

CHANGING AMERICA: THREE ARGUMENTS ABOUT ASIAN AMERICANS AND THE LAW

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INTRODUCTION

America is changing. Soon, people of color collectively will be the racial majority, while whites as a group will find themselves racial minorities like everyone else.¹ Already, only about three-quarters of the United States population is Caucasian and non-Hispanic, to use Census Bureau classifications.²

This dramatic demographic shift is being produced by many factors, among them: immigration, which has become a predominantly Asian and Latino phenomena as the numbers of newcomers has increased greatly;³ intermarriage, which has risen among all racial groups although there remains residual resistance to black-white unions;⁴ and the fluidity of identity, expressed recently by people declaring their otherwise submerged Native-American heritage in response to

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This Essay is a sequel of sorts to Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

1. SAM ROBERTS, WHO WE ARE: A PORTRAIT OF AMERICA BASED ON THE LATEST U.S. CENSUS 67 (Rev. ed. 1995).

2. See *id.* (analyzing latest census figures).

3. *Id.* at 78.

4. *Id.* at 48, 115; see Richard Morin, *Unconventional Wisdom: New Facts and Hot Stats from the Social Sciences*, WASH. POST, Sept. 13, 1995, at C5 (providing various statistics regarding interracial relationships); see also Antonio McDaniel, *The Dynamic Racial Composition of the United States: An American Dilemma Revisited*, DAEDULUS, Jan. 1995, at 179 (comparing intermarriage rates of Asian Americans and African Americans, and concluding that rates are much higher for former than latter).

the popularity of the Disney movie, *Pocahontas*, a sharp, if quaint and temporary, contrast to the tradition of "passing" as white.⁵

More than numbers, however, are changing. Significant economic, political, and culture changes are occurring as well.

The concrete effects explain why there is no consensus on these new realities and new images. For every person pleased with racial diversity, someone else is displeased with cultural diversity. Whether these changes are cause for celebration or for dismay, they can be confusing and troubling.

Meanwhile, the law has proven ineffective in responding to the facts. It is the rare case or statute that addresses the complexities of multiple races and the contradictions of multi-culturalism. It is also only recently that legal scholarship has turned to the issues created by a diverse population.⁶ At a descriptive level, the racial realities must be recognized, even if at a normative level, color-blindness is adopted as the dominant principle. The presence of not only blacks, but also Asians and Latinos, and more groups and also individuals formerly relegated to the official status of "Other," suggests that color-blindness is an all-the-less appropriate metaphor at the turn of the millennium. It is important to consider groups and individuals who are neither black nor white, not only for their own sake but also as a means of better understanding of central black-white conflicts.

This Essay offers some tentative thoughts on what the many Asian American experiences can contribute to the jurisprudence of race.⁷ It makes three independent but related arguments: (1) Asian Americans demonstrate that color-blindness is a myth; (2) Asian Americans show the dangers of applying social science in the law; and (3) Asian Americans must become involved in the legal process. The

5. See Leef Smith, *A Powhatan Princess in Their Past; Disney's Pocahontas Inspires Virginians to Shake the Family Tree*, WASH. POST, July 13, 1995, at B1 (describing recent trend of asserting Native American nationality).

6. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993); Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1993); see also Symposium, *Race and Remedy in a Multi-Cultural Society*, 47 STAN. L. REV. 819 (1995).

7. For an articulation of an Asian American perspective on the law, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993).

Two important articles on Asian Americans and the law are Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985), and Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087* (Hyung-chan Kim ed., 1992). In both articles, Professor Gotanda argues that Asian Americans have been cast in a citizen-foreigner paradigm rather than a black-white paradigm.

arguments share the common theme of examining Asian Americans to test conventional notions about race and the law.

These arguments, of course, extend beyond Asian Americans, but are developed here using them as an example. Each of these arguments can and should be challenged and contested. Taken together, they form another meta-argument—regardless of the conclusions that are reached—that addressing race is imperative. Failure to discuss race exacerbates racism; it does not cure it.

