eight months in the United States. Instead, he ate, slept, and diligently worked to improve his English. My paternal grandmother worked full time as a nurse and raised my father and his brother. My maternal grandmother raised four children on her own, all while working full time at a print shop.

My family did the hard work. They learned English without an accent, became professionals, and assimilated to create opportunities for me to reap the benefits of the "American Dream." My father grew up being taught the adage to "work twice as hard as a white person to be treated as his equal."<sup>3</sup> They swallowed the indignities and injustices of being treated unequally at work, and, as a result, I was raised with a life of great privilege.<sup>4</sup> However, life and the law

1. The Qing Dynasty fell in 1912 ending a 2,000-year-old imperial system. *Puyi*, ENCYCLOPEDIA BRITANNICA, (Feb. 3, 2021), <https://www.britannica.com/biography/Puyi> [<https://perma.cc/KM9K-DL9D>]. Following the last emperor's forced abdication, the Republic of China was founded, the Kuomintang and the Chinese Communists waged the Sino-Japanese War following the Japanese invasion of 1931, and, in 1949, the Chinese Communist Party established the People's Republic of China. *China Profile — Timeline*, BBC (July 29, 2019), <https://www.bbc.com/news/world-asia-pacific-13017882> [<https://perma.cc/U462-SVVA>].

2. As Kimberlé Williams Crenshaw wrote, scholars of color face a bind when writing about their own groups. They can use the third person for an "appearance of objectivity [that] actually presumes a dominant group perspective" or they can use the first person and risk seeming "unscholarly." See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). I choose to use the first person for the Introduction, Parts III and IV, and the Conclusion. This Note will adopt the third person for Parts I and II.

3. It is unclear where exactly to attribute this phrase. As Savala Trepczynski mentioned, "people of color have a golden rule . . . . Our rule says *be twice as good*. Starting when we're children, people of color learn in overt and subtle ways that we must often be twice as good (and work twice as hard) to get half as far as our white counterparts." Savala Trepczynski, *People of Color Learn at a Young Age That They Must Be Twice as Good. Now White People Need to Be Twice as Kind*, TIME (Aug. 17, 2020, 7:00 AM), <https://time.com/5871387/white-people-must-be-twice-as-kind/> [<https://perma.cc/669U-FY7F>]; see also Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC (Sept. 2012), <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/> [<https://perma.cc/HY2D-74CQ>].

4. I grew up being told stories of my father and grandfather's bosses taking advantage of their work ethic. These narratives contained both racial undertones and overt statements revealing that their bosses felt comfortable treating them less well than white employees because they were Chinese and would not complain.

are more complicated than the proverbial house with a white picket fence that my forebearers were able to provide for me.

Realizing this “American Dream” came at significant personal cost. For my family and countless others, they were uprooted from *home* — taken from a rich cultural context filled with music, food, and a shared mother tongue.<sup>5</sup> They exchanged mooncakes and ducks for mashed potatoes and turkeys on holidays. Implicit in the directive to learn to speak English without an accent was learning to be white.

This Note investigates the impact Asian Americans<sup>6</sup> have had on the development of law in the United States, starting with outright exclusion from entry to the United States, moving through the civil rights laws of the 1960s, and ending with the present where discrimination is more prevalent in places the law does not yet reach. Specifically, there are now covering demands<sup>7</sup> placed on Asian Americans to conform to the trappings of white U.S. culture. Though subtle and at times less harsh than exclusion, the implicit and explicit demands to cover rest on the United States’ history of racist statutes, case law, and policies. This Note stands on the shoulders of a long line of scholars who have combatted the erasure of Asian Americans from the law by publishing “identity projects” that challenge and nuance the Black-white dichotomy prevalent in the U.S. legal system.<sup>8</sup>

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5. See discussion *infra* Part III.

6. Terminology is important. Much of this piece challenges the notion that “Asian” means a discrete, bounded group of people who can be easily distinguished from non-Asians. There are individuals born in Asia who immigrate, as well as citizens born in the United States of Asian ancestry. Furthermore, due to intermarriage, there are Asians who also have ancestors of African descent, Latinx descent, and Asians whose “forebears sailed with Christopher Columbus.” See generally Frank H. Wu, *Asian Americans and Affirmative Action — Again*, 26 ASIAN AM. L.J. 46, 48 (2019) [hereinafter Wu, *Affirmative Action*]. For the purpose of this Note, I use the term Asian American to refer to all Asians living in the United States who are often subjected to similar passing and covering demands and expectations. While Pacific Islanders are often included with Asian Americans, I have elected not to do so here out of respect for key differences such as experiences with colonization and sovereignty disputes that are beyond the scope of this paper. See also Naomi Ishisaka, *Why It’s Time to Retire the Term ‘Asian Pacific Islander,’* SEATTLE TIMES (Nov. 30, 2020, 4:11 PM), <https://www.seattletimes.com/seattle-news/why-its-time-to-retire-the-term-asian-pacific-islander/> [https://perma.cc/C9PR-D9FW] (“[S]ome Pacific Islander, also known as Pasifika, community leaders say it’s time to disaggregate Pacific Islander from Asian Americans and take the ‘P’ back to speak truth to the reality of the Pacific Islander experience.”).

7. See discussion *infra* Part III.

8. Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 12–13 (2010). Neil Gotanda wrote, “[a]s a response to invisibility, identity articles about Asian Americans are an effort to establish a history and a presence in

Part I surveys the xenophobia in the late 1880s that was rooted in the belief that Asian immigrants were inferior and perpetually foreign. It also examines litigation Asian immigrants brought trying to claim whiteness and the Alien Land Laws that prevented land ownership and how these laws seeded the ground for the Japanese internment.<sup>9</sup> Part II examines the cultural makeover of Asian Americans following the enactment of the civil rights laws of the 1960s, exploring assimilation and the model minority myth.

Part III investigates the tension faced by the descendants of earlier generations of Asian Americans, those who have benefitted from assimilation — whether to claim honorary white status or to further ally themselves with Black, Indigenous, and People of Color (BIPOC) communities.<sup>10</sup> Finally, Part IV proposes that Asian Americans could and should do more than simply respond to racism and instead work towards racial solidarity while challenging implicit demands to cover.<sup>11</sup>

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the legal literature . . . . The production of these articles is a mode of resistance to racial subordination and the creation of the means — identities — to move forward that resistance.” *Id.*; see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1250 (1993) (“[T]he inclusion of Asian American voices in the form of narrative, personal and otherwise, in the practice of legal scholarship [can be] a powerful method to combat the effects of exclusion.” (internal citations omitted)).

9. See discussion *infra* Section I.B.

10. See Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [<https://perma.cc/3Z8B-E29Q>]; cf. Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 118 (2021) (“While language is key to anti-subordination, BIPOC damages those efforts rather than being helpful, especially among those searching for new language addressing contemporary issues or race and racism.”).

11. On September 22, 2020, President Donald Trump issued an Executive Order on Combating Race and Sex Stereotyping, through which he sought to prevent federal funding for “divisive concepts”, such as critical race theory. See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020). In response to the notion that this Note may fit the Order’s definition of “divisive concept,” the Author offers a brief quote from Professor Mari Matsuda:

Who but an optimist, after all, would see American racism and choose to write about it instead of conceding to its strength in preacknowledged defeat? That [critical race theorists] write, enter theoretical debate, teach in law schools, speak to white audiences, and participate in community struggle is all a testimony of faith. The irony of their rejection as divisive, separatist, and impolitic is that if they were those things they would not be doing what they are doing.

MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 54 (1996).

## I. HISTORICAL ARTIFACTS — ANTI-ASIAN ANIMUS

This Part discusses the anti-Asian animus that met the earliest Asian immigrants. It covers the Chinese Exclusion Act and highlights litigation that sought to challenge the racial hierarchy explicit in U.S. naturalization law.<sup>12</sup> While a full retelling of the history of the earliest Asian immigrants is beyond the scope of this Note, this Part highlights key areas through which the judiciary contributed to the establishment of the Asian American identity — an identity labeling Asian Americans as perpetual foreigners.<sup>13</sup> While much of this history has been told, enough of it has been consistently rendered invisible such that it becomes necessary to lay the groundwork to fully understand the impact of the courts on the shaping of a modern Asian American identity.<sup>14</sup> This survey demonstrates the law’s role in establishing Asian Americans as “perpetual foreigners” and early attempts by immigrants to assimilate and be welcomed in the United States.

### A. Exclusion and Litigating Whiteness

At the end of the nineteenth century, the early Chinese arrivals to the United States were immigrants seeking opportunity. Not unexpectedly, this influx of new workers created economic competition that stoked nativist fires.<sup>15</sup> This early period has been described by some as the “Driving Out,” where U.S. citizens burned

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12. See generally Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58, 61 (1882) (repealed 1943).

13. The many scholars upon whose work this Note stands must be acknowledged. While it would be impossible to create a comprehensive list, the Author has been particularly influenced by RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998); MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* (2003).

14. See Mark E. Steiner, *Inclusion and Exclusion in American Legal History*, 23 *ASIAN AM. L.J.* 69, 69–70, 69 n.2 (2016) (discussing the simultaneous growth in Asian American historiography and its continued erasure from some mainstream legal history textbooks).

