ARE FILIPINAS ASIANS OR LATINAS?: RECLAIMING THE ANTI-SUBORDINATION OBJECTIVE OF EQUAL PROTECTION AFTER GRUTTER AND GRATZ

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INTRODUCTION

During the summer of 2003, I had the privilege of participating in a round table discussion on the likely impact of the Supreme Court’s affirmative action holdings in Grutter v. Bollinger1 and Gratz v. Bollinger.2 Hosted by the New York University Asian/Pacific/American Studies Program & Institute, all of the discussants were Filipina Americans from government, academia, and the private sector, keenly interested in how the Court’s rulings impact our community. As the lone law teacher3 present, I was specifically asked to present Grutter and Gratz, and I did so on the assumption that Filipinas4 self-identify as Asians because of the Philippines’s location in the South Pacific. After outlining the Court’s holdings, I opined that because Asians were not viewed to be underrepresented in the University of Michigan’s law and undergraduate schools, the affirmative action programs in Grutter and Gratz did not apply to them. The Court was silent with respect to Asians, and therefore, silent with respect to Filipinas. Furthermore, even with respect to the minorities the programs did favor, Justice O’Connor’s majority opinion in Grutter suggested that she would expect the eventual phasing out of affirmative action policies over the next twenty-five years.5

* Professor of Law, The Pennsylvania State University; J.D., University of Southern California; B.A., Swarthmore College. Many thanks to Tristan Sorah-Reyes for inviting me to participate in this Symposium, to the editors of the Journal of Constitutional Law for their hospitality, and to my co-panelists and the audience for their insights that helped sharpen my thinking on this subject; to Luz Alava, for her most able research assistance; to Dorie Evensen, for her suggestions for resources on school reform; to Dean Phil McConnaughay for his financial and moral support of this and many other projects; and most especially, to my family in the Philippines, and to my wife, Corie, and my children, Ryan and Julia, for their constant love and sustenance. All errors that remain are mine.

2 539 U.S. 244 (2003).
3 Ironically, in a region that boasts sizeable Filipina populations especially in the New York and Philadelphia metropolitan areas, I am quite certain that I am the only law teacher who self-identifies as Filipino American on the east coast.
4 I will use the terms “Filipinas” and “Filipina Americans” interchangeably in this Essay.
5 See infra Part I.A.2.
At the end of my remarks, some discussion ensued about affirmative action generally, but then the focus shifted to barriers to college entry faced by Filipina youths today, perhaps because neither Michigan nor the Court appeared to address the needs of Asians. The round table brought to light a perception that many Filipinas, especially those whose parents were recent immigrants, often opted to attend local community colleges close to home rather than to apply to the elite institutions to which Chinese families, it was asserted, sent their children. Several discussants surmised that many immigrant parents, although placing a high value on education, perceive the high costs of sending their children to major universities to be prohibitive, especially in terms of tuition and housing. Some participants pointed out, however, that the elite institutions, not the local community colleges, have the resources to subsidize students' educations, making the costs of attendance quite reasonable. Reflecting upon these comments, it became clear to the group that for the Filipina American community, mentoring immigrant parents and sharing with them accurate information about the U.S. college admissions game appear to be just as important as understanding the ramifications of the affirmative action debate.

From this round table exchange I gleaned two lessons: first, the holdings in \textit{Grutter} and \textit{Gratz} suggest that Filipina Americans might want to review their default decision to self-identify as Asians, as a practical and political matter. Lani Guinier recently described the university admissions process as a political act;\textsuperscript{7} similarly, a college-bound Filipina's decision to characterize herself as Asian (or Latina or something else) is a political act. Whether Filipinas qualify as affirmative action candidates might rest on this political act. Second, and more important, notwithstanding its attractiveness, race-based affirmative action will not likely continue as a constitutionally permissible vehicle to address societal inequities; indeed, Filipina Americans do not presently qualify under Michigan's existing program. Filipina Americans may therefore need to explore and pursue other political acts that ensure equal educational opportunities—such as the mentoring of immigrant parents—perhaps in coalition with fellow travelers from other groups.

In this Essay, I explore these two avenues of political action—self-identification for affirmative action purposes and longer-term solutions to educational inequity, in an attempt to develop a coherent

\textsuperscript{6} Teranishi et al. have recently empirically verified this perception. \textit{See infra} note 41 and accompanying text.

and effective post-Grutter and Gratz strategy for promoting equal educational opportunities consistent with the demands of equal protection. I will use the experiences of Filipina Americans as a vehicle for exploring these issues. I hope to show that “diversity” as the underlying goal of affirmative action fails to capture the core of modern equal protection jurisprudence implicit in Brown v. Board of Education and Loving v. Virginia—that treating all races equally requires that policymakers take steps to undermine “White Supremacy” and that the cornerstone of equality is the elimination of subordination. After Grutter and Gratz, we would do well to recover and lift up that anti-subordination ideal, and I contend that Filipina Americans are particularly well-positioned to lead a coalitional effort toward that end.

I. FILIPINAS, AFFIRMATIVE ACTION, AND EDUCATIONAL EQUITY

A. Affirmative Action Post-Grutter and Gratz: Racing to the Bottom of a Very Shallow Well

The Grutter and Gratz split-decision is, by now, well-known to most students of constitutional law, and I will therefore summarize it only briefly here. Justice O’Connor provided the swing vote in the Grutter case to uphold (five to four) Michigan Law School’s affirmative action program, but sided with the Grutter dissenters in Gratz to invalidate the College of Literature, Science, and the Arts’ program by the same slim margin. Most noteworthy was that a majority of the Court embraced Powell’s Bakke approach applying strict scrutiny, the first time it had done so in the context of higher education admissions

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9 388 U.S. 1 (1967).
10 Id. at 11–12.
15 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290–91 (1978) (applying strict scrutiny to the school’s admissions policy, despite the fact that the plaintiff was not a member of a traditionally underrepresented class).
programs since 1978. That the Court applied strict scrutiny arguably may have been foreshadowed by the Court's adoption of that standard in its employment cases in City of Richmond v. J.A. Croson Co.\(^\text{16}\) and Adarand Constructors, Inc. v. Peña.\(^\text{17}\) But that the Grutter Court would find that Michigan Law School's decision to admit a "critical mass"\(^\text{18}\) of minorities survived such scrutiny is remarkable even if defensible; indeed, there are reasonable arguments to suggest that the limited point system struck down in Gratz was as narrowly tailored, albeit stating the preference in quantitative rather than qualitative terms.\(^\text{19}\) Just as universities did after Bakke, we should expect that many will study the two cases closely to ensure that their programs fall on the Grutter rather than the Gratz side of the line.