I. JUSTICE ANTONIN SCALIA AND AUTHOR PETER BRIMELOW MEET THE MODEL MINORITY

In what will be a famous or an infamous passage, depending on the course of later events, Justice Antonin Scalia, concurring in the result but implicitly dissenting in the reasoning in the Supreme Court's recent affirmative action case, wrote, "In the eyes of the government, we are just one race here. It is American."⁸

This simple statement in dicta exemplifies the color-blind view in contemporary constitutional discourse.⁹ The color-blind philosophy fails when it is tested against the Asian American experiences. Color-blindness fails on all of its three conceptual levels with Asian Americans. First, at the level of private beliefs, mainstream society repeatedly refers to the race of Asian American individuals in making judgments. Second, at the level of government action, the United States has, in the past, relied on the race of Asians in establishing public policy that disfavors them, and might well do so again. Third, at the theoretical level, as a result of the racialized role of Asian Americans as individuals and as a group, they cannot find a "neutral" vantage point in race relations. These levels are analyzed in turn.

At the first level of private action, the myth of the model minority reveals the myth of color-blindness. Criticism of the model minority image of Asian Americans has become so familiar as to be taken for granted by many of us. But every generation should be reminded of the lies of the myth and their use for dubious purposes. The myth might never be debunked, no matter how thorough or objective the efforts to do so.

Anyone who studies Asian Americans knows about the model minority myth. Since the arrival of Asian immigrants in the nineteenth century, and most notably since the 1960s, this ubiquitous

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

9. See generally Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 30 (1991) (arguing that color-blindness is complex set of inconsistent arguments).

superminority image has suggested that Asian Americans achieve economic success and gain societal acceptance through conservative values and hard work.

The image is a myth because Asian Americans have not achieved economic success except in a superficial sense. Comparing equally educated individuals, whites earn more money than Asian Americans.¹⁰ Qualifications count less than race, in a pattern of regular discrimination, not so-called "reverse" discrimination. The discrimination which Asian Americans in fact face can be reinforced by the exaggerations of the myth. This reinforcement occurs, for example, when non-Asian Americans believe that Asian Americans should be subjected to maximum quotas in college admissions because they have done too well and represent unfair competition.

Everyone should know that the model minority myth is deployed in ways that expose the insincerity of its goodwill. The myth is used to denigrate other racial minorities. It is used to ask African Americans, rhetorically, "Well, the Asian Americans succeeded; why can't you?" As the original *New York Times* article introducing the image put it, Asian Americans stand in contrast to "problem minorities."¹¹

Criticisms of the model minority myth based both on its empirical bases and political uses have been made for more than a generation. The critique of the model minority myth presents a case study in the transition of ideas about race from academic circles to the popular press. By 1980, there was a sizable scholarly literature disproving the model minority myth.¹² By 1990, mass media articles had appeared, initially opinion pieces, later news articles.¹³ Histories of Asian Americans by Ronald Takaki, Sucheng Chan, and Roger Daniels added authority to the arguments.¹⁴

The critique of the model minority myth, disappointingly, also offers an example of the failure of rational argument against racial stereotyping. "Model minority myth" is a popular phrase, perhaps

10. See HERBERT R. BARRINGER ET AL., *ASIANS AND PACIFIC ISLANDERS IN THE UNITED STATES* 265-67 (1993) (reporting and analyzing conclusions of numerous comparative studies tending to reject basis of model minority myth).

11. William Petersen, *Success Story: Japanese American Style*, N.Y. TIMES, Jan. 9, 1966 (Magazine), at 20 (introducing stereotype that Asian Americans have succeeded despite discrimination).

12. See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD-WORLD L.J. 225, 244-47 (1995) (citing various examples of current literature debunking model minority myth).

13. See *id.* at 240 n.81 (listing representative articles criticizing model minority myth).

14. For comprehensive histories of Asian Americans tending to reject the model minority minority, see generally SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991); ROGER DANIELS, *CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850* (1988); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989).

because of the alliteration. But the "model minority" is still emphasized over the "myth." Three examples confirm the continuing strength of the stereotype. The controversial book *The Bell Curve*¹⁵ places Asian Americans nominally at the top of its racial hierarchy of intelligence quotient scores, which it argues effectively determines socioeconomic status.¹⁶ The campaign against affirmative action plays upon the supposed successes of Asian American students, without making clear whether that success is to be copied or feared.¹⁷ Former presidential candidate and United States Senator Phil Gramm, who is a Caucasian, looks at his wife Wendy Gramm, who is an Asian American, as an embodiment of the model minority.¹⁸

Yet, the model minority myth ought to self-destruct. After all, to be able to see Asian Americans as a racial group, especially a racial group which can be contrasted with other racial groups, requires a highly developed sense of color-consciousness. If society was color-blind in the sense of blotting out race and all references to race, it would be impossible to point at Asian Americans, much less use them as an example. Ironically, when Asian Americans are used to attack affirmative action, the case for evaluating the merit of individuals focuses on the supposed success of a racial group.