15. Merriam-Webster defines nativism as “a policy of favoring native inhabitants as opposed to immigrants.” *Nativism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nativism> [<https://perma.cc/CP6Z-9J2W>] (last visited Sept. 12, 2021). In the context of the United States, nativism usually refers to white Europeans favoring themselves as opposed to racialized immigrants. See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 63–64 (1996); K-Sue Park, *Self-Deportation Nation*, 132 *HARV. L. REV.* 1878, 1913–14 (2019).

Chinatowns while terrorizing and lynching Chinese immigrants.<sup>16</sup> This nativism spurred the enactment of the Chinese Exclusion Act, which suspended the immigration of Chinese laborers — the first federal immigration restriction based solely on membership in a specific ethnic group.<sup>17</sup> In response, Chinese immigrants already in the United States challenged the law. As this Part shows, the Supreme Court upheld exclusion while simultaneously defining the boundaries of whiteness.<sup>18</sup>

In 1889, the Supreme Court upheld the Chinese Exclusion Act in *Chae Chan Ping v. United States* when it held that a Chinese laborer's certificate to return had been annulled by the passage of the Act.<sup>19</sup> The Court suggested that exclusion was needed to keep the peace and

16. See, e.g., JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 47–50 (2008) (describing a particularly heinous extrajudicial hanging of 16 Chinese men and one Chinese woman in Los Angeles in 1871). The Author wishes to acknowledge that while Pfaelzer and other scholars use the term “lynching,” other scholars draw a distinction between hangings that occurred in the American West with the lynchings primarily based in the South that were utilized as a weapon to terrorize Black Americans. See Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFRICAN-AM. L. & POL’Y 107, 135–38 (2010).

17. Pub. L. No. 47–126, 22 Stat. 58, 61 (1882) (repealed 1943) (“[N]o State court or court of the United States shall admit Chinese to citizenship . . .”). It should be noted that the Page Act, passed seven years prior, barred Chinese women from immigrating to the United States for “lewd and immoral purposes.” See Ming M. Zhu, *The Page Act of 1875: In the Name of Morality*, SOC. SCI. RSCH. NETWORK 17 (Mar. 23, 2010) (unpublished article on file with the Social Science Research Network) (quoting the Act). Some have argued that this focus on “morality” was merely a smokescreen to set the stage for discriminating on the basis of race, thus complicating the assertion that the Chinese Exclusion Act was in fact the first race-based immigration restriction. See *id.* at 1, 4, 6, 17.

18. As an illustrative example of foreignness, many Asian Americans speak about the difficulty in answering the question, “where are you from?” because it often carries with it an assumption of foreignness. See Conor Friedersdorf, *On Being Asked, ‘Where Are You From?’*, ATLANTIC (Sept. 19, 2015, 7:00 AM), <https://www.theatlantic.com/notes/2015/09/on-being-asked-where-are-you-from/405355/> [<https://perma.cc/6X6S-FFRF>]; see also Jeff Guo, *Every Asian American Has Been Asked This Question. A Computer Gives the Best Answer.*, WASH. POST (Oct. 21, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/10/21/the-awkward-thing-that-happened-when-scientists-asked-a-computer-to-tell-asian-faces-apart/> [<https://perma.cc/CZN5-ZL7W>] (“Every single [Asian American] has a well-worn reply to the question: So where are you *really* from? . . . [I]t implies that your genetic history is the most interesting thing about you. This gets tiresome no matter how proud you are of your heritage.”).

19. 130 U.S. 581 (1889).

prevent violence.<sup>20</sup> In its opinion, the majority equated the influx of Chinese to an “invasion” that would be a “menace to our civilization.”<sup>21</sup> The Court further reinforced notions of foreignness by describing the Chinese as “inferior” strangers unwilling to change their traditions.<sup>22</sup> In embracing this sentiment, the Supreme Court legitimized decisions from other courts and thus helped solidify the sentiment that the Chinese were incapable of assimilating as citizens of the United States.<sup>23</sup> This language spoke of an “impassable difference” with white people and that the Chinese were “incapable of . . . intellectual development beyond a certain point.”<sup>24</sup> In highlighting these differences, the courts laid foreignness as a foundational aspect of the identity that would soon become “Asian American.”

In response to the nativism of the late nineteenth, many Chinese turned to the courts to recognize their rights by bringing habeas

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20. *See id.* at 594 (“[A] limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there.”).

21. *Id.* at 595 (“[T]heir immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”).

22. *See id.* (“[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.”).

23. One of those decisions was *People v. Hall*, 4 Cal. 399 (1854), where the California Supreme Court reviewed the murder conviction of a white man who had been convicted on the testimony of Chinese witnesses. The text of an 1850 law stated, “[n]o black or mulatto person, or Indian, shall be allowed to give evidence in favor of, for or against a White man.” *Id.* at 399 (citing the statute). Thus, the court had to decide whether to credit testimony of Chinese witnesses. The court acknowledged the notion that “Asiatics” likely crossed the Behring’s Straits, and cited archeologists and scientists who discussed the physical similarities between the two races. *Id.* at 401. This allowed the court to suggest that the Chinese were essentially “Indians” under the statute because even if that science was archaic, it was what legislators would have understood when they passed the statute. The court ultimately held that “[t]he use of these terms [‘Black or Mulatto person, or Indian’ in the statute] must, by every sound rule of construction, exclude every one who is not of white blood.” *Id.* at 403.

24. *Id.* at 404–05 (“The anomalous spectacle of a distinct people . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference”); *see also* *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.”).



corpus petitions<sup>25</sup> and fighting for birthright citizenship.<sup>26</sup> In the 1920s, some Asian Americans also sought to naturalize as U.S. citizens hoping that naturalization would bring attendant rights and protections.<sup>27</sup> With naturalization limited to “free white persons,”<sup>28</sup> a series of litigation called “the naturalization cases” arose when plaintiffs brought suit challenging Congress’s restriction of naturalization.<sup>29</sup> As Law Professor Ian Haney López wrote, these naturalization cases brought litigating the definition of whiteness to the forefront because “being a ‘white person’ was a condition for acquiring citizenship” and thus, “the courts were responsible for deciding not only who was [w]hite, but *why* someone was [w]hite.”<sup>30</sup> These cases demonstrate the important ways in which the courts legally constructed an Asian American “race” by relying on the science of the time, common knowledge, and a performative standard of assimilation.<sup>31</sup> Engaging with the logic and language of the opinions in the naturalization cases demonstrate historical conceptions of racial identity and the role of the court in establishing these identities.

One of the core naturalization cases, *Ozawa v. United States*, made its way to the Supreme Court in 1922 when Takao Ozawa sought to naturalize as a U.S. citizen.<sup>32</sup> Born in Japan in 1875, Ozawa attended U.C. Berkeley and had made a life for himself in the United States.<sup>33</sup>

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25. See Frank H. Wu, *From Black to White and Back Again, White by Law: The Legal Construction of Whiteness*, 3 ASIAN L.J. 185, 205 (1996) (book review) [hereinafter Wu, *From Black to White*] (citing Christian G. Fritz, *A Nineteenth Century “Habeas Corpus Mill”: The Chinese Before the Federal Courts in California*, in 1 ASIAN AMERICANS AND THE LAW: CHINESE IMMIGRANTS AND AMERICAN LAW 55 (Charles McClain ed., 1994)) (describing how habeas petitions were brought by Chinese immigrants seeking to be allowed to disembark from ships in San Francisco harbor).

26. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (recognizing birthright citizenship for children born in the United States to Chinese parents); see also *Tape v. Hurley*, 6 P. 129 (Cal. 1885) (striking down Chinese exclusion from public schools).

27. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 56–57 (1996).

28. After ratification of the Constitution, Congress limited naturalization in 1790 to “any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years.” Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795).

29. See *id.*

30. HANEY LÓPEZ, *supra* note 27, at 1–2.

31. See discussion *infra* Section I.B.

32. 260 U.S. 178 (1922).

33. HANEY LÓPEZ, *supra* note 27, at 56.

In his case, Ozawa drew on “biological, social, and performative conceptions of race” to assert “that he was white.”<sup>34</sup> One of the ways that he argued his whiteness was by attempting to show that he had assimilated to U.S. culture.<sup>35</sup> In addition, quoting anthropologists who had previously written about the whiteness of Japanese skin, he argued that his skin color actually was “white.”<sup>36</sup> Lastly, in the alternative, he sought to distinguish the Japanese race from that of the Chinese race, whom he argued had a specific Exclusion Act passed against them.<sup>37</sup>

The Court rejected Ozawa’s argument that the color of his skin made him white.<sup>38</sup> Alluding to “numerous scientific authorities” that it did not cite, the Court held that the phrase “white person” was synonymous with “a person of the Caucasian race.”<sup>39</sup> As Ozawa was deemed “clearly of a race which is not Caucasian,” he thus would not be eligible for naturalization through the Court’s “gradual process of judicial inclusion and exclusion.”<sup>40</sup> Thus, *Ozawa* held that people of Japanese descent could not naturalize as citizens due to their non-whiteness.<sup>41</sup>

In 1923, a mere three months after its decision in *Ozawa*, the Supreme Court rejected the scientific connection that equated Caucasian with “white” for the purposes of the naturalization

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34. Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 635 (2009).

35. The factors Ozawa listed in support of his assimilation were: 1) not reporting his name, marriage, or names of his children to the Japanese Consulate; 2) not connecting to Japanese churches, schools, or organizations; 3) deciding to send his children to an American church and a American school; 4) using English most of the time at home and not teaching his children Japanese; 5) choosing to attend American schools for 11 years; 6) living in the United States for 28 years; and 7) choosing a U.S.-educated woman rather than a Japanese-educated woman for his wife. *See id.* at 649 (quoting Brief of Appellant, *Ozawa v. United States*, 260 U.S. 178 (1922)); *see also* HANEY LÓPEZ, *supra* note 27, at 56–57.