Our concern for the moment, however, is different from that of a university admissions committee parsing the twin opinions. Comments by Justices Scalia and O'Connor suggest that minority communities should ask themselves whether and to what extent affirmative action policies will continue to be useful post-Grutter and Gratz.\(^\text{20}\) How might Filipinas strategically position themselves, in particular, with respect to the post-Grutter and Gratz affirmative action debate, and, in general, to the task of furthering the larger goal of educational equity for all?

Consider the limits of the Grutter and Gratz affirmative action paradigm. If Bakke began the assault on affirmative action in 1978, the Grutter and Gratz double-header has likely sounded its death-knell. Focusing on statements made by Justices Scalia and O'Connor, one might characterize the Grutter and Gratz tandem as envisioning a post-affirmative action race to the bottom of a very shallow well: minorities may well end up fighting over shrinking pieces of the proverbial admissions pie until the pie itself disappears. Put another way, if Scalia and O'Connor are right, minorities might be tempted to forego constructive, anti-subordination coalition building in favor of in-fighting over limited affirmative action programs that may well fade from the constitutional landscape in a short time—in effect, choosing to race to the bottom of a very shallow well.


\(^\text{17}\) 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor ... justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny."); see also Akhil Reed Amar & Neal Kumar Katyal, Bakke's Fate, 43 UCLA L. REV. 1745 (1996) (distinguishing diversity programs for college students from set-asides for government contractors).

\(^\text{18}\) Grutter, 539 U.S. at 329.

\(^\text{19}\) See Gratz, 539 U.S. at 295 ("The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'. . . .") (Souter, J., dissenting).

\(^\text{20}\) See infra Parts I.A.1, I.A.2.
1. *A race to the bottom...*

In his dissent in *Grutter*, Justice Scalia remarked, "litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass.'"\(^{21}\) Since, for example, Asians and Jews were not among the minority groups who could avail themselves of Michigan's affirmative action plan (while Blacks, Latinas, and Native Americans were),\(^{22}\) Justice Scalia's statement suggests that some of these disfavored parties might seek inclusion through litigation. Under this view, there would be a great incentive either to seek inclusion or, alternatively, to argue for the dismantling of these programs on fairness grounds. Implicit in this scenario is the very real possibility that inter-group fighting among minorities may have the unintended effect of strengthening the position of majority groups, rather than assisting minorities by furthering anti-subordination goals, driving this race to the bottom. Further, intra-group fighting among various ethnic subgroups may exacerbate such inter-group infighting. To take one example, might Southeast Asians such as Filipinas take a different position on affirmative action than East Asians like the Chinese, Japanese, and Koreans, based on enrollment differentials among the subgroups?\(^{23}\)

Complicating matters even further, if Justice Scalia is right, how should ethnic subgroups that simultaneously reflect characteristics of both favored and disfavored racial groups self-identify? Again, Filipina Americans provide a paradigmatic example: Filipinas are considered the second largest Asian immigrant group in the United States,\(^{24}\) but at the same time, they also bear cultural similarities to Latinas because of the groups' shared history of Spanish coloniza-

\(^{21}\) *Grutter*, 539 U.S. at 349 (Scalia, J., dissenting).

\(^{22}\) According to the majority of the Court:

The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."

*Id.* at 316 (quoting Michigan Law School's official admissions policy).


tion. Specifically, I am interested in discussing how Filipinas have fared under affirmative action programs, as well as the costs and benefits to Filipinas, as a group and in coalition with others, when they self-identify as Asians rather than Latinas.

In Part II, I will argue that Filipinas should self-identify solely as Filipinas, at once proclaiming their differences from and their similarities to the larger groups of Asians and Latinas. This political choice should demonstrate the subjectivity and imprecision of "diversity" as an admissions value. Because Filipinas share a geographic proximity to other Asian nations but a cultural affinity to Latinas, a Filipina applicant's diversity quotient is difficult to determine. Put differently, using broad categories such as "Asians" and "Latinas" to divide candidates between those who are and who are not presumptively diverse fails to accurately capture significant segments of America's population, such as Filipinas, whose backgrounds traverse and transgress group boundaries. If played correctly, this political decision of Filipinas to self-identify as Filipinas might help halt this race to the bottom by exposing the underlying difficulty with using diversity as the method for leveling educational inequities. Instead of racing to the bottom, minority groups might take note of Filipinas claims to membership in both a presumptively "diverse" (Latina) and "non-diverse" (Asian) group, and therefore re-focus their efforts on pursuing anti-subordination instead of diversity.

2. . . . of a very shallow well.

Examining Scalia's predicted race to the bottom also has particular constitutional currency in light of Justice O'Connor's aspiration in *Grutter* that affirmative action be unnecessary in twenty-five years. If

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26 While I recognize that the Census Bureau appears to prefer the term "Hispanic" (as does the Court and the University of Michigan Law School), I opt for the term "Latina" for the reasons cited by Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman, to wit:

We prefer 'Latino/a' to 'Hispanic' because it seems to us that the term 'Hispanic' mis-leads by emphasizing the Spanish, European origins of the few conquerors who made their way to [North America], as opposed to the origins of a majority of persons who constitute the group to which the term refers, who are predominantly mixed, of indigenous and African ancestry.


27 Justice O'Connor said:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.
a majority of the Court continues to affirm this O'Connor dictum, then not only will minorities race to the bottom in an ever closing circle of despair, but the bottom itself will soon fall out, or mixing metaphors for a moment, there will not be enough water to go around once the affirmative action well dries up in a scant twenty-five years.