At the second level of government action, the new attacks on immigration reveal the myth of color-blindness from a different angle. The historical restrictionist approach to immigration is articulated in the Supreme Court's late nineteenth century decisions upholding the Chinese Exclusion.¹⁹ In precedent that has never been explicitly overruled, but, has repeatedly been expressly affirmed, the Court has abdicated its role.²⁰ It accepted the congressional finding that "the

15. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

16. *Id.* at 272-76, 299-301 (explaining methodology for analyzing bell curve and significance of each section of curve); see generally *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995) (reprinting major articles analyzing *The Bell Curve*, including essays by Stephan Jay Gould, Howard Gardner, Henry Louis Gates, Jr., Nathan Glazer, Andrew Hacker, Randall Kennedy, Orlanda Patterson, and Thomas Sowell).

17. See Wu, *supra* note 12, at 238-39 (arguing that Asian Americans are admired for their triumph over adversity and feared because they are becoming too enmeshed in successful American society).

18. See Ralph Z. Hallow, *For '96 Race, Gramm Looks Hard to Beat*, WASH. TIMES, Oct. 6, 1993, at A8 (describing Senator Gramm's staff memo recommending emphasis on Gramm's wife's ethnicity, education, and occupation as "selling points").

19. See *Fong Yue Ting v. United States*, 149 U.S. 698, 704 (1893) (finding that exclusion of Chinese laborers from United States was constitutional exercise of legislature's powers); *Chae Chan Ping v. United States*, 130 U.S. 581, 609-10 (1889) (same).

20. See *Fong Yue Ting*, 149 U.S. at 712 (stating that after establishing Congress' unquestionable right to expel aliens, "it behooves the court to be careful that it does not undertake to pass

presence of foreigners of a different race in this country, who will not assimilate with us, [is] dangerous to [the country's] peace and security."²¹ Since then, federal legislation in the immigration area has moved steadily, if slowly, toward what might be termed race-neutral standards, but recently a counter-reaction has emerged.

The modern restrictionist approach is presented by Peter Brimelow, author of *Alien Nation: Common Sense About America's Immigration Disaster*.²² Brimelow at least is honest enough to explain the racial origins of his arguments. He writes, "Race and ethnicity are destiny in American politics"²³ and "[c]ulture is a substitute for ethnicity."²⁴ According to Brimelow, "[t]he American nation of 1965, nearly 90 percent white, was explicitly promised that the new immigration policy would not shift the country's racial balance. But it did."²⁵ Therefore, "[i]t is simply common sense that Americans have a legitimate interest in their country's racial balance."²⁶ Indeed, white Americans "have a right to insist that their government stop shifting"²⁷ the racial balance and they "have a right to insist that it be shifted back."²⁸ Brimelow also candidly suggests that the economic basis for lowering immigration masks a more troubling set of motivations. "People habitually justify their immigration preferences in economic terms, but really they are motivated by a wide range of ethnic, moral, and even psychological agendas."²⁹

It is within the context of Brimelow's attacks on immigration that current legislative proposals to reduce the level of immigration should be interpreted. They are efforts to return a racial consciousness to an area of the law which, because it has been characterized as part of foreign relations rather than domestic politics, becomes a sphere separate from civil rights. In immigration, a long line of Supreme Court precedent has made clear that Congress can do what would be forbidden elsewhere.³⁰ Brimelow, and others like him, would urge Congress to test the limits. Proposals that conspicuously omit race in

upon political questions").

21. *Chae Chan Ping*, 130 U.S. at 606.

22. PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995).

23. *Id.* at xvii.

24. *Id.* at 262.

25. *Id.* at 188.

26. *Id.* at xvi.

27. *Id.* at 264.