36. *See* HANEY LÓPEZ, *supra* note 27, at 57 (listing some of the descriptors used by anthropologists: “[I]n Japan the uncovered parts of the body are also white”; ‘the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which whites assume as their own privilege’; and ‘in the typical Japanese city of Kyoto, those not exposed to the heat of the summer are particularly white-skinned’”).

37. *See* Carbado, *supra* note 34, at 661.

38. *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (“[T]o adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.”).

39. *Id.* at 198.

40. *Id.* (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878)).

41. *See id.* at 198; *cf.* Carbado, *supra* note 34, at 634 (“[I]n the context of Japanese American internment, people of Japanese ancestry became in life what the Supreme Court in effect rendered them in law — irreducibly foreign.”).

statute.<sup>42</sup> The issue that propelled *United States v. Thind* to the Court stemmed from anthropologists' classification of Asian Indians as "Caucasian."<sup>43</sup> The Court abandoned the scientific test from *Ozawa* because of the visual perception of the difference between "blond Scandinavian[s]" and "brown Hindu[s]."<sup>44</sup> In this case, months after applying the scientific test in *Ozawa*, the Court rejected scientific classifications and instead relied on a "common knowledge test."<sup>45</sup> As a result, not only did naturalization become impossible for Asian Indians after *Thind*, but the United States also began a campaign of denaturalizing citizens of Asian Indian descent.<sup>46</sup>

These litigation attempts highlight how the Supreme Court reified a U.S. identity synonymous with whiteness.<sup>47</sup> This not only established unsurpassable barriers to naturalization, but also placed additional burdens on Asian immigrants to engage in a performative practice of assimilation to demonstrate their "American-ness." Law Professor, and current president of Queens College, Frank H. Wu raised important questions about these cases: "What if *Ozawa* and *Thind* had held the other way?" and "what if the assimilated nature of *Ozawa* the man . . . were the crucial factor in the decision?"<sup>48</sup>

A study by Law Professor John Tehranian of the 15 naturalization cases to follow *Ozawa* and *Thind* proposes an answer to Wu's questions.<sup>49</sup> Tehranian posited that instead of merely tossing out a

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42. See *United States v. Thind*, 261 U.S. 204, 208 (1923).

43. See HANEY LÓPEZ, *supra* note 27, at 61.

44. *Thind*, 261 U.S. at 209 ("It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . .").

45. See HANEY LÓPEZ, *supra* note 27, at 56, 64 ("*Thind* ended the reign of the term 'Caucasian.' With this decision, the use of scientific evidence as an arbiter of race ceased in the racial prerequisite cases. In its place, the Court elevated common knowledge . . ."); see also *Thind*, 261 U.S. at 214–15 ("[T]he words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood.").

46. After *Thind*, the federal government denaturalized at least 65 naturalized citizens between 1923–1927. HANEY LÓPEZ, *supra* note 27, at 64. In a particularly horrific consequence, a man named Vaisho Das Bagai, committed suicide writing in his note, "But now they come to me and say, I am no longer an American citizen . . . . What have I made of myself and my children? We cannot exercise our rights, we cannot leave this country." *Id.* at 64–65.

47. See *id.* at 61.

48. See Wu, *From Black to White*, *supra* note 25, at 203.

49. John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000). These cases

scientific standard for a common knowledge test, the courts advanced a theory of performative assimilation as a prerequisite to naturalization.<sup>50</sup> By looking at subsequent cases dealing with races such as Arab and Armenian immigrants, Tehranian contended that a close textual reading shows that the Court allowed a test that placed the very potential to assimilate on trial.<sup>51</sup> Law Professor Sherally Munshi argued that *Thind* and a subsequent denaturalization case in the wake of *Thind* established a demand of visual conformity to the average *white* U.S. citizen.<sup>52</sup> Thus, the judicial branch was not only responsible for entrenching the notion that Asian Americans were foreign, but also legally constructing racial categories and boundaries based on performative notions of whiteness and assimilation. In this way, a set of “races” were subjected to a standard where assimilation into U.S. culture was viewed as a prerequisite to naturalization.

### B. Alien Land Laws and Internment

The Japanese immigrated to the United States under different circumstances than the Chinese and with different educational backgrounds; however, the pre-existing anti-Chinese sentiment was easily transferred to these immigrants.<sup>53</sup> These new immigrant farmworkers soon began competing with white landowners<sup>54</sup> culminating in the passage of the 1913 California Alien Land Law

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dealt with other minority groups that did not fall neatly into categorization, such as Arabs and Armenians.

50. See generally Tehranian, *supra* note 49.

51. See *id.* at 820–21 (“Successful litigants demonstrated evidence of whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping.”).

52. Sherally Munshi, “*You Will See My Family Become So American*”: *Toward a Minor Comparativism*, 63 AM. J. COMPAR. L. 655, 675–76 (2015).

53. See Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 46 (1998) (discussing the ways in which Japanese immigrants were initially clumped together with Chinese immigrants in the popular imagination). Although Chinese immigrant labor was viewed as a yellow invasion, China itself was not perceived to be a strategic threat. See *id.* at 46. In contrast, Japan had a growing industrial strength and imperial military goals which was more worrisome. See *id.* at 47 n.32 (“The sweeping Japanese victories in the Russo-Japanese War strongly reinforced yellow peril propaganda, inspiring rumors in the United States that resident Japanese were spies and soldiers in disguise, representing the first wave of a ‘peaceful invasion’ which threatened to overrun the country.” (quoting JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 25–27 (1968))).

54. See *id.* at 54–55 (discussing the Alien Land Laws arising from a context where Japanese immigrants began to challenge California farm owners).

that “barred ‘aliens ineligible to citizenship’ from owning a fee simple absolute interest in agricultural property or from entering into leases for such land longer than three years.”<sup>55</sup> Subsequently, the 1920 amendment expanded the types of land unavailable to aliens.<sup>56</sup> In 1923, these statutes received the constitutional stamp of approval from the U.S. Supreme Court in *Webb v. O’Brien*<sup>57</sup> and *Frick v. Webb*.<sup>58</sup> Law Professor Keith Aoki argued that finding Supreme Court support for these restrictive laws at the height of the laissez-faire right to contract era suggests attitudes about nation and race “ideologically affirmed the ‘foreignness,’ and hence, ‘disloyalty’ of the Issei and their American citizen children.”<sup>59</sup> This “symbolic dispossession” of Japanese Americans from the land paved the way for their internment.<sup>60</sup> The Alien Land Laws “transferr[ed] and generaliz[ed] anti-Chinese sentiments to all Asian immigrants” and “provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066.”<sup>61</sup> Thus, mapping anti-Chinese sentiment onto anti-Japanese fervor leveraged existing anti-Asian stereotypes to seed the ground for internment and the deprivation of civil liberties of Japanese Americans.

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55. *Id.* at 55 (citations omitted).

56. *See id.* at 57. This “barred guardianships and trusteeships in the name of ‘aliens ineligible to citizenship’ who would be prohibited from owning such properties, barred all leases of agricultural land, barred corporations with a majority of shareholders who were ‘aliens ineligible to citizenship’ from owning agricultural land.” *Id.* Thus, Japanese Americans found themselves barred from owning land accessible to their white counterparts.

57. 263 U.S. 313, 326 (1923) (holding that “[n]o constitutional right of the alien was infringed”).

58. 263 U.S. 326, 334 (1923) (holding that the act did not violate the Fourteenth Amendment).

59. Aoki, *supra* note 53, at 66 (suggesting that *Lochner* era substantive due process contravenes such a restraint on property rights). The *Issei* were the immigrant generation of Japanese to the United States. *See Topics: Issei*, DENSHO DIGIT. REPOSITORY, <https://ddr.densho.org/browse/topics/43/> [<https://perma.cc/D3SZ-7Z78>] (last visited Sept. 13, 2021).

60. *See Aoki, supra* note 53, at 67–68 (“This symbolic dispossession and material deprivation laid the ideological, legal and cultural foundation for the mass physical dispossession, evacuation and internment of Japanese and Japanese Americans on the West Coast in 1942.”).

61. *See id.* at 68 (“The inescapable lesson to be drawn is that the denial of basic rights such as due process and property ownership of non-citizens may be a step toward the cavalier denial of civil rights to citizens.”).

On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066.<sup>62</sup> What followed was over 100,000 people of Japanese ancestry, nearly 70,000 of whom were U.S. citizens, were detained — first in “assembly centers” and then in long-term camps.<sup>63</sup> In many ways, the language of the Order paralleled historical statutory exclusions of Chinese Americans and demonstrated the limits of naturalization — naturalization was not enough to protect the civil liberties of these citizens.<sup>64</sup>

Before forced relocation, many Japanese Americans sold their businesses and homes, sometimes at five or ten cents on the dollar; others lost their businesses and homes entirely without remuneration.<sup>65</sup> While difficult to estimate, Joan Bernstein, the Chair of the Commission on Wartime Relocation and Internment of Civilians, estimated that uncompensated losses reached between \$2 billion and \$6.2 billion when adjusted for inflation.<sup>66</sup> In addition to these stark economic losses, the conditions of the camps were appalling. Psychologists have described how camp conditions such as communal bathrooms, harsh ecological conditions, and entire families living in single rooms created significant psychosocial stressors.<sup>67</sup> The

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62. See Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

63. See *id.* In comparison with the Chinese Exclusion Act, Executive Order 9,066 actually ordered the “exclusion” of persons from prohibited military zones. See *id.*; see also *Assembly Centers*, DENSHO ENCYCLOPEDIA, [https://encyclopedia.densho.org/Assembly\\_centers/](https://encyclopedia.densho.org/Assembly_centers/) (last visited Sept. 15, 2021) (“‘Assembly centers’ were makeshift concentration camps providing temporary housing for about 92,000 people of Japanese ancestry uprooted under Executive Order 9066.”).