Affirmative action's impending demise suggests, as Lani Guinier has noted, an invitation to engage in a political dialogue about the meaning of equal protection in the context of educational opportunity.28 As applied to Filipina Americans, the question becomes: Given the Court's endorsement of limited and time-bracketed affirmative action programs in higher education, what political strategy should Filipinas embrace in order to ensure equal educational opportunity for themselves and if possible, for all?

At least three options come to mind: first, Filipinas could find ways to take advantage of Michigan-type affirmative action programs by making the case that they should be grouped together with blacks and Latinas rather than with Asians, fulfilling Justice Scalia's prediction of intergroup conflict. Second, Filipinas could continue to self-identify as Asians and abandon affirmative action as an option.29 Or, third, Filipinas could forge their own identity and be acknowledged as sui generis.

There is precedent for Filipinas being considered a separate ethnic group. The University of California system did just that when until relatively recently it deemed Filipinas eligible for affirmative action consideration separate and apart from other Asians and Latinas.30

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28 See Guinier, supra note 7, at 210–11 ("Race provides both information and motivation to operationalize a process of self-monitoring and experimentation that is consistent with Justice O'Connor's invitation to begin 'a reflective conversation with the situation.'") (quoting Susan Sturm, Lawyers and the Practice of Workplace Equity, 2002 Wis. L. REV. 277, 325 (2002)).


30 Sources I consulted differed as to the dates policies favoring Filipinas ended, hence my use of the phrase “relatively recently.” Compare Okamura & Agbayani, supra note 23, at 189 (noting that Filipinas were omitted from affirmative action programs beginning in 1986), with ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION 213 n.92 (2002) (noting that Filipinas were given special consideration in undergraduate admissions until 1993). Nonetheless, I suspect that the discrepancy in these dates may be due to the differences as to when each of the University of California campuses chose to implement the policy with respect to Filipinas. In any event, one need only recall the history of discrimination against Filipinas in California to understand why affirmative action for Filipinas was pursued in the first place. See, e.g., RICK BONUS, LOCATING FILIPINO AMERICANS: ETHNICITY & THE
There also appears to be a growing desire among many individuals for a more country-based, as opposed to race-based, self-identification process. In a 2003 survey by the U.S. Census Bureau, one of the primary findings was that respondents wanted to be able to self-identify more accurately, a trend first reflected in the 2000 Census questions, but still in need of some tinkering as the government tries to unpack the difference between race and language identifiers. For instance, "[w]hy are Chinese and Samoan, for example, accepted as races when Mexican and Cuban are not?" They are now treated as an ethnolinguistic group under the banner "Spanish/Hispanic/Latino." On the 2000 Census questionnaire, Filipinas could check the "Filipino" box, but were listed alongside other Asian groups while Latinas were categorized separately.

Because it comes closest to approximating my constitutional interpretation of equal protection as seeking to uphold an anti-subordination principle, I favor the third approach—that Filipinas acknowledge their unique nature qua Filipinas. As I will elaborate in Part II, the decision to stand alone would have at least two positive effects related to the two lessons I gleaned from the 2003 summer round table discussion. First, it would remind us that broad classifications based on race or, in the case of Filipina Americans, national origin, gloss over important differences in ethnicity, culture, wealth, and language that make such classifications rather poor proxies for helping to promote anti-subordination. If Filipina Americans as a group are already diverse (and indeed, may legitimately claim membership in both the Asian and Latina camps), would not the larger group of Asian or Latina or African Americans be even more diverse? Perhaps the trend in census data collection suggesting a movement

CULTURAL POLITICS OF SPACE 38 (2000) ("Male Filipino laborers in California and other states were forbidden to marry outside their race... The signs posted in front of hotels and other business establishments forbidding the entry of Filipinos testify to [their] unequal status... ."); YEN LE ESPRITU, FILIPINO AMERICAN LIVES 13 (1995) ("Between 1928 and 1930, competition for jobs as well as concern over 'hybridization' culminated in a series of race riots in Washington and California meant to drive Filipinos out of various communities.").


34 Id.
toward ethnic specificity and away from larger group affiliation underlies an implicit realization that group affiliation dilutes individualism and masks the diversity apparent among subgroup members.

Second, and more important, understanding the diversity within a single group like Filipina Americans might help further the notion that affirmative action is a second best solution: while important to level the currently uneven playing field, affirmative action helps perpetuate group stereotypes, falls short of attaining the true promise of equal protection for every individual, and masks more pressing needs, for example, to address the problems of the poor or the immigrant regardless of race. Put another way, appreciating the imprecision of broad racial categories exposes the weakness underlying the diversity rationale as an equal protection device. If the true goal of affirmative action programs is to level the playing field, then schools should recapture this anti-subordination principle rather than use diversity "aesthetics" as its chosen means.

B. The (Mis)education of Filipinas in the United States

As with many difficult socio-legal issues, Filipina American access to education in the United States is a complex portrait, reflecting both positive and negative images. Take the example of post-secondary educational attainment: Filipinas have long enjoyed a high level of educational attainment overall, especially among those who have earned bachelor's degrees. Moreover, a 2003 study revealed that Filipinas appeared to be more comfortable in a university setting than other Asian students. However, closer analyses of the

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55 See, e.g., LEAP ASIAN PAC. AM. PUB. POLICY INST. & UCLA ASIAN AM. STUDIES CTR., EXECUTIVE SUMMARY, THE STATE OF ASIAN PACIFIC AMERICA: TRANSFORMING RACE RELATIONS 2 (Paul M. Ong ed., 2000), http://www.leap.org/docs/ExecSumm_TRR.pdf. The report states: [Asian Pacific American] realities are changing the nature of race politics by interjecting ethnicity. Community activists and advocates have promoted pan-Asianism, but this identity is fragile. Asian subgroups have insisted on maintaining their ethnic identities, as seen in the incorporation of ethnic groups (e.g., Chinese, Japanese, Filipinos, Vietnamese, etc.) into the racial categories for the 2000 Census.