28. *Id.*

29. *Id.* at xvii.

30. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 799-800 (1977) (upholding immigration statute that discriminated on basis of gender and legitimacy in manner that concededly would be invalid as applied to citizens).

their text may well have racial concerns as their spirit. The movement to close the borders to all immigration, legal and otherwise, may be motivated as much by the numbers of immigrants as by their race and their presumed culture. As a consequence, the "one race" of "Americans" can be defined at its threshold in a manner that is racially exclusive.

At the third level of theory, it is impossible to be neutral in race relations. Everyone has a vested interest. Color-blindness has been promoted as an idea of neutrality. Asian Americans sometimes have been portrayed as living between black and white and, accordingly, neutral. The most famous Asian American of late, Los Angeles Judge Lance Ito, while presiding over the O.J. Simpson trial in 1994 and 1995, was described as "neutral" in the racialized "trial of the century."³¹ Even Judge Ito could not maintain his "neutral" place racially. Despite his judicial role and corresponding neutrality in the symbolism of the trial process, and even though his racial status may have seemed irrelevant, it became relevant to observers. One revealing episode was Senator Alfonse D'Amato's appearance on a radio show mid-way through the trial.³² In his remarks, Senator D'Amato mocked Judge Ito as having a heavy Asian accent, later explaining that he was using the racial reference as a means of criticizing the conduct of the trial.³³ Numerous other racial references to Judge Ito and Asian American witnesses occurred within the trial itself and in the extensive media coverage.³⁴

It would be a cliché but for the denials, that for many people, race remains important. Justice Scalia's facile remark that we are all Americans effectively obscures the legal construction of that category.³⁵ Not everyone can become an American. Those people who

31. Joseph Mallia, *Ito's Right Man for Job*, BOSTON HERALD, Oct. 18, 1994, at B3 (summarizing Judge Ito's qualifications in presiding as judge in Simpson case).

32. See Melinda Hennenburger, *D'Amato Gives a New Apology on Ito Remarks*, N.Y. TIMES, Apr. 7, 1995, at A1 (explaining context of remark by Senator D'Amato).

33. See Lawrence Van Gelder, *D'Amato Mocks Ito and Sets Off Furor*, N.Y. TIMES, Apr. 6, 1995, at A4 (reporting Senator D'Amato's explanation concerning remarks about Judge Ito).

34. For an interesting discussion of the presentation of Asian Americans in the O.J. Simpson trial, see forthcoming article by Cynthia Lee. Cynthia Kwei Yung Lee, *Race and the O.J. Simpson Trial: An Asian American Perspective*, 6 HASTINGS WOMENS' L.J. (forthcoming 1996).

In contrast to Senator D'Amato's description of Judge Lance Ito, essayist Stanley Crouch, writing from an explicitly black perspective, characterized Chinese criminologist Henry Lee in seemingly positive racial terms, as "the ghost of Charlie Chan . . . brought to life with a deeply human three-dimensionality the Hollywood scriptwriters never achieved." Stanley Crouch, *The Good News*, ESQUIRE, Dec. 1995, at 116.

35. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 5 (1994) (asserting that most judges and scholars accept common wisdom concerning race resulting in "racial etiquette," which effectively ignores race as issue).

cannot become Americans, regardless of their consent to the ideals of the community, have been excluded in the past because of their race and may again be excluded in the future because of their race. Even as citizens, Asian Americans can be treated as outsiders to their own society, as demonstrated most vividly by the wartime internment decisions.³⁶ Even as full members within their own society, Asian Americans may be used as a model minority to criticize other racial minorities. Throughout the spectrum of possibilities, race is relevant.

II. IF THE STEREOTYPE FITS, WEAR IT?

The recurring debate over the use of social science in the law has concentrated on empirical data that has been used to reach results that are "liberal," most notably in *Brown v. Board of Education*.³⁷ The latest version of this debate, which is only starting to become apparent, will turn on empirical data that is used to reach results that are "conservative," most likely arguments along the lines of "it can't be racism if it's true." It is only a matter of time before politicians seeking to rationalize official discrimination rely on *The Bell Curve*, or parties involved in litigation defend private prejudice based on similar studies.