64. See *id.*; see also *Ishida v. United States*, 59 F.3d 1224, 1226 (Fed. Cir. 1995) (“[O]nly individuals of Japanese ancestry actually became the object of mass exclusion, relocation, and detention actions, despite the fact that no documented acts of espionage, sabotage or fifth column activity were shown to have been committed by any identifiable American citizen of Japanese ancestry or permanent resident Japanese alien on the West Coast. No mass exclusion, relocation or detention was ordered against American citizens or resident aliens of German or Italian descent.” (citation omitted)).

65. Natasha Varner, *Sold, Damaged, Stolen, Gone: Japanese American Property Loss during WWII*, DENSHO BLOG (Apr. 4, 2017), <https://densho.org/sold-damaged-stolen-gone-japanese-american-property-loss-wwii/> [<https://perma.cc/2WTB-XYDH>].

66. See Geoffrey S. Smith, *Doing Justice: Relocation and Equity in Public Policy*, 6 PUB. HISTORIAN 83, 95 (1984) (reviewing COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1983) and PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1993)).

67. See Donna K. Nagata, Jacqueline H. J. Kim & Kaidi Wu, *The Japanese American Wartime Incarceration: Examining the Scope of Racial Trauma*, 74 AM. PSYCH. 36, 39 (2019) (noting that evidence points to a historical trauma passed onto future generations).

long-term effects of the internment were “an accelerated loss of Japanese language and cultural practices.”<sup>68</sup>

*Korematsu v. United States* remains the most well-known case on internment.<sup>69</sup> In 1944, Fred T. Korematsu challenged his conviction for remaining in an exclusion zone and refusing to go to a camp.<sup>70</sup> Upholding his conviction, the Supreme Court held that the government’s interest in national security justified the deprivation of his liberty.<sup>71</sup> This holding was later discredited on many grounds, one of which was proof that then-Solicitor General Fahy suppressed reports that there was no indication of spying by Japanese Americans and reports that indicated racial animus drove the decision.<sup>72</sup> Although *Korematsu’s* inclusion in the Supreme Court’s anti-canon<sup>73</sup> seems almost universally agreed upon, the actual implications on civil rights jurisprudence remain more difficult to sift through.<sup>74</sup>

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68. *See id.* at 42 (“This diminishment of ethnic heritage had important psychological consequences for the [third generation Japanese Americans] who described themselves as having ‘inherited’ the need to become ‘super’ American and prove their worth to society.”).

69. 323 U.S. 214 (1944). It is worth noting that there are three other cases often discussed in pieces with a more in-depth examination of the internment. *See Ex Parte Endo*, 323 U.S. 283 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

70. *See Korematsu*, 323 U.S. at 215.

71. *See id.* at 218.

72. Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T JUST. (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/VSC9-F3CW].

73. *See* John Ip, *The Travel Ban, Judicial Deference, and the Legacy of Korematsu*, 63 HOW. L.J. 153, 173 (2020) (discussing that the modern consensus is that “*Korematsu* amounted to a shameful failure on the part of the Supreme Court” and citing scholars that refer to it as “[lying] overruled in the court of history,” “a historical curiosity, a relic of an era in which the country collectively lost its head to the toxic combination of war hysteria, xenophobia, and racism,” “defunct,” and “deeply discredited”).

74. As seen in the recent discussion in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Justices do not completely agree on the extent to which *Korematsu* is controlling or even related to the Muslim Ban. Justice Sotomayor argued that presidential statements about the assimilability of Muslims are directly parallel to *Korematsu* where the Court gave “a pass [to] an odious, gravely injurious racial classification’ authorized by an executive order.” *Id.* at 2447 (Sotomayor, J., dissenting) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Ginsburg, J., dissenting)); *cf. id.* at 2423 (majority opinion) (writing that *Korematsu* is an “inapt” comparison because of the narrow holding that the forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of presidential authority).

The internment tells a cautionary tale, an example of how characterizing Asian Americans as perpetually foreign can be weaponized into unfounded attacks on loyalty that result in the deprivation of civil liberties during wartime. It also demonstrates how earlier anti-Chinese sentiment about an inability to adopt U.S. culture was easily transferred to another East Asian group. These Japanese descendants faced nativism in California, which was deemed a “minority problem” that needed to be “solved” through assimilation.<sup>75</sup> The fact that the law gave voice to this stereotype of alienness demonstrates how the Asian American identity has been legally constructed in tandem with foreignness. Asian Americans cannot avoid being perceived to be perpetually foreign — no matter how long one’s family has been in the United States.<sup>76</sup>

## II. ASSIMILATION, COVERING, AND HONORARY WHITENESS

Part II investigates how Asian Americans responded to racism by seeking to assimilate further into the tapestry of the United States. Many of these assimilation attempts were in response to the xenophobia outlined in Part I.<sup>77</sup> The opportunity to *successfully* assimilate may have been allowed and encouraged out of an interest convergence between Asian Americans and white Americans during the civil rights movement.<sup>78</sup> However, allowed or hard won, there now exists some Asian Americans who are “honorary whites” in all but the color of their skin.<sup>79</sup>

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75. Dillon S. Myer, Dir., War Relocation Auth., *The Facts About the War Relocation Authority* 11 (Jan. 21, 1944), <https://www.trumanlibrary.gov/library/research-files/speech-facts-about-war-relocation-authority-dillon-s-myer-meeting-los?documentid=NA&pagenumber=1> [<https://perma.cc/6Y38-W596>]. The Director of the War Relocation Authority described the relocation of thousands of “evacuees” to “normal American communities” as the accomplishment that he took “the greatest satisfaction” because it allowed “moving toward the liquidation of a most difficult minority problem.” *Id.*; see also John Hayakawa Torok, *Asian American Jurisprudence: On Curriculum*, 2005 MICH. ST. L. REV. 635, 680 (2005) (“The War Relocation Authority sought the dispersal of interned Japanese Americans to promote their assimilation.”).

76. This came to the forefront of recent national conversations on the COVID-19 pandemic. Xenophobic fearmongering resulted in many Asian Americans fearing anti-Asian bias crimes and attacks. See Matt Stevens, *How Asian-American Leaders Are Grappling with Xenophobia Amid Coronavirus*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/03/29/us/politics/coronavirus-asian-americans.html> [<https://perma.cc/N6KL-TUCS>].

77. See Nagata et al., *supra* note 67 (discussing the loss of Japanese culture as a result of the Japanese internment).

78. See discussion *infra* Sections II.A–B.

79. See discussion *infra* Sections II.A–B.



### A. Assimilation and the Model Minority Myth

In 1952, the McCarran-Walter Act ushered in an era of colorblind immigration by removing overt racial categorization and replacing them with the National Origins Quota System.<sup>80</sup> However, the Act continued to allow for discrimination against Asians by codifying disproportionately smaller caps on immigrants from Asian nations.<sup>81</sup> Furthermore, it severely limited Asian immigration to those with certain education levels, skills, and professions.<sup>82</sup> As a result, this new era saw the immigration of a more highly educated and wealthier class of immigrants paired with a new set of assimilation demands to match.<sup>83</sup> While assimilation provided Asian Americans a chance to enter elite society as doctors, lawyers, and professionals, it was predicated on downplaying mother tongues and cultural traditions.<sup>84</sup>

The existence of East Asians with professional degrees and economic stability gave rise to Asian Americans being called the “model minority.”<sup>85</sup> In one of the earliest characterizations of Asian Americans as the model minority, a 1966 issue of the *U.S. News & World Report* described Chinese Americans as “an important racial minority pulling itself up from hardship and discrimination to become a model of self-respect and achievement.”<sup>86</sup> Another article from that

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80. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101–1537 (2021)).

81. See *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP’T STATE, <https://history.state.gov/milestones/1945-1952/immigration-act> [<https://perma.cc/53F6-T97W>] (last visited Aug. 24, 2021); see also Munshi, *supra* note 52, at 715–16.

82. See Munshi, *supra* note 52, at 715–16; see also Nary Kim, *Too Smart For His Own Good? The Devolution of a “Model” Asian American Student*, 20 ASIAN AM. L.J. 83, 90 (2013) (“[U]nder the newly devised immigration policy, Asians eligible for entering the United States were educated and affluent ‘skilled workers,’ such as graduate students, professionals and technicians.”).

83. See Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 11 (2004) (“[R]efraining from identifiably ‘Asian’ activities (such as socializing mostly with other Asians, for instance), and engaging instead in activities and attitudes that are usually associated with whites (such as being ‘wary of minority militants’)”).