56 While I do not agree with Justice Thomas's analysis in Grutter, I would affirm that purely pursuing classroom aesthetics is undesirable. See Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting) (describing Michigan's defense of policy thusly: "Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits."). The goal of affirmative action, like other equal protection-enhancing programs, should be to promote anti-subordination.

57 See Alberta M. Gloria & Tamara A. Ho, Environmental, Social, and Psychological Experiences of Asian American Undergraduates: Examining Issues of Academic Persistence, 81 J. COUNSELING & DEV. 93, 97-98 (2003) ("Filipino American students reported the most positive perception of the university environment, followed closely by Vietnamese American students. Korean American and Chinese American students indicated the least positive perception of the environment.").
data reveal that Filipina degree holders appear to be mostly part of the post-1965 immigration boom and that second- and third-generation U.S. citizens of Filipina descent do not fare as well.\footnote{See Okamura & Agbayani, supra note 23, at 184–85, 186–87 (comparing the results of a 1986 survey showing a substantial representation of Filipina college graduates with data on second- and third-generation Filipinas).}

A second paradox: Data from 1997 to 1998 reveal that while Filipinas in California enrolled in greater percentages than Latinas and African Americans across all California public colleges and universities, they enrolled in substantially lower percentages in the more prestigious University of California system than other Asians.\footnote{See Cal. Postsecondary Educ. Comm’n, First-time Freshmen in California Colleges and Universities, Fall 1998 (Jan. 2000) (presenting college-going rates of public high school graduates by racial-ethnic group that shows other Asians enrolled at around 20% in the U.C. system, while Filipinas enrolled at about 9% in fall 1997 and 1998), at http://www.cpec.ca.gov/factsheets/factsheet2000/fs00-03.asp.} Relatively, Filipinas enrolled at higher rates than other Asians at the less prestigious community college and California State University systems.\footnote{Id.} More recently, sociologists Robert Teranishi et al. reported in a 2004 \textit{Review of Higher Education} article that Filipinas and other Southeast Asians from lower income families were less likely to attend private universities than their Chinese, Japanese, and Korean counterparts.\footnote{Robert T. Teranishi et al., \textit{The College-Choice Process for Asian Pacific Americans: Ethnicity and Socioeconomic Class in Context}, 27 REV. OF HIGHER EDUC. 527, 535 (2004).} This phenomenon is partly explained by the fact that many Filipinas and Southeast Asians desired to live closer to home, choosing to attend local schools to please their relatives.\footnote{See id. at 537 (“Filipinos and Southeast Asians from the lowest income bracket were most likely to choose a college because it was close to home.”).}

Finally, a third paradox, most relevant to our study of affirmative action policies: Because they are considered Asians by many, Filipinas are often excluded from affirmative action policies even when statistics suggest that they do not enroll in the same numbers as other Asians, leading in some cases to enrollments in numbers lower than Latinas and African Americans. Perhaps the most stunning example is from the University of California at Berkeley’s admissions information for the undergraduate class entering in the fall of 1996. Despite the fact that 1996 saw the largest number of Filipina Americans (979 in all) apply to Berkeley, their 16% acceptance rate was the lowest among all ethnic and racial groups.\footnote{Okamura & Agbayani, supra note 23, at 189.} Jonathan Okamura and Ame Fil Agbayani surmise that the reason for this result was that, as Asians,
Filipinas were ineligible for affirmative action, while others like Latinas and African Americans, remained eligible.\textsuperscript{44}

These three examples paint a rather difficult picture for Filipinas seeking to navigate the post-\textit{Grutter} and \textit{Gratz} landscape. Rather than accepting their default status as "Asian," it might be tempting for Filipinas to join the race to the bottom by arguing that they deserve to be included along with Latinas and African Americans in affirmative action policies. Indeed, some Filipinas have attempted to distance themselves from other Asians in order to emphasize their unique cultural background and to acquire affirmative action benefits.\textsuperscript{45} In my view, the first objective is worthwhile and the second may be if pursued for the purpose of de-emphasizing diversity and restoring anti-subordination as the primary reason for affirmative action. In the next Part, I will explore the practical ramifications of Filipinas' political choices either to embrace the Asian label, to identify as Latina, or to adopt an independent stance. I will argue that the third option best captures the goal of reinstating anti-subordination as the true objective of affirmative action.

\section*{II. DIVERSITY AND AFFIRMATIVE ACTION: THE SELF-IDENTIFICATION DILEMMA}

Recalling the lessons from the 2003 summer round table I attended on affirmative action, I believe that Filipinas have a choice to make in this post-\textit{Grutter} and \textit{Gratz} world—to embrace the Asian label, argue for inclusion as a Latina, or to emphasize their uniqueness as Filipinas, a significant immigrant ethnic group in the United States. After exploring each of these options in turn, I will examine which choice best facilitates movement toward equal protection for all.

\textsuperscript{44} \textit{Id.} The differences between admissions rates for Filipina and other Asian undergraduate students following the University of California's ending of its race-based affirmative action policies extended to graduate admissions as well. The \textit{San Francisco Chronicle} reported:

Eighteen percent fewer Latinos, blacks, and Filipino Americans than last year have been accepted to graduate school at the University of California at Berkeley for next fall—the first class to enter under UC's ban on race-conscious admissions. . . . The number of Asian American students admitted (other than Filipinos) increased by 6 percent, and the number for whites remained about the same.


\textsuperscript{45} See \textit{LEAP}, supra note 35, at 3 ("Filipinos focus[ ] on their largely unsuccessful efforts as an ethnic subgroup to separate from the [Asian Pacific American] grouping, largely motivated by the desire to emphasize the group's unique cultural and racial identity and to benefit from affirmative action programs.").
A. Filipinas as Asians

The U.S. Census Bureau defines "Asian" as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example . . . the Philippine Islands." By this definition, and perhaps by most Filipinas' own estimations, Filipinas are Asian. Geography is a logical way to categorize, and the Philippines is geographically more proximate to other Asian countries than to Latin America, for example.