With only rudimentary guidelines from the Supreme Court in *Adarand Constructors, Inc. v. Peña*,³⁸ that strict scrutiny is not always fatal, and that lower courts should consider "evidence," it is unclear whether social science as a means will support liberal ends. In any event, the model minority myth will be an important exhibit. Needless to say, the model minority myth has some truth to it. There is a credible and possibly persuasive argument that Asian American family income is, on the average, higher than white family income.³⁹ Like all good social science, such data presents as many questions as it provides answers. It is as problematic as it is polemic.

While one can respond to the critique of the model minority myth, such a defense of the model minority myth rests on the assertion that the myth is true. The response of descriptive truth fails to address a threshold issue of normative truth: is it appropriate to use race as an independent variable or the suspect classification with which to make

36. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding constitutionality of internment of Japanese-Americans during World War II), *conviction vacated on writ of coram nobis*, 584 F. Supp. 1406 (N.D. Cal. 1984).

37. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (finding that segregated educational facilities were inherently unequal with some reliance on data showing social impact of segregation).

38. 115 S. Ct. 2097 (1995).

39. See BARRINGER, *supra* note 10, at 265-67.

generalizations and draw conclusions? The proponent of the model minority myth implicitly must answer in the affirmative. But the data should be placed within a context for legal purposes.⁴⁰

Specifically, the proponent of the model minority myth cannot avoid answering other questions. Which comparisons are apt: family income or individual income? Controlling for which other factors among many: citizen/immigrant status, gender, education, language skills, etc.? Overall, the proponent of the model minority myth also should be directed toward addressing the purpose of using the model minority myth—is it to attack affirmative action, or exclude Asian Americans from affirmative action?

Aside from the model minority myth, there are other “facts” about Asian Americans that may be considered as conundrums on this issue of social science in the law. One fact in particular conforms to stereotypes: it is true that today a majority of Asian Americans are foreign-born.⁴¹

Given the efforts to limit immigration, the foreign-born status of most Asian Americans will attract attention to them, even to those who are native-born citizens. If the majority of Asians in America are immigrants, and some unsubstantiated claims about undocumented immigration place it at a level equal to legal immigration, would that then make it “reasonable” under a statute similar to Proposition 187⁴² in California, to “suspect” that they were also undocumented immigrants?

These inquiries are meaningful if the law is to be purposive. In order to respond meaningfully to these queries—to give legal significance to the factual inquiries—the traditional test of invidious intent is important in constitutional law.⁴³ To the extent that the intent

40. See generally David L. Faigman, “Normative Constitutional Fact Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) (setting forth comprehensive survey of Supreme Court cases that uses social science data); Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (proposing “cultural meaning” test for racial discrimination claims, which would permit use of wide range of historical, psychological, and sociological interpretative evidence).

41. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *THE FOREIGN-BORN POPULATION*: 1994, at 111 (1995).

Another fact that is contrary to stereotype but conforms to mainstream behavior is that most Asian Americans who reveal a religious preference are adherents of Western faiths, not Eastern faiths. See Ari L. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. TIMES, Apr. 10, 1991, at A1 (reporting that Asian Americans are religiously assimilated).

42. For the amendments made by Proposition 187, establishing the standard of reasonable suspicion, see CAL. GOV’T CODE § 53069.65 (West 1994); CAL. HEALTH & SAFETY CODE § 130(c) (West 1994); CAL. WELF. & INST. CODE § 10001.5(c) (West 1994).

43. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (finding that in order to establish discrimination in jury selection process, plaintiff must not only prove discriminatory

test may be divisive, requiring that a wrongdoer be identified, or that it may be inadequate, because of unconscious bias, it should be replaced by an approach that can weigh in the balance more than merely statistical data. None of this is to suggest that social science be disregarded.

The risks of relying on social science are well worth taking. The danger, however, is that courts will rely on empirical evidence without addressing the contested nature of the proof and the context in which it is generated. The courts must be willing to make normative judgments.⁴⁴ Otherwise, a Panglossian world will be the result, with what is becoming confused with what *should be*.