84. See discussion *infra* Section II.B.

85. See William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES (Jan. 9, 1966), <https://www.nytimes.com/1966/01/09/archives/success-story-japaneseamerican-style-success-story-japaneseamerican.html> [<https://perma.cc/TWJ6-Z63D>] (“By any criterion of good citizenship that we choose, the Japanese Americans are better than any other group in our society, including native-born whites. They have established this remarkable record, moreover, by their own almost totally unaided effort.”); see also Chang, *supra* note 8, at 1259.

86. See *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REP., Dec. 26, 1966, at 6. In a prelude to the ways this myth would be used to compare Asian Americans to other BIPOC people, the article said, “[a]t a time when

same year described the industriousness of Japanese Americans in the face of adversity and racism and the benefits of their strong familial ties.<sup>87</sup>

However, the model minority is a myth because, with many early conceptions of Asian Americans, the facts simply did not reflect the reality — for example, claims of higher median family income compared white families with single earners to multigenerational Asian American households with multiple earners.<sup>88</sup> Furthermore, viewing Asian Americans as having “made it” overlooks important nuanced distinctions between East Asians whose families have been in the United States for generations and Southeast Asian immigrants.<sup>89</sup> Thus, the general conception of Asian Americans as a model minority has become mythologized to the point of inaccuracy.

The existence of the model minority myth harms Asian Americans because they are not perceived to need the same kinds of social services, and their personalities are flattened into two-dimensional caricatures.<sup>90</sup> On top of this, there is dual harm where the model minority myth serves to deny the existence of racism towards and oppression of Asian Americans while legitimizing the oppression of other BIPOC communities, particularly Black communities.<sup>91</sup>

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Americans are awash in worry over the plight of racial minorities — [o]ne such minority, the nation’s 300,000 Chinese-Americans, is winning wealth and respect by dint of its own hard work . . . . Still being taught in Chinatown is the old idea that people should depend on their own efforts — not a welfare check — in order to reach American’s ‘promised land.’” *Id.*; see also Chang, *supra* note 8, at 1259.

87. See Petersen, *supra* note 85, at 21 (“Often unable to marry for many years, they developed a family life both strong and flexible enough to help their children across a wide cultural gap. Denied access to many urban jobs, both white-collar and manual, they undertook menial tasks with [ ] perseverance . . .”).

88. See Chang, *supra* note 8, at 1262 (comparing national income statistics may also be misleading because Asian Americans are more concentrated in urban centers with both higher incomes and higher costs of living); cf. Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth,”* 100 NW. U. L. REV. 331, 333 (2006) (“In very general terms, we found that the model minority stereotype is not correlated with hostility to Asians . . .”).

89. For example, viewing Asian Americans as a model minority diverts attention from the poverty rates of newly arrived Asian immigrants and the English language instruction and social service needs of these immigrants. See Chang, *supra* note 8, at 1261.

90. See Z.W. Julius Chen, *Diverse Among Themselves: Critiquing Asian Americans’ Supposed Gains Under Percentage Plans*, 14 UCLA ASIAN PAC. AM. L.J. 86, 104 (2009) (“Even those Asian Americans who are objectively disadvantaged or most in need of assistance are swept up by the model minority myth, leading to an inability to access necessary services, programs, and assistance.”).

91. See Chang, *supra* note 8, at 1264.

In an example of interest convergence between Asian Americans and white Americans, the model minority myth exists and is promoted at the expense of Black Americans. It exists and allows for less openly racist treatment of Asian Americans but also the continued degradation of Black Americans.<sup>92</sup> The model minority myth allowed for dominant white culture to romanticize Asian Americans pulling themselves up by their bootstraps without a “welfare handout”<sup>93</sup> and, at the same time, critique other BIPOC communities for not doing the same. This was an evolution of the ways in which Black Americans and Asian Americans have been traditionally pitted against each other, going back as far as the 1800s.<sup>94</sup>

### B. Covering

Law Professor Kenji Yoshino’s scholarship on covering provides an intellectual structure for understanding how Asian Americans may “cover” to try and fit better into white U.S. culture. Covering involves downplaying marginalized aspects of one’s identity to be

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92. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); see also Harvey Gee, *Asian Americans and the Law: Sharing a Progressive Civil Rights Agenda During Uncertain Times*, 10 DEPAUL J. FOR SOC. JUST., Summer 2017, at 9; Kat Chow, ‘Model Minority’ Myth Again Used as a Racial Wedge Between Asians and Blacks, NPR (Apr. 19, 2017, 8:32 AM), <https://www.npr.org/sections/codeswitch/2017/04/19/524571669/model-minority-myth-again-used-as-a-racial-wedge-between-asians-and-blacks> [https://perma.cc/28EX-8L46]; Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them> [https://perma.cc/SA6F-AMMJ] (“The image of the hard-working Asian became an extremely convenient way to deny the demands of African Americans . . . If Asians could find success within the system, politicians asked, why couldn’t African Americans?”).

93. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1563 (1996) (book review) (“Racial politics has so dominated welfare reform efforts that it is commonplace to observe that ‘welfare’ has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black ‘welfare queen’ or profligate teenager who becomes pregnant at taxpayers’ expense to fatten her welfare check.”).

94. In 1870, Senator Sumner attempted to remove “white” from naturalization laws to extend naturalization to African Americans however “[i]t was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship.” See *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (Case No. 104).

viewed as more mainstream.<sup>95</sup> This covering may allow the individual to avoid the harshest forms of discrimination.<sup>96</sup> Covering is different from “passing”<sup>97</sup> because it is an avenue that a person of a marginalized identity can take to be viewed more favorably by the majority. On the other hand, passing depends on physical appearance and cannot occur when a group has physiological traits that render passing impossible.<sup>98</sup> For many Asian Americans, passing is not available because their faces will always be viewed as “Asian;” however, covering can downplay aspects of their identity, so the “Asian-ness” is not the main impression.<sup>99</sup> Yoshino argues that, in theory, people no longer have to be a particular identity to obtain success but that everyone must still cover marginalized identities when society is dominated by white supremacy.<sup>100</sup>

Yoshino describes four axes along which people cover: appearance, affiliation, activism, and association.<sup>101</sup> Covering along the appearance axis governs how an individual presents themselves to the world.<sup>102</sup> Covering along the affiliation axis concerns the cultural institutions and groups an individual identifies with.<sup>103</sup> Covering along the activism axis describes how much individuals politicize their identity.<sup>104</sup> Finally, covering along the association axis is who an individual chooses to love, be friends with, and work alongside.<sup>105</sup>

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95. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 23 (2006) [hereinafter YOSHINO, *COVERING*].

96. *See id.* at 22.

97. A concept well-developed in sociological literature, “[p]assing is the phenomenon whereby nonwhites present themselves as white . . .” Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 *UCLA L. REV.* 282, 284 (2017). The notion grew out of the racial hierarchy in the United States, where passing could be used to “escape slavery, circumvent racism, access new worlds of economic and employment opportunity, shop and dine, investigate lynching, and, for many passers, to seek liberation and ensure survival.” *Id.* at 288–89 (citations omitted).

98. *See* YOSHINO, *COVERING*, *supra* note 95, at 79. Yoshino writes about the ways in which LGBTQ people and people of color cover aspects of their identity to live in the mainstream United States, which is white and straight. *See id.*

99. *See* Shin, *supra* note 83, at 1 (“Asian Americans cannot convincingly pretend to be white and can only attempt to suppress ethnic behaviors.”).

100. *See* YOSHINO, *COVERING*, *supra* note 95, at 21–22 (“We are at a transitional moment in how Americans discriminate . . . [I]ndividuals no longer need[ ] to be white, male, straight, Protestant, and able-bodied; they need[ ] only to *act* white, male straight, Protestant, and able-bodied.”).

101. *See id.* at 79.

102. *See id.*

103. *See id.* at 79, 82.

104. *See id.* at 79, 85.

105. *See id.* at 79, 90.

For Asian Americans, covering demands can also be found in language. The current Title VII jurisprudence that draws a bright line between immutable and mutable characteristics shows this phenomenon.<sup>106</sup> An Asian person cannot, under the law, be discriminated against based on the color of her skin because the color of one's skin is deemed immutable.<sup>107</sup> However, an Asian person's accent and cultural customs would be seen as "changeable, socially created, and voluntarily adopted" and, thus, not protected to the same extent.<sup>108</sup>

Covering also explains why some Asian Americans who are further removed from the immigrant experience "feel pressure to distance themselves from immigrants."<sup>109</sup> For Asian Americans, the desire to cover along the appearance axis can manifest in clothing decisions but may also be seen in recent plastic surgery trends.<sup>110</sup> Along the affiliation axis, there are groups, clubs, and religious affiliations that link Asian Americans to their countries of origin. For Asian Americans, even identifying as a person of color can be perceived as a political statement, or participating in protests, visibly as an Asian

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106. Of note, in 2013, the Equal Employment Opportunity Commission (EEOC) published data about Asian American Pacific Islanders (AAPIs). It found that out of 32,360 total receipts alleging discriminated based on race, 4.2% were from AAPIs, which is less than the approximately 5.6% of AAPIs reported on the 2010 Census. See UNITED STATES CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/decade.html> [<https://perma.cc/Z9AM-A8SG>] (last visited Aug. 26, 2021); see also *What You Should Know About the EEOC and the Asian American and Pacific Islander Communities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-asian-american-and-pacific-islander-communities> [<https://perma.cc/6B7Z-NBPE>] (last visited Aug. 26, 2021).

107. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 847 (1997).