Geography, of course, is not the only way to categorize and perhaps may not be the best way to categorize Filipinas for affirmative action purposes, even under a diversity regime. Are Filipinas' educational experiences more or less likely to be similar to Asians than to Latinas? Statistics cited earlier suggest that Filipinas tend to not perform as well as other Asians, and in some circumstances, not as well as Latinas or African Americans without the aid of affirmative action. Even within the Philippines, many Filipinas do not perform as well as other Asians, especially the Chinese, often leading to mistrust and disdain between the two groups. On the other hand, Filipinas are similar to Laotians and Cambodians in their difficulties with educational attainment relative to the Chinese. Ignoring this similarity would relegate the anti-subordination principle of affirmative action behind the use of geography as a unifying theme.

B. Filipinas as Latinas

To the extent that Latinas are viewed as worthy of affirmative action, should not Filipinas benefit as well because of the history the Philippines and many Latin American countries share? Put differently, if President McKinley's desire to colonize the Philippines as


\[\text{See supra notes 39–41 and accompanying text.}\]

\[\text{See text accompanying notes 43–44.}\]

\[\text{See, e.g., AMY CHUA, WORLD ON FIRE 1–5 (2003) (discussing the relative success of the ethnic Chinese in the Philippines that has led to a backlash against them by the Filipina majority). Anecdotally, having grown up in Manila and spending much time with my family there in recent years, I can report a common perception among Filipinas that the ethnic Chinese in Manila view us with disdain and contempt, often characterizing Filipino men in particular as lazy and unambitious. Filipinas, in turn, often envy the Chinese their material successes.}\]

\[\text{See, e.g., General James Rusling, Interview with President William McKinley, THE CHRISTIAN ADVOCATE, Jan. 22, 1903, at 17, reprinted in THE PHILIPPINES READER 22–23 (Daniel Schirmer & Stephen Rosskamm Shalom eds., 1987) ("[T]here was nothing left for us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them, and by God's grace do the very best we could by them, as our fellow-men for whom Christ also died.")} \text{(quoting President McKinley), available at http://historymatters.gmu.edu/d/5575 (last visited Nov. 18, 2004).}\]
an extension of America’s empire mirrored the contemporaneous southwestern expansion into Texas and California in the name of “manifest destiny”—in effect, substituting one Western colonizer for another—should not Filipinas be included in affirmative action programs that benefit the “Hispanic”? This might be especially appropriate in the context of affirmative action where Filipinas have been unable to enroll in numbers similar to Asians, and even at times unable to enroll in numbers comparable to Latinas and African Americans, as had occurred at Berkeley in 1996.

Yet this shared history between Filipinas and other Latinas may not be precise enough. As previously discussed, taken as a whole, Filipinas apparently enroll at higher percentage numbers than most Latinas. Just as distancing themselves from Asians risks masking their privileged position vis-à-vis some other Asian subgroups, Filipinas who self-identify as Latinas play down their relatively privileged status in higher education vis-à-vis most Latinas.

In other words, focusing exclusively on their oppressed status vis-à-vis Asians and ally ing themselves with Latinas understates Filipinas’ relative privilege with respect to members in both groups. The more accurate position acknowledges that Filipinas share characteristics with both Asians and Latinas, shifting the focus from either geographic (Asian) or cultural (Latina) affinity to a discussion of the original goal of affirmative action programs, which is to pursue anti-subordination.

C. Filipinas as Filipinas

As with any other broadly defined group, Filipinas and Filipina Americans are a diverse lot. A brief survey of Philippine history and culture reveals this diversity first-hand. Spanish colonization and Christianization mark the Filipina culture’s Latin roots; intermar-

51 See generally ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY (1935) (discussing “manifest destiny” and the United States’s policies in Texas and California).

52 See supra text accompanying notes 39, 43.

53 See Cal. Postsecondary Educ. Comm’n, supra note 39 (showing that in 1998, 9.1% Filipina applicants enrolled in colleges, compared with 2.8% of Black applicants and 2.7% of Latina applicants).

54 Among the many interesting books on Philippine history, politics, and culture from both Western and Philippine authors, see, for example, AGONCILLO, supra note 25 (tracing the history of the Filipinas from pre-colonialism to the late 1980s); RENATO CONSTANTINO, THE NATIONALIST ALTERNATIVE (1979) (addressing problems of economic development in the Philippines); STANLEY KARNOw, IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES (1989) (exploring the American presence in the Philippines); AMBETH R. OCAMPo, BONIFACIO’S BOLO (1995) (recounting Philippine history in a series of journalistic essays); DAVID G. TIMBERMAN, A CHANGELESS LAND: CONTINUITY AND CHANGE IN PHILIPPINE POLITICS (1991) (examining the elements of Philippine politics and government over the last quarter century).
riage, trade, and geographic location reveal a strong Asian influence; American education, occupation, and popular culture add a distinctly Western cast.

Perhaps just as important, the Philippines would likely have never developed into a nation-state without the Spanish conquest. Pre-colonial Philippine governments consisted of disparate tribal arrangements. The archipelagic composition of the over 7,000 islands helped spawn a myriad of languages and dialects (more than 100) and ethnicities and cultures (from the aboriginal Aetas to the Chinese and Indian mestizos) that exist in modern Philippine society. This diversity may have made the islands an easy target for the Spanish; the natives' disunity and geographic dispersal facilitated their colonization. Appointed by King Phillip II to colonize the islands, Miguel Lopez de Legazpi noted, "[t]hey have no leaders and are so divided among themselves... that they can never join together in a demonstration of strength."

Within the United States, Filipina Americans are similarly diverse. Though much scholarship has arisen out of the traditional centers of Filipina immigration in Hawaii and California, Filipinas have roots throughout the United States, having first settled in the mainland in Louisiana in 1765. And while the U.S. Census captures the group as "Filipinos," individuals often self-identify as Ilocanos, Visayans, Manileños, Batangueños, Bicolanos, and so forth, importing to the United States their regional and provincial affiliations from the homeland and privileging them over their shared national identity. As Rick Bonus has noted, "Philippine ethnicity and nationalism resurface in the United States in peculiar ways... ."

See AGONCILLO, supra note 25, at 40 (explaining that the tribal units consisted of thirty to one hundred families).