III. RACE REFLECTED IN CIVIL PROCEDURE

Procedure reproduces substance. The tendency to view race as breaking down neatly along black and whites lines is reinforced by the traditional model of litigation as between two parties. A generation ago, Professor Abraham Chayes published the pathbreaking article, *The Role of the Judge in Public Law Litigation*.⁴⁵ He argued that many cases could no longer be conceived of as purely private disputes between a pair of adversaries, but instead should be seen as having a significant public impact involving multiple parties.⁴⁶

Despite the influence of the Chayes article on structural litigation, only a few of the major desegregation cases have involved representatives of all racial groups⁴⁷—never mind the additional problem of ensuring that each representative, in fact, speaks for whom he purports to represent, legally and as well as literally.⁴⁸ Typically, there is a named plaintiff of a racial minority group, say, blacks, who represents, in a formal sense, either all people of color, or only that

impact but must also prove invidious intent that race was reason that jurors were excluded); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (requiring proof of racially discriminatory intent in equal protection challenge to town's zoning plan); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that disparate impact alone will not make law unconstitutional without proof of racially discriminatory purpose).

44. See generally Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Themes*, 89 YALE L.J. 1063 (1980) (arguing that substantive principles are necessary for constitutional themes).

45. Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (analyzing theories of various types of litigation).

46. *Id.* at 1286.

47. See *Keyes v. School Dist.*, 413 U.S. 189, 198 (1973) (deciding school desegregation case involving tripartite school system with separate institutions for African Americans, Latinos, and whites).

48. See Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 476 (1976) (noting that, in racial desegregation litigation, named plaintiffs and their counsel are not adequately representative of minorities for whom they are speaking).

specific group, suing a defendant entity that represents in some sense the white majority or white decisionmakers. Asian Americans, less than individual blacks, cannot always depend on formal representation in the litigation. Asian Americans, less than most whites, also cannot depend on the presumed representation in the underlying political process. As much as whites may object to a consent decree to which they are not a party,⁴⁹ or other result reached in public law litigation, all the more so may Asian Americans have cause to complain that they are excluded.

Whether the courts can function within the Chayes model will be tested by the Lowell High School case, filed in 1994 in San Francisco, California.⁵⁰ In one of the most diverse cities in the nation, where the largest racial minority group are Asian Americans, a group of Chinese Americans filed a challenge to the school desegregation consent decree.⁵¹ They argued that their rights to equal protection were violated by admissions standards to Lowell High School, the flagship of the district, which required that Chinese Americans score higher than everyone else, including whites, to gain admission.⁵²

The Lowell case arises as much from civil procedure problems as it does from substantive equal protection doctrine. It raises, acutely, issues about the importance of representation in structural litigation and the potential for unanticipated collateral attacks on consent decrees. Whatever its outcome on the merits, this challenge should signal the end of racial bipolarity in civil procedure.

49. See *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that nonparties to consent decree may bring collateral challenges).

50. See *Ho v. San Francisco Unified Sch. Dist.*, U.S. Dist. Ct., N.D. Cal. Case No. C-94-2418 WHO, Memorandum Decision and Order, Sept. 28, 1995 (denying motions to dismiss and rejecting argument that plaintiffs were adequately represented in earlier litigation) (order marked "DO NOT PUBLISH OR INCLUDE IN DATABASE" (on file with author); see also Selena Dong, "Too Many Asians: The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action," 47 STAN. L. REV. 1027, 1029 (1995) (tracing case of public school employing admission policy, resulting from 1993 consent decree, that required raised admission standards for Chinese applicants). The *Martin* case and Lowell High School case are different because Asian Americans cannot be characterized as even constructively represented by the original defendants to the litigation.

51. See Venise Wagner, *San Francisco Sued over School Admissions Quotas*, S.F. EXAMINER, July 11, 1994, at A1 (reporting that suit against school district was based on assertions that consent decree's racial caps were unconstitutional).

52. See Dong, *supra* note 50, at 1030 (stating that because desegregation consent decree required each school in district to enroll students from at least four of nine specified ethnic/racial groups, no one group could constitute more than 40% of total enrollment).

CONCLUSION

The American dilemma is no longer an apt term.⁵³ There is the old American dilemma of black-white race relations, but it has been joined by the new American dilemmas of multiple race relations, many disputes among even more contending groups, and still without a consensus on basic principles or guiding visions. It is too late to be optimistic, but too early to be pessimistic.

53. With apologies to Gunnar Myrdal.