108. See *id.*

109. Harvey Gee, *Asian Americans, Critical Race Theory, and the End of the Model Minority Myth*, 19 TEMP. POL. & C.R. L. REV. 149, 175 (2009) (book review) ("This desire by later-generation Asian Americans to disassociate themselves from new Asian immigrants, the authors claim, seems to be associated with a desire to 'Americanize' themselves in hope of preventing racial discrimination." (citing ROSALIND S. CHOU & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* 38 (2008))).

110. See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 336–37 n.207 (1997) (discussing Western beauty standards and trends to make eyes rounder and noses less flat); see also Gee, *supra* note 109, at 178 (discussing how Asian Americans attempt to change their Asian names and style of dress to "adopt white ways of thinking, understanding, and acting in the process"). "Later-generation Asian Americans are so concerned with appearing American that they may also work hard to change their physical appearance and emotional patterns so as to appear 'less Asian' to whites." See *id.* at 175.

American, can be perceived as rocking the boat and failing to cover.<sup>111</sup> Takao Ozawa pursued the “American Dream” by claiming a white appearance and forsaking affiliations with Japanese cultural and religious groups and institutions.<sup>112</sup> In this sense, he covered aspects of his appearance, affiliation, and association with all things Japanese in the hopes that he might win the privileges of naturalization.<sup>113</sup>

So, as the argument goes, Asian Americans can be included in our pluralistic society as long as they behave as insiders, as white people.<sup>114</sup> Unfortunately, this often comes with being pitted against Black people in the United States. The argument proceeds by saying that if Asian Americans cover their Asian-ness, they may invite people in power and decisionmakers to forget that they are perpetual foreigners and finally be accepted as full U.S. citizens. However, these covering demands have since become internalized and, thus, are much harder to reach by the law and inadequately addressed by modern civil rights statutes.

### C. The Choice for a New Generation of Assimilated Asian Americans

It is highly unlikely that an Asian American today would bring a lawsuit claiming to be white because the United States has moved past facially discriminatory immigration laws. There are also more Asian Americans born in the United States who benefit greatly from the assimilation decisions of their family, their attendant wealth, and educational privilege. However, for these assimilated Asian Americans, there is no avoiding the phenotypical traits that render passing impossible.<sup>115</sup> As a result, many have internalized these demands to cover their identity, showing how white supremacy colonizes the mind even after a facially discriminatory policy is long gone.<sup>116</sup> These Asian Americans are faced with a choice about how to

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111. See Sudhin Thanawala, *Asian Americans See Generational Split on Confronting Racism*, ABC NEWS (May 2, 2021, 9:30 PM), <https://abc3340.com/news/nation-world/asian-americans-see-generational-split-on-confronting-racism> [<https://perma.cc/2N4U-BEKT>] (“Many young activists say their parents and other elders are saddened by the [anti-Asian] violence but question the value of protests or worry about their consequences.”).

112. See Carbado, *supra* note 34, at 635.

113. HANEY LÓPEZ, *supra* note 27, at 56–57 (listing the factors used by Ozawa as he sought to demonstrate his whiteness in contrast to his Japanese heritage).

114. See YOSHINO, COVERING, *supra* note 95, at 22.

115. See discussion *supra* Section II.B.

116. See discussion *intra* Part III.

understand the legacy of discrimination in the United States — should they continue down a path of covering with the hope that honorary whiteness might protect them, or should they embrace racial solidarity to challenge white supremacy?

### III. WILL COVERING FULLY ADDRESS THE DISCRIMINATION ASIAN AMERICANS FACE?

For non-first-generation Asian Americans whose predecessors made the decision to assimilate for them, they may not even know what they are covering. For those raised speaking English in the home, those not teased for bringing smelly food to school, and those with English-sounding names, we no longer need to always make a conscious decision to cover aspects of our identity.<sup>117</sup> However, covering demands have not ended and have evolved in significant ways, still worth investigating.<sup>118</sup> With the rise of COVID-19, the United States has seen a rise in anti-Asian bias incidents and hate crimes.<sup>119</sup> Asian Americans have been reminded once more that our acceptance is conditional on geopolitics and the perception that we do not cause trouble.<sup>120</sup> As one of the fastest-growing minorities in the United States,<sup>121</sup> we have a unique opportunity to secure a sense of

117. See Eddie Lin, *Being Bullied About My Lunch Made Me a Better Person*, VICE (Oct. 12, 2015, 3:00 PM), <https://www.vice.com/en/article/xy74g7/being-bullied-about-my-lunch-made-me-a-better-person> [https://perma.cc/SJU3-L8D7] (“Mama was a new immigrant and clueless of the social pitfalls in revealing the wrong lunch contents at the cafeteria of a mainly white school in the Los Angeles suburbs.”).

118. One way this plays out on the level of microaggressions is around naming conventions where professors are unwilling or unable to pronounce their students’ names and thus ask them to choose new names. See Derrick Bryson Taylor & Christina Morales, *Professor Who Asked Student to ‘Anglicize’ Her Name Is Put on Leave*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/us/phuc-bui-diem-nguyen-laney-college.html> [https://perma.cc/WK6T-SYJ7] (discussing a student who wanted to begin using her legal name after using an anglicized nickname for years and how names are core to one’s identity, but “unless you have an American- or English-sounding name, you are a foreigner, and that somehow you have to prove your worth in the United States”).

119. See, e.g., Cathy Park Hong, *The Slur I Never Expected to Hear in 2020*, N.Y. TIMES MAG. (Apr. 16, 2020), <https://www.nytimes.com/2020/04/12/magazine/asian-american-discrimination-coronavirus.html> [https://perma.cc/9RVP-BHMD].

120. See Jia Lynn Yang, *Who Belongs in America?*, N.Y. TIMES (Apr. 25, 2020), <https://www.nytimes.com/2020/04/25/us/coronavirus-immigration-china-book-yang.html> [https://perma.cc/5WYR-WJAE]. Many Asian Americans are confronting an uncomfortable truth about how our faces “can still mark [us] as foreign” no matter how long our families have been in this country or how well we “fit in.” See *id.*

121. See Abby Budiman, *Asian Americans Are the Fastest-Growing Racial or Ethnic Group in the U.S. Electorate*, PEW RSCH. CTR. (May 7, 2020), <https://www.pewresearch.org/fact-tank/2020/05/07/asian-americans-are-the-fastest->

belonging by defining who we are and what we stand for separate from the trope of the perpetual foreigner. However, the path is not clear because the effectiveness of covering is still hotly debated.<sup>122</sup>

### A. More Effective Covering and Assimilation

Some Asian Americans argue that the solution to discrimination is to work harder at covering their identity, which will thereby accelerate their assimilation into honorary whiteness. This assimilationist view defines “success” as finally extending white, colorblind individualism to Asian Americans. This is a view that finds credence and support at the U.S. Supreme Court.<sup>123</sup> Spelled out, it says that Asian Americans can become honorary whites much like the Irish and Italian immigrants before them through hard work and sacrifice.<sup>124</sup> Some scholars argue this honorary whiteness status is about to happen, is happening, or has already happened.<sup>125</sup>

With the rise of anti-Asian sentiment due to the COVID-19 pandemic, Asian Americans are searching for answers.<sup>126</sup> Amongst the many calls for opposing bias and hate, some Asian Americans have argued that they should more effectively cover their Asian American identity. In one striking example, former presidential candidate and former New York City mayoral candidate Andrew

growing-racial-or-ethnic-group-in-the-u-s-electorate/ [https://perma.cc/M6NB-6FVF]; see also John Eligon, *Why the Fastest Growing Population in America Is the Least Likely to Fill Out the Census*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/14/us/asian-american-census.html> [https://perma.cc/2A2F-WUYF] (“Asian-Americans are the fastest growing population in the nation.”).

122. See Yang, *supra* note 120.

123. See *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

124. See Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOB. STUD. L. REV. 637, 641 (2015) (“Asian Americans find themselves on the threshold of becoming ‘Honorary Whites’ . . .”); see also Emily S. Zia, *What Side Are We On? A Call to Arms to the Asian American Community*, 23 ASIAN AM. L.J. 169, 188 (2016) (explaining that Asian Americans are not yet honorary whites but are in danger of becoming so).

125. See discussion *infra* Section III.B.

126. See Tiffany Hsu, *Anti-Asian Harassment Is Surging. Can Ads and Hashtags Help?*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2020/07/21/business/media/asian-american-harassment-ad-council.html> [https://perma.cc/H6LA-6BWN] (“Asian-Americans are facing a surge of harassment linked to fears about the coronavirus pandemic . . . A coalition of civil rights groups recorded more than 2,100 incidents in 15 weeks; the New York City Commission on Human Rights recently described a ‘sharp increase in instances of hostility and harassment.’”).



Yang argued for whitewashed covering as a solution to the vitriol and anti-Asian animus:

We Asian Americans need to embrace and show our American-ness in ways we never have before. We need to step up, help our neighbors, donate gear, vote, wear red white and blue, volunteer, fund aid organizations, and do everything in our power to accelerate the end of this crisis. We should show without a shadow of a doubt that we are Americans who will do our part for our country in this time of need.<sup>127</sup>

Additionally, he cited Japanese Americans who enlisted in the army at high rates as their families languished in internment camps as a decision that assisted the Japanese in being accepted after the Second World War.<sup>128</sup> Implicit in this call to serve in the military was a call to demonstrate loyalty.