Id. at 54.

See id. at 20-32 (describing the development of civilization on the Philippine islands before the Spanish conquest).

KARNOW, supra note 54, at 45.

See, e.g., BONUS, supra note 30, at ix (concentrating on the Filipina communities in Los Angeles and San Diego counties); ESPIRITU, supra note 30, at 22 (featuring personal stories narrated by San Diego Filipinas); Okamura & Agbayani, supra note 23, at 188-92 (focusing on barriers to higher education for Filipinas in California).

ESPIRITU, supra note 30, at 1.

BONUS, supra note 30, at 27.

The Philippines has ethnic minority groups who are indigenous yet not seen as equal to the rest. We see the resulting tensions in, for example, debates over an official national language (one preferred to Tagalog and resistant to other ethnolinguistic groups such as Cebuano and Ilokano); over holding onto southern parts of the country (where there is a strong movement by Filipino Muslims and their allies to secede); and over land ownership (between the state and private firms on one side, and minority groups asserting tribal control of natural resources on the other).

Id.
This diversity within the Filipina American community teaches us at least two things about developing our post-Grutter and Gratz dialogue. First, diversity is a malleable concept that does not best capture the original anti-subordination goal contemplated by affirmative action programs. Indeed, focusing too much on diversity may mask anti-subordination, leading to the race to the bottom foretold by Justice Scalia. It is therefore important for Filipinas to speak out with others about the imprecision of diversity as an educational equity goal by rejecting categories based on geography and geopolitics (that would classify them as Asians) or on culture and history (that would categorize them with Latinas). Filipinas should instead focus on anti-subordination as the one principle worth pursuing through affirmative action programs. Second, Filipinas should seek to implement this anti-subordination ideal by advocating policies that emphasize the need for government to (1) refrain from perpetuating oppressive inequities in education along the lines of, among other things, race, gender, and socioeconomic class; and to (2) affirmatively act to level the playing field. It is through this theoretical and practical reformation of the affirmative action paradigm that Filipinas can best leverage the choice to self-identify qua Filipinas so as to restore anti-subordination as the paramount goal of affirmative educational equity policies.

1. Re-casting Affirmative Action as Anti-subordination, Not Diversity

As noted previously, some Filipinas have tried to escape from under the shadow of the Asian geopolitical category. A 2000 report on Asian Pacific Americans ("APA") notes that "[t]he case of Filipinos focuses on their largely unsuccessful efforts as an ethnic subgroup to separate from the APA grouping, largely motivated by the desire to emphasize the group's unique cultural and racial identity and to benefit from affirmative action programs." While I subscribe to the first point—that Filipinas are, as a group, a unique collective that is difficult to wedge into a monolithic category of Asians—I am wary about the second—that Filipinas should therefore seek to benefit from affirmative action programs. The second point worries me neither because I devalue affirmative action (it is important and necessary) nor because I believe that I have not benefited from it (indeed, I have). Rather, I am concerned that proceeding down such a path leads to a race to the bottom of a very shallow well, as I described earlier. If affirmative action is to be pre-

62 See supra note 45 and accompanying text.
63 LEAP, supra note 35, at 3.
64 See supra Part I.A.2.
served, it should be done not simply because Filipinas are a diverse lot, nor because Filipinas are at once Asian and Latina. Instead, Filipinas should point to their unique cultural identity, which includes a history and a continuing legacy of the effects of oppression by government entities. Affirmative action, therefore, will serve as a way of ensuring that equal protection of the law is afforded all who suffer subordination. For Filipinas, this will mean inclusion in such programs, as the facts regarding Filipinas' position in relation to other minority groups bear out.

But what of the shallow well? Won't pointing out Filipinas' relative subordination mischaracterize the fact that, vis-à-vis Latinas and African Americans, Filipinas are actually quite privileged in the world of post-secondary education? Despite their troubles, because Filipinas enjoy a privileged status when compared with other groups, I would prefer that, rather than embarking on their own for the sole purpose of benefiting from affirmative action, Filipinas emphasize instead the shallow nature of the post-Grutter and Gratz diversity well and lead an effort to reclaim the anti-subordination message that has been lost in the shuffle. That emphasis means supporting other groups that have suffered and are currently laboring under de jure or de facto oppression—for example, Native and African Americans, the poor (of all races), gays and lesbians—in their efforts to receive greater compensation, even if it means sacrificing Filipinas' own interests. The end goal of this effort should not even be the preservation of what is unique about Filipinas and Filipina culture, but it should be the re-dedication and re-commitment to fighting oppression along all lines that divide, be they race, gender, sexual orientation, citizenship, or poverty. Affirmative action means providing opportunities to those for whom opportunities are not and have not been forthcoming.

Thus, by emphasizing and reclaiming their diversity, Filipina Americans would be well-poised to help lead a coalition of like-minded citizens to recapture the Equal Protection Clause's anti-subordination ideal—that every person be treated as an individual under the law. Ironically, it is in recognizing their diversity that Filipinas as a group can highlight the shortcomings of affirmative action's group-based approach. Not every Filipina American has a Spanish surname or speaks English fluently or is a nurse or engineer by profession or is a Catholic or has almond-shaped eyes. Indeed, to

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65 U.S. CONST. amend. XIV, § 1. In addition, the Fifth Amendment's Due Process clause has been read to contain an equal protection component that constrains the federal government in the same way that the Fourteenth Amendment constrains the states. See Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that racial segregation in the public schools in the District of Columbia violated the Fifth Amendment's due process clause).
conceive of Filipina Americans as a group requires a certain suspension of disbelief. Groups, by definition, have certain shared characteristics that whitewash the differences that divide their members. Most often, the underlying reason for this group affiliation is the goal of achieving a certain result. In affirmative action, one desired result is to ensure equal educational opportunity, despite the cost of losing one's individuality in the process. While this cost might be worth it to some in the short run, the long-term desire of every group is that its members be treated as individuals equal under the law, free from both covert and overt prejudices enshrined in the policies and practices of the state. Take anti-miscegenation laws, for instance: just as Filipina Americans did in California during the 1930s, sizeable numbers of African Americans opposed Virginia's anti-miscegenation law. They opposed the law not because they all wanted to marry white people, but because they believed that it perpetuated a negative stereotype of African Americans while withholding from each such person the power to marry whomever she desired.