This argument does not deny the racism Asian Americans experience; however, it argues that the path forward can be found in U.S. meritocracy, where academic excellence secures jobs which then bring economic security.<sup>129</sup> Nowhere can this be seen clearer than in the language of recent Supreme Court arguments on affirmative action.<sup>130</sup> In the Asian American Legal Foundation's (AALF) 2003 amicus brief in *Grutter v. Bollinger*,<sup>131</sup> the organization argued that continued affirmative action "threaten[s] . . . a century-and-a-half-long struggle [by Asian Americans] to be treated as individuals."<sup>132</sup> It argued further that a strict application of the Fourteenth Amendment

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127. Andrew Yang, Opinion, *We Asian Americans Are Not the Virus, but We Can Be Part of the Cure*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/opinions/2020/04/01/andrew-yang-coronavirus-discrimination/> [<https://perma.cc/BU9B-L647>].

128. *See id.* ("During World War II, Japanese Americans volunteered for military duty at the highest possible levels to demonstrate that they were Americans.").

129. *See* Yamamoto, *supra* note 107, at 822 ("Some Chinese American supporters more directly express perceptions of underlying racial-cultural differences: formal racism in the system has ended; Chinese Americans have elevated themselves as a group through ability and cultural values despite hardship . . .").

130. It appears that this remains a minority of Asian Americans. However, with the huge increase in Asian immigration, this trend might change in the coming years. *See* Kimmy Yam, *70% Of Asian Americans Support Affirmative Action. Here's Why Misconceptions Persist*, ABC NEWS (Nov. 14, 2020, 5:10 PM), <https://www.nbcnews.com/news/asian-america/70-asian-americans-support-affirmative-action-here-s-why-misconceptions-n1247806> [<https://perma.cc/Y4NX-GSBR>].

131. Brief for the Asian American Legal Foundation as Amicus Curiae Supporting Petitioners, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 152363, at \*4 [hereinafter AALF Brief].

132. *Id.*

secured the rights of the Chinese as individuals as opposed to a racial group. Citing an internment case, *Hirabayashi v. United States*,<sup>133</sup> the argument continues asserting that classifications of citizens solely on the basis of race are “by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>134</sup>

The appeal of this argument lies in its apparent simplicity: Asian Americans have fought hard not to be discriminated against and have done so as the model minority proving we can reach the same levels of success as our white counterparts. In this way, calling to be treated as “individuals” becomes coded language for calling to be afforded the same type of privilege white people benefit from. If accepting this benefit means we need to cover and step away from our outsider identity, all the better: we can finally shed notions of being the perpetual foreigner. However, this raises a critical question: does covering aspects of identity that might render a subject foreign have an attendant cost?

### B. Racial Solidarity — “We Will Not Be Used”<sup>135</sup>

In contrast to the view that Asian American success comes from more effective covering, some argue that covering entails a cost of forsaking fellow BIPOC communities. This argument suggests that Asian Americans should recognize the ways we owe our civil rights protections to the struggle of Black Americans.<sup>136</sup> In support of this, scholars describe Asian Americans as “constructive Blacks” to describe a phenomenon of Asian Americans being lumped together with other non-whites under the law.<sup>137</sup>

Critical race theorists have long acknowledged the privilege Asian Americans have been afforded but nonetheless called with a clear

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133. 320 U.S. 81, 100 (1943).

134. AALF Brief, *supra* note 131, at \*8, \*16 (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi*, 320 U.S. at 100) (internal quotations omitted)) (calling attention to historical anti-Chinese sentiment on the West Coast) (“Time and again, Chinese Americans have received equal treatment only after appealing to the federal judiciary for the protections afforded individuals by the United States Constitution.”).

135. MATSUDA, *supra* note 11, at 149.

136. Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 250 (1995) [hereinafter Wu, *Neither Black nor White*]; see also Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385 (1999).

137. See Wu, *Neither Black nor White*, *supra* note 136, at 250 (“Thus, Asian-American legal status is contingent on African-American legal status.”).

voice for Asian Americans not to be used in service of white supremacy.<sup>138</sup> This theory of racial triangulation places Asian Americans between white and Black, not quite white enough to be a citizen, but offered a “racial bribe” to accept a place slightly higher than Black Americans.<sup>139</sup> Heeding Professor Mari Matsuda’s call to “not be used,”<sup>140</sup> many Asian American scholars have argued forcefully that true liberation comes from racial solidarity with other BIPOC communities to fight white supremacy.<sup>141</sup> These scholars reject the ways in which the model minority myth has upheld white supremacy and made Asian Americans the “buffer minority.”<sup>142</sup>

This view has a clear opinion when it comes to affirmative action — Asian Americans are working against their own interests when they fight to dismantle the program.<sup>143</sup> Asian American scholars have discussed how the Supreme Court has replicated the traditional model minority myth to compare Asian Americans relative to other minorities.<sup>144</sup> Harvey Gee writes that elevating Asian Americans to honorary white status actually supports more white people admitted to prestigious universities.<sup>145</sup> Others argue that in addition to a moral imperative to support other BIPOC communities that have been targeted by racism, Asian Americans should see how affirmative action continues to benefit more recently arrived Asian immigrants and Asian Americans from other ethnicities.<sup>146</sup> In this way, covering

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138. See MATSUDA, *supra* note 11, at 149–60.

139. See Zia, *supra* note 124, at 173, 189 (referencing Claire Jean Kim’s theory of racial triangulation).

140. See *id.* at 173.

141. See *id.* at 195; see also Gee, *supra* note 92, at 5–6.

142. See Chanbonpin, *supra* note 124, at 654 (“[T]he creation of an intermediary group like ‘Honorary White’ is a hegemonic strategy; installing a buffer group between Black and White aids in the maintenance of White dominance.” (citing Eduardo Bonilla-Silva, *We are all Americans!: The Latin Americanization of Racial Stratification in the USA*, 5 RACE & SOC’Y 3, 5 (2002)) (internal citations omitted)).

143. See Chang, *supra* note 8, at 1264.

144. See Gee, *supra* note 92, at 23.

145. See *id.* at 26 (arguing honorary whiteness “obfuscates the real motive of affirmative action opponents: abolishing ‘racial preferences,’ which would maintain the status quo”).

146. See Zia, *supra* note 124, at 192; see also Abbi Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, A Diverse and Growing Population*, PEW RSCH. CTR (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/> [<https://perma.cc/7MW9-5XZQ>] (showing that comparing Chinese, Japanese, and Indians with Cambodians, Hmong, Laotians, and Filipinos shows marked differences when it comes to economic well-being and educational attainment).

induces an additional cost — acting against the best interests of Asian Americans.

Professor Wu acknowledges the “uneasy position” that Asian Americans play in affirmative action cases due to racial triangulation.<sup>147</sup> He dissects this relationship most cogently when discussing the case challenging Harvard’s admissions program.<sup>148</sup> In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,<sup>149</sup> the plaintiff altered its strategy from opposing affirmative action to arguing, instead, that affirmative action discriminates against Asian Americans.<sup>150</sup> Wu argued, citing the Harvard complaint, that the claim was a mere pretense where, after a list of grievances on behalf of Asian Americans, the prayer for relief is solely about abolishing affirmative action without even a single mention of Asian Americans.<sup>151</sup> He argues that this is evidence of the plaintiff’s true desire to abolish affirmative action rather than obtain relief for discrimination that Asian Americans may face. Plaintiffs, in this case, construe Asian Americans to be honorary whites, ironically lifting up one minority group to oppress another.<sup>152</sup> This is an unfortunate echo of the model minority myth and the pernicious way it was used to put down Black Americans during the civil rights movement.<sup>153</sup>

#### IV. A DIFFERENT PATH MUST BE POSSIBLE

In addition to affirmative action, demands for Asian Americans to cover and embrace whiteness are implicated in discriminatory policing,<sup>154</sup> growing electoral power,<sup>155</sup> and the “bamboo ceiling” in

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147. Wu, *Affirmative Action*, *supra* note 6, at 46.

148. *See id.* at 50; *see also* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 803 F.3d 472 (D. Mass. 2014).

149. 803 F.3d 472 (D. Mass. 2014).

150. *See* Wu, *Affirmative Action*, *supra* note 6, at 50–51.

151. *See id.* at 51; *see also* Complaint at 119, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 807 F.3d 472 (D. Mass. 2014).

152. *See* Wu, *Neither Black nor White*, *supra* note 136, at 225.

153. In fact, Professor Chanbonpin astutely highlights how *Students for Fair Admissions* has an advertising campaign that seems to target Asian American students who feel they have been discriminated against by being rejected from school. Chanbonpin, *supra* note 124, at 659. The organization’s landing page seeking new plaintiffs has a young Asian American woman on the front. *See* UNIV. WIS.-MADISON NOT FAIR, <http://uwnotfair.org/> [<https://perma.cc/MNS2-FPDA>] (last visited Sept. 2, 2021).

154. In response to rising anti-Asian bias, the NYPD created a new task force that raised debates over race and policing in the Asian American community. Sydney Pereira, *NYPD Creates New Task Force Focusing on Anti-Asian Hate Crimes*,

employment.<sup>156</sup> Concentrated in urban centers, Asian Americans are engaged in fierce debates about our proximity to whiteness and the ways that proximity implicates deep-seated histories of discrimination.<sup>157</sup> If we are to avoid being used in service of white supremacy, Asian Americans must gain fluency in identifying covering demands and comfort with responding in ways that are informed by our history.<sup>158</sup> Rather than shedding the perpetual foreigner stereotype by following AALF's path, which seeks us to become honorary whites, Asian Americans can thoughtfully and forcefully challenge covering demands in solidarity with BIPOC communities.