The Equal Protection Clause should have as its primary goal anti-subordination—the elimination of unfair distinctions brought about by an illegitimate classification method. That, after all, is the message of *Brown v. Board of Education*—that "separate but equal" is inherently unequal, not because there are no differences between the dominant and minority cultures, but because perpetuating stereotypes for the

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68 The goal of diversity, as understood in the Michigan cases, does appear to have an element of anti-subordination to it to the extent that underrepresented groups are included in affirmative action programs. Hence, I agree with Devon Carbado and Mitu Gulati's assertion that diversity has, in practice, an "inclusion" function that approximates my conception of anti-subordination. See Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1154 (2003) (book review) ("To the extent that certain groups are excluded from universities and colleges, a democratic process failure has occurred. The mandate of diversity requires that all groups have access to a constitutive aspect of American democracy: a college education. No group should be left behind."). Substituting anti-subordination for diversity, however, leads to a clearer and more forthright explanation for why affirmative action programs should continue.
benefit of the majority to the exclusion of the subordinated furthers oppression.  

Equal protection's anti-subordination principle should be realized through both government restraint as well as government action to bridge the gap created by unearned societal privilege. At a minimum, the anti-subordination principle requires the state to refrain from perpetuating systems that promote unfair discrimination. Thus, anti-miscegenation laws are unconstitutional because they promote white supremacy, and, by implication, nonwhite inferiority, as Justice Stewart noted in *Loving v. Virginia.* Put differently, laws separating the races promote the privileges enjoyed by the favored race.

Aside from the Clause's respect for "negative" rights, equal protection should mean also that the government will act affirmatively to level the playing field, ensuring that unearned societal privileges do not lead to disparate treatment. For example, the government should work to provide truly equivalent educational opportunities for all students—from kindergarten through graduate school. As noted earlier, in the post-*Grutter* and *Gratz* world, it would be foolish to focus on affirmative action as being exclusively about race, because the Court will likely have decreasing tolerance for this argument over time (per O'Connor) and because such a focus may ultimately lead to a race to the bottom among minority groups for the title of most oppressed (per Scalia).

Filipinas, by asserting their diversity, may help re-focus the positive aspect of the anti-subordination principle by pointing out that race is not the primary issue, but that promoting anti-subordination, in all facets of life, is the most important issue. A far less worthy and more short-sighted alternative would be to embrace race-based affirmative action without critique. By doing so, however, Filipina Americans risk blinding themselves to the reality that the primary beneficiaries of the policy are the middle class (and, more specifically, middle class white women). And while it may be better that the middle class be composed of Filipina as well as European Americans, it would be bet-

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69 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (citing a study stating that separate educational facilities are "usually interpreted as denoting the inferiority of the negro group" and thus ruling that racial segregation in public schools violates the Equal Protection Clause).

70 *Loving*, 388 U.S. at 11 (Stewart, J., concurring) (stating that Virginia's prohibition of interracial marriage is a measure designed to maintain white supremacy).

71 See * supra* Parts I.A.1, I.A.2.


73 See * id.* at 349 (Scalia, J., dissenting) ("litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass'.")

ter still to provide post-secondary educational opportunities to those who cannot afford it, many of whom are Filipinas and other persons of color. Moreover, there is successful, historical precedent for such an anti-subordination movement: though far from perfect, Martin Luther King’s civil rights platform of the 1950s and 1960s was a multicultural, multiracial movement based on anti-subordination principles of social justice for all, especially the poor.

CONCLUSION

TOWARD EDUCATIONAL EQUITY BEYOND AFFIRMATIVE ACTION REMEDIES: RECLAIMING THE ANTI-SUBORDINATION OBJECTIVE THROUGH SELF-SACRIFICE AND STEWARDSHIP

To effectuate this shift from a race-based affirmative action agenda to an anti-subordination one, perhaps a corresponding shift in coalition-building strategy should also occur. Instead of diversity, affirmative action supporters should embrace anti-subordination as the coalition’s core principle. Specifically, instead of self-interested models of coalition-building, groups might embrace self-sacrifice and stewardship models of leadership more consistent with the theme of anti-subordination. This would mean that Filipinas would seek first

75 Bayard Rustin, a leading advisor to Dr. King who happened to be gay, was deliberately kept out of the public’s eye for fear that exposure of his sexual orientation would harm the movement. Andrew Sullivan observes that despite enduring slights and more from both the white power structure and the black civil rights movement, “Rustin never succumbed to the anger that was his right.” Andrew Sullivan, The “Invisible Man,” TIME, Jan. 20, 2003, at 41.

76 See generally David J. Garrow, Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference (1986) (providing a narrative history of Martin Luther King, Jr.’s work with the Southern Christian Leadership Conference from 1955 to 1968).

Let me be clear: I do not believe that a change in rhetoric alone is enough. It might be that a majority of the populace has signed on to the idea that “affirmative action” means undeserved preferences for minorities, or worse yet, “reverse discrimination”; it might also be that no amount of re-education will change that. I take heart, however, from the exit polling following the approval of California Proposition 209, which led to the elimination of affirmative action policies in that state. Exit polls revealed that while a majority of voters disapproved preferences, quotas, and set-asides, they also favored remedial affirmative action in hiring and education for those who need the help, suggesting a willingness to consider anti-subordination principles. Guerrero observes:

Polls showed that 70 percent of voters supported [Proposition 209]. This support, however, did not translate into support to end affirmative action. Tellingly, when voters were asked whether they favored “affirmative action,” 50 percent said yes. When a qualifying clause was added, and voters were asked whether they supported “affirmative action programs to ensure equal opportunities for minorities,” support rose to 61 percent.

Guerrero, supra note 30, at 94.

77 I expound upon these three principles of coalition building—anti-subordination, self-sacrifice, and stewardship—in a forthcoming essay, arguing that these principles are superior to the dominant self-interest based model of coalition politics. Victor C. Romero, Rethinking Mi-
to serve others, using the gifts they have in stewardship, toward the goal of alleviating oppression. In the affirmative action context, that may mean forming coalitions with members from both subordinated Asian groups like Cambodians and Laotians as well as with Latinas and African Americans, in an effort to reclaim anti-subordination as the paramount policy goal, rather than focusing exclusively on the more limited, short-term objective of accruing benefits for Filipinas only.

Outside the affirmative action context, Filipinas should apply the three principles of anti-subordination, self-sacrifice, and stewardship in an effort to effect educational equity generally. While some progress has been made, 2004 data from the National Center for Educational Statistics paints a bleak picture for minorities and the poor. Two facts are particularly telling: first, not only are they more likely than white students to be poor, but African American and Latina students are also more likely to be concentrated in the poorest schools. For instance, 47% of African American and 51% of Latina fourth-graders attended the most impoverished schools versus 5% of whites; conversely, 6% of African American and Latina fourth-graders were in the least impoverished schools in 2003, compared with 29% of whites. Second, the youths of Latina, African American, and Native American groups are either out of school or unemployed at higher percentage rates when compared with the percentages for whites and Asians. As I am not an expert in education policy, I do not suggest a comprehensive program of reform. Rather, I emphasize the commitment to the principle of anti-subordination, echoing the call of education reform expert Joseph Check to ensure that application of these principles be applied to particular contexts, rather than assuming that one size fits all.

79 Id. at 10.
80 As Check notes: [O]ne of the favorite strategies of reform advocates is “scaling up,” or taking a program that was successful in one locality or setting and replicating it widely across the country. The gross differences in composition of local school systems evident in the federal database warns us that “scaling up” must be undertaken with great caution. A reading program, for instance, which has been successful with African American elementary school students in one city will not automatically work with a largely Hispanic or Asian population that may be found in another. Differences in cultural and linguistic background translate to differences in learning style, and so in a very real sense all success in urban education is local.

Fortunately, there are many contemporary examples of self-sacrifice and stewardship in the service of anti-subordination efforts in educational equity. For instance, one might look to former management consultants Rajiv Vinnakota and Eric Adler, who used their corporate expertise to help found Schools for Educational Evolution and Development (SEED), a boarding school for the urban poor of Washington, D.C., many of whom are people of color. As a charter school, SEED receives public funds but operates independently of the Washington school system, providing an elite education to students who do not fit the preppy, Andover/Exeter model, 98% of whom are African American, 79% of whom are from low-income homes. In his research to develop SEED, co-founder Vinnakota identified three things disadvantaged students in urban public schools lack: a challenging college-preparatory curriculum; a stable home to provide the basic necessities of food, clothing, and a safe and supportive space to do one’s schoolwork; and the educational values usually cultivated by one’s family and community. A true steward working to further anti-subordination, Vinnakota credits his grandfather, a farmer in a small village in India, for inspiring him to value education and to give back to his community (which, in this case, Vinnakota appears to have defined broadly to include predominantly low-income, inner-city minority residents).

Not every group, however, enjoys the access to the economic resources of a Vinnakota. More modest proposals include 1972’s “Operation Manong,” a federally-funded program supporting University of Hawaii students who wished to provide tutoring and other academic support programming to Filipina and other immigrant children in public schools. “Manong” is a Tagalog word that means “older brother,” indicating the program’s desire to have successful Filipina students give back to the younger generation by lending their time and talent to mentoring those in need, again for the purpose of furthering anti-subordination.

Finally, self-sacrifice and stewardship need not mean that those being helped are completely dependent on the helpers. Those being helped certainly have gifts to contribute as well. Coalitions might, for instance, adopt the “sweat equity” model employed by Habitat for Humanity, wherein persons who want their houses built must help

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82 Id.
84 Id.
85 See Okamura & Agbayani, supra note 23, at 195 (describing “Operation Manong”).
86 LEO JAMES ENGLISH, TAGALOG-ENGLISH DICTIONARY 893 (1986).
build not just their homes, but others' houses as well.\textsuperscript{87} As applied to education programs, this model suggests that parents should be encouraged to participate directly in their children's education, which is consistent with what many believe to be crucial to operating consistently good schools. For example, a 2003 study suggests that school districts willing to learn about and reach out to Latina communities succeed in building partnerships that pay dividends in early literacy among Latina children.\textsuperscript{88} One particular strategy is to encourage Latina parents to serve as classroom readers.\textsuperscript{89}

The examples I describe here all have in common the pursuit of anti-subordination in education by abiding the principles of self-sacrifice and stewardship. In this post-\textit{Grutter} and \textit{Gratz} world, we all need to think more clearly about what affirmative action means in the larger context of fulfilling the equal protection ideals of educational equity. For Filipina Americans, this should mean a choice to affirm diversity, not for its own sake, but as a starting point in redirecting affirmative action toward its original—and in my view, correct—goal of alleviating subordination.

\textsuperscript{87} See Millard Fuller, \textit{Building on Core Principles}, HABITAT WORLD, Feb./Mar. 2004, at 2 ("[Habitat for Humanity's] methodology that has brought such good results includes 'sweat equity'—a concept that requires prospective homeowners to invest hours of labor helping build their own Habitat houses and the houses of others."). Habitat for Humanity founder Millard Fuller is yet another example of a good steward. A self-made millionaire at the age of twenty-nine, Fuller decided to use his gifts to help establish the organization in 1976. See Habitat for Humanity Int'l, Millard Fuller (providing a biographical profile of Fuller), at http://www.habitat.org/how/millard.html (last visited Nov. 18, 2004).

\textsuperscript{88} See Jeanne R. Paratore et al., \textit{Learning About the Literate Lives of Latino Families}, in \textit{LITERACY AND YOUNG CHILDREN} 117 (Diane M. Barone & Lesley Mandel Morrow eds., 2003) (noting specific strategies to help develop literacy partnerships between schools and Latina parents, including monthly newsletters, a home literacy portfolio, and having parents as classroom story readers).

\textsuperscript{89} Id.