For Asian Americans, the ability to recognize the perpetual foreigner stereotype as a demand to cover is a crucial first step.<sup>159</sup>

GOTHAMIST (Aug. 19, 2020, 12:40 PM), <https://gothamist.com/news/nypd-creates-new-task-force-focusing-anti-asian-hate-crimes> [<https://perma.cc/B9K6-FWNK>]; cf. *We Want Cop-Free Communities: Against the Creation of an Asian Hate Crime Task Force By the NYPD*, ASIAN AM. FEMINIST COLLECTIVE (Sept. 3, 2020), <https://aafcollective.medium.com/we-want-cop-free-communities-3924956251a2> [<https://perma.cc/5P7T-UMWW>] (“Our communities stand to face greater harm because of police.”).

155. Sabrina Tavernise, *A New Political Force Emerges in Georgia: Asian-American Voters*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2020/11/25/us/georgia-asian-american-voters.html> [<https://perma.cc/U57G-ELT3>] (discussing how 78% of voters in Georgia voted for gubernatorial candidate Stacey Abrams but “their political preferences are fluid” and “hardly a done deal for the Democratic Party”).

156. See Buck Gee, Opinion, *A Bamboo Ceiling Keeps Asian-American Executives from Advancing*, N.Y. TIMES (Oct. 16, 2015, 3:21 AM), <https://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/a-bamboo-ceiling-keeps-asian-american-executives-from-advancing> [<https://perma.cc/6GP9-TUS7>] (recounting a recent study concluding that Asian-Americans were “150 percent less likely than their white counterparts to be an executive in large Silicon Valley companies”).

157. For example, in New York City, the most selective high schools are disproportionately attended by Asian American students in part because of a competitive entrance exam, the Specialized High School Admissions Test (SHSAT). The Asian American community is deeply divided as to how to remedy this disparity, with newly arrived immigrant Asians pitted against progressive Asian Americans who have been in the United States for longer. See Chris M. Kwok, *The Inscrutable SHSAT*, 27 ASIAN AM. L.J. 32, 49–50 (2020) (“We are fighting the original civil rights battles with an analytical lens that is sorely in need of an update.”).

158. See MATSUDA, *supra* note 11, at 58 (“No one else will speak about what no one else sees. From the relative safety of academia, it is time to hear our own voices, to silence the ones that say ‘stop acting your color.’ This is the privilege we earned from generations before who made wise choices. They survived so we could flourish, so we could speak up, act up, do right, with our colors flying.”).

159. In a recent exercise of the perpetual foreigner stereotype that should be classified as a demand to cover, a Brooklyn Democratic District Leader, tweeted “I, for one, will never, ever buy anything made in China again. Join me. I can’t even look

When foreignness is carelessly attributed to an Asian American, it should be recognized as a demand to cover, and Asian Americans should feel emboldened to seek a reason for that demand, “even if the law does not reach the actors making the demand or recognize the group burdened by it.”<sup>160</sup> As Professor Yoshino noted, the fact that everyone covers their subordinate, powerful, or mainstream identities may simply be a neutral product of living in a multifaceted society.<sup>161</sup> Politicizing and emphasizing aspects of one’s identity that are in tension with the dominant culture does not automatically bring authenticity, but it is important nonetheless to challenge *coerced* covering.<sup>162</sup> Asian Americans can and should push back on demands to cover by seeking the underlying reason behind the demand.

Once the demand to cover is recognized, the individual has the agency to choose where, when, and to what extent he wants to cover.<sup>163</sup> To facilitate that choice, Asian Americans must understand that there was a moment in U.S. history when Asian Americans fought to be labeled white.<sup>164</sup> Without an understanding of this history and the ways in which fighting for whiteness distanced ourselves from other BIPOC communities, Asian Americans risk

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at Chinese food” in response to a *New York Times* article on China tariffs. This comment, from the leader of a district with many Chinese-American citizens and restaurants, made no attempt to distinguish between the nation of China and any kind of Chinese food. See *Brooklyn Democratic Leader Called to Resign After Anti-Chinese Tweet*, NBC N.Y. (Jan. 4, 2021, 7:05 AM), <https://www.nbcnewyork.com/news/local/brooklyn-democratic-leader-called-to-resign-after-anti-chinese-tweet/2811033/> [<https://perma.cc/L4JE-WMSZ>]; see also Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 740 n.8 (2001) (quoting a Flushing councilwoman “describing Asian immigrants as ‘colonizers,’ and their arrival more like ‘an invasion, not an assimilation’”).

160. See Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG. (Jan. 15, 2006) [hereinafter Yoshino, *The Pressure to Cover*], <https://www.nytimes.com/2006/01/15/magazine/the-pressure-to-cover.html> [<https://perma.cc/7PH9-68L3>]; see also YOSHINO, COVERING, *supra* note 95, at 23 (arguing that “[t]his covering demand is the civil rights issue of our time” and that we are not fulfilling our commitment to racial justice “if we protect only racial minorities who conform to historically white norms”).

161. See YOSHINO, COVERING, *supra* note 95, at 94.

162. See *id.*

163. Yoshino argues for a civil rights jurisprudence closer in line to Germany’s Constitution that enshrines a “right to personality” which analyzes civil rights in terms of universal liberty rather than in terms of group-based equality. He argues that this would prevent us from going down the problematic path of making assumptions about a particular group’s cultures. See Yoshino, *The Pressure to Cover*, *supra* note 160.

164. See discussion *supra* Section I.A.

further alienating themselves and exercising privilege over other BIPOC communities.<sup>165</sup>

Armed with an understanding of our history and an ability to recognize demands to cover, Asian Americans who have accumulated wealth from previously assimilated generations must acknowledge that our Asian American identity is in part a reaction to covering demands placed on us. In choosing whether to cover, this subset of Asian Americans who have benefitted from assimilation must acknowledge both the opportunity and responsibility given to us by our forebears — we now have the chance to go back and pick up the pieces of themselves they left behind without doubting our place in this country. When called a foreigner, be it in explicit or implicit terms, Asian Americans can and should name it as a demand to cover, ask for a reason, and decide if that reason is worth agreeing to cover.

By identifying covering demands and seeking reasons for those demands, Asian Americans can better position themselves in racial justice coalitions because we will have chosen a path of dignity and retained our humanity. We will successfully reject the “racial bribe” and retain a sense of agency over our personhood.<sup>166</sup> At this moment in our nation’s history, it is more important than ever to find dignity so that we may ally ourselves with marginalized communities. In this way, we must be vigilant in making sure that we will never be used in service of white supremacy.

### CONCLUSION

There is a Japanese concept called “kimin,” which can be roughly translated as “abandoned people.”<sup>167</sup> Law Professor Robert Chang wrote that this concept resonates when thinking about *Ozawa*<sup>168</sup> because Takao Ozawa had been forsaken by both a Japanese government that did not join his lawsuit and the United States, which

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165. Congresswoman Grace Meng has introduced an act in the U.S. House of Representatives titled, Teaching Asian Pacific American History Act, which authorizes the Secretary of Education to increase awareness of Asians and Pacific Islanders’ history through elevation of programs that acknowledge how Asian Americans have contributed to our American fabric. H.R. 8519, 116th Cong. (2020).

166. See Zia, *supra* note 124, at 173, 188–89.

167. See Roman Rosenbaum, *From Diasporic Communities to ‘Abandoned People’ (Kimin)*, in *RECENTRING ASIA: HISTORIES, ENCOUNTERS, IDENTITIES* 149, 150 (Jacob Edmond, Henry Johnson & Jacqueline Leckie, eds., 2011).

168. *Ozawa v. United States*, 260 U.S. 178 (1922).

refused him citizenship.<sup>169</sup> Asian Americans have spilled much ink over defining ourselves in proximity to and distance from whiteness. Unfortunately, neither path allows for a full celebration of our heritage nor an acknowledgment of the deep cost associated with assimilation and covering.

As the United States deals with a resurgence of latent anti-Asian hate, the perpetual foreigner stereotype and model minority myth gained greater visibility. The Japanese American internment, the Alien Land Laws, and even the Chinese Exclusion Act seemed less historical artifacts and more unignorable pieces of United States history. Encouragingly though, many Asian Americans refused to be silent and instead marched in solidarity with BIPOC communities — viewing our liberation as inextricably tied to theirs. As we navigate this next decade, hate crimes, education, and immigration will continue to be contested areas of law. Asian Americans must bring the lens of coerced covering to the conversation so that we can fight to fully realize our humanity.

I am here thanks to the sacrifices of my family and intend to use that privilege to speak out loudly for justice.<sup>170</sup> While my family obtained stability because of their hard work, important parts of “home” were lost in the process of covering. Covering meant conceding that we would play by the rules of white supremacy. I have both the opportunity and responsibility to chart a new path. Before notions of the perpetual foreigner render Asian Americans *kimin* — never properly here, never properly there — it is past time to assert a collective identity that takes our history into consideration and celebrates the richness of our humanity. This may be the only way to retain our integrity.

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169. See Robert S. Chang, *Passion and the Asian American Legal Scholar*, 3 *ASIAN L.J.* 105, 106 (1996).

170. MATSUDA, *supra* note 11, at 26 (1996) (“We are here in the particular physical sense of our personal genealogies because we are the children of survivors, of people who judged correctly which fights to fight, when to lay low, and when to assert personhood.